

1/185

5187-153-LPS

INDIAN CASES

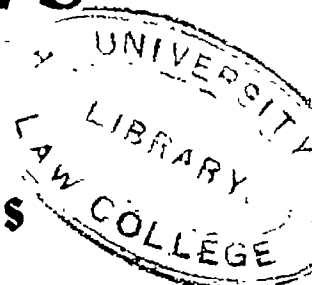
[STARTED IN 1909]

CONTAINING

Full Reports of Decisions

OF

The **PRIVY COUNCIL**, the **FEDERAL COURT**,
the High Courts of **ALLAHABAD**, **BOMBAY**,
CALCUTTA, **LAHORE**, **MADRAS**,
NAGPUR, **PATNA** and **RANGOON**,
the Chief Court of **ODDH**, and the Courts
of the Judicial Commissioners of
PESHAWAR and **SIND**



153

Many of which are not reported elsewhere.

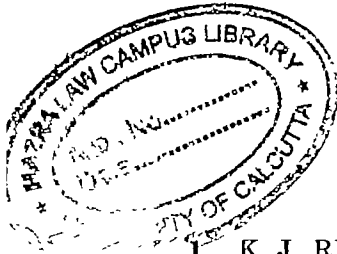
VOLUME 185, 1940



Founded by
Sir S. D. Chaudhri, Kt., K. B., B. A., LL.B.,
Speaker, Legislative Assembly, Punjab.

EDITORS ... { A. K. CHAUDHRI, B.A., Bar.-at-Law, Lahore.
V. M. KULKARNI, B.A., LL.B.

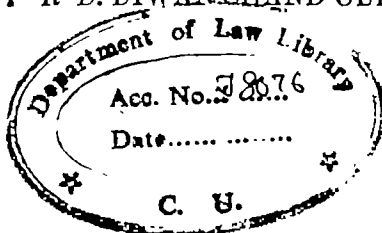
PRINTED AND PUBLISHED BY S. ALI BAKSH FOR THE INDIAN CASES, LTD., AT THE
"LAW PUBLISHING PRESS," BAZAR 'JUDGH MUHAMMAD LATIF', LAHORE.



LP 2079

REPORTERS.

1. K. J. RUSTOMJI, BAR.-AT-LAW, LONDON.
2. TARACHAND BRIJMOHANLAL, B.A., LL.B., *Advocate Lahore High Court, Agent Federal Court of India, DELHI.*
3. M. A. AZIZ, M.A., (Cantab), LL.B., *Advocate of the High Court at ALLAHABAD.*
4. B. S. KALELKAR, M. A., LL. B., *Advocate, High Court (O. S.), BOMBAY.*
5. M. M. MALHOTRA, B.SC., B.L., *Advocate of the High Court at CALCUTTA.*
6. JITENDRA MOHAN BANERJEE, M.A., B.L., *Advocate of the High Court at CALCUTTA.*
7. MALIK RAM LAL ANAND, B.A., LL.B., *Advocate of the High Court at LAHORE.*
8. V. N. VENKATAVARADACHARI, B.A., B.L., *Advocate of the High Court at MADRAS.*
9. N. KASTURI RANGA IYENGAR, B.A., B.L., *Advocate of the High Court at MADRAS.*
10. BRIJ KISHORE PRASAD, B. A., B.L., *Advocate of the High Court at PATNA.*
11. SYDNEY LOO-NEE, BAR.-AT-LAW, RANGOON.
12. ABUL HASSAN SYED ALLI, *Vakil, State High Court, HYDERABAD (DECCAN).*
13. S. R. KAGALKAR, B.A., LL.B., (BOM.), *Vakil, State High Court, HYDERABAD (DECCAN).*
14. A. L. HALVE, B.A., LL.B., *Advocate of the High Court, NAGPUR (C. P.).*
15. M. GHULAM HASAN, B.A., LL.B., *Advocate of the Chief Court at LUCKNOW.*
16. P. B. ADVANI, M.A., LL.B., *Advocate of the Judicial Commissioner's Court at KARACHI (SIND).*
17. R. B. DIWAN CHAND OBHRAI, B.A., LL.B., *Advocate, PESHAWAR.*





INSTRUCTIONS FOR BINDER.

Labels for this Volume should be as below:—

UPPER LABEL
(Red.)

LOWER LABEL
(Black.)

INDIAN CASES

1940

Vol. 185 COMPARATIVE TABLES

FOR

I. L. R. (1939) Madras.
(1939) 1 Madras Law Journal.
(1939) 2 Madras Law Journal.
49 Madras Law Weekly.
50 Madras Law Weekly.
(1939) Madras Weekly Notes.

CONSOLIDATED

Comparative Tables showing serially the Volumes and Pages of the following Indian Law Journals and Reports for the year 1939 with the corresponding Volumes and Pages of Indian Cases.

This volume contains the Comparative Tables only for—

I. L. R. (1939) Madras
(1939) 1 Madras Law Journal.
(1939) 2 Madras Law Journal.

49 Madras Law Weekly.
50 Madras Law Weekly.
(1939) Madras Weekly Notes.

I. L. R. (1939), MADRAS, FROM JANUARY TO DECEMBER.

Page.	Names of Parties.	Corresponding Vol. and Page of Ind. Cas.	Page.	Names of Parties.	Corresponding Vol. and Page of Ind. Cas.
1	An Advocate, <i>In re</i> ...	179 204	45	Appa Rao v. Seetharamayya ...	181 950
7	Venkataramaswami v. Imperial Bank of India ...	178 220	54	A. Subramania v. K. S. Venkatarama Iyer ...	185 326
19	Official Assignee, Madras v. Suryakanthammal ...	181 288	63	Nagayya v. Narasayya ...	179 201
21	Kumarappa Chettiar v. Chidambaram Chettiar ...	178 737	70	Muniyandia v. Muthusami ...	183 643
30	Desikachari v. Mahant Paryag Dasji Varu ...	181 278	73	Sankaralingam v. Arumugam ...	177 331
36	Ebrahim Sait v. South India Industrials, Ltd ...	181 349	78	Vedakannu v. Gnanayya ...	178 503
			81	Ramanatha v. Arumachalam ...	179 504
			87	Arunagirinatha, <i>In re</i> ...	179 605
			121	Nagappa Chettiar v. O. R. M. O. M. S. P. Firm ...	182 673

I. L. R. (1939) MADRAS, FROM JANUARY TO DECEMBER—contd.

135	Ramanathan v. Viswanathan	180	85	458	K. V. Krishna v. K. G. Subra-	
140	Edangapurandar v. Narasimha-				mania	180 855
	chariar	180	49	466	Tulajarama Rao v. Sir James	
144	Chockalingam v. A. R. P. L. S.				Taylor	181 451
	P. Muthiah	182	660	480	M. S. S. Chidambaram v. Com-	
151	Nagaratnam v. Seshayya	180	994		missioner of Income-tax, Madras	180 133
178	Commissioner of Income-tax,			483	Maduranayakam v. Secretary of	
	Madras v. S. L. Mathias	178	906		State for India in Council	185 476
194	Seshavatharam & Co. v. Bapa-			496	Mohideen v. Nagu Bai	186 279
	nayya	185	154	507	Nataraj v. Subbaroya	185 677
199	Viswanadham v. Menon	183	639	520	Ganga Raju v. Ramayya	183 596
203	Hanumantha Rao v. Sithara-			525	Mottai Meera v. Abdul Kadir	186 214
	mayya	182	639	530	Gopi Reddi v. Rami Reddi	1 865
213	S. P. Perumal v. M. K. Kondal	183	494	532	Raja Vyricherla Narayana Gaja-	
216	Jalamanna v. Rama Rao	183	508		patiraju v. Revenue Divisional	
218	Perianna v. Sellappa	182	879	566	Officer, Vizagapatam	1 1 230
223	Nilakanta v. Appa Naika	180	236		Panchayat Board; Thiruvotthiyur	
226	Viraraju v. Venkataratnam	183	518		v. Western India Matches Com-	
234	Veerayya v. Chellamma	182	306		pany	182 474
242	Sankaramurthy v. Subbamma	179	121	585	Rm. Ar. Ar. Rm. Arunachalam v.	
248	Venkata Reddi v. Venkatarat-				Sabaratanam	185 159
	nam and Sons	180	44	593	Balanagayya v. Varadarajulu	184 832
252	Sriramechandra v. Venkates-			597	Gopalaswami v. Swaminatha	184 261
	wara	181	491	600	Mahalakshmi v. Somaraju	189 17
259	Venkatadrjahnama Naidu v. Na-			611	Kalyanasundaram v. Vaithi-	
	rayanasami Iyer		396		linga	183 337
269	Commissioner of Income-tax,	180		622	Maharaja of Venkatagiri v.	
	Madras v. P. R. A. I. M. Muthu-				Raja Rajeswara Rao	189 123
	karuppan Ohettiar	181	525	708	District Magistrate, Trivandrum	
278	S. N. Narayanan v. Commissioner				v. Mammen Mappillai	180 216
	of Income-tax, Madras	179	652	728	O. P. Matthen, <i>In the matter of</i>	181 502
282	Shamsuddin Ravuthar v. Shaw			744	Matthen v. District Magistrate,	
	Wallace & Co.	184	153		Trivandrum	182 551
290	Paramasivam v. Ramasami	180	406	764	Kutumba Sastri v. Sundaram-	
296	P. R. Govindaswami v. O. Javam-				ma	183 95
	mull	183	418	770	Commissioner of Income-tax,	
301	Gopala Rao v. Lakshminara-				Madras v. Sreeramulu	185 465
	samma	181	388	776	Ramanathan v. Palaniappa	189 98
306	Palghat Coimbatore Transport			794	Ankamma v. Venkata Subbayya	182 833
	Co., Ltd. v. Narayanan	183	279	803	Dharapuram Janopekara Nidhi,	
311	Seshayya v. Arundhatamma	183	511		Ltd. v. Lakshminarayana	182 999
317	Venkayya v. Venkata Rao	179	983	820	Meenakshi v. Ramaswami	184 183
324	Ayya Pattar v. Krishnan	182	351	828	A. Veeran v. P. P. Koya	185 578
328	Mahadevi v. Veerarayan	179	421	833	Dodda Khaji v. Nanjappa	185 554
333	Narasimham v. Babu Rao	183	751	838	Guruvappa v. Mounaguruswami	187 731
338	Veerammani v. Chikka Royal	185	500	843	Etti v. Secretary of State for	
343	Balarani Reddi v. Official Recei-				India in Council	184 887
	ver, Nellore	183	441	853	Diraviyam v. Veeranan	185 562
349	Marudamuthu v. Venkatrama	184	60	870	Munusami v. Kappasami	186 208
353	G. J. Joseph, <i>In re</i>	182	228	877	Lakshmiddevamma v. Veera	
358	Sreeramulu v. Commissioner of				Reddi	188 696
	Income-tax, Madras	184	268	886	Kumaraswami v. Thiruvenga-	
367	Suryanarayana v. Narasimha-				datha	186 379
	swami	180	640	891	Annamalal v. Muthuswami	189 364
374	Ayyappa v. Kasiperumal	180	267	904	Emberumanar, Jeer Swamigal v.	
384	Skinner v. Arunachalam	180	651		Hindu Religious Endowments	
388	Commissioner of Income-tax,				Board, Madras	185 77
	Madras v. Valliammai	180	270	909	Thayarammal v. Junus Ohettiar	186 460
393	E. M. Muthappa v. Commissioner			913	Natesa v. Krishna	184 641
	of Income-tax, Madras	180	825	917	Krishnamurthy v. Satyanarayana	188 751
397	Muthukaruppan v. Commis-			928	Madura Municipality v. Alagi-	
	sioner of Income-tax, Madras	181	97		risami	187 780
404	Subbayya v. Commissioner of			943	Ponnambalam v. Raman	188 895
	Income-tax, Madras	181	514	947	Subbiah Tevar, <i>In re</i>	184 593
415	Lakshmikutty v. Nambisan	185	173	951	Trichinopoly Varthaga Sangam,	
422	Nachimuthu v. Balasubrama-				Ltd. v. Shanmugasundaram	184 387
	nia	187	735	967	Ramanuja Pedda Jiyangarlu v.	
439	D. S. Raju Gupta, <i>In re</i>	189	25		Venkatacharlu	188 41
443	Perumal v. Subbulakshmi	180	773	971	Ramappa v. Thirumalappa	188 831

I. L. R. (1939) MADRAS, FROM JANUARY TO DECEMBER—concl'd.

977	Zamindar of Udayam v. Sudai Udayan ...	186	350	1004	Minakshi Iyer v. Noor Muham-mad ...	183	699
980	A. P. M. Ibrahim Sahib & Brother v. Gurulinga ...	188	727	1017	Secretary of State for India in Council v. M. A. O. Aruna-chalam ...	189	228
986	Sundaresa v. Sarvajana Sow-kiabi Virdhi Nidhi, Ltd. ...	189	429	1030	Govinda v. Ayi ...	183	567
995	Sreedevi v. Kurikkal ...	188	823	1035	Venkataramayya, <i>In re</i> ...	187	103

(1939) 1 MADRAS LAW JOURNAL, FROM JANUARY TO JUNE.

1	Kamalaranjan Roy v. Secretary of State ...	178	472	134	Board of Commissioners for the Hindu Religious Endowments, Madras v. Pidugu Narasimham ...	179	1003
9	Venkatasubbu Mudaliar v. Narayanaswami Chetty ...	184	378	137	Gopala Rao v. Lakshminara-samma ...	181	388
23	Viraraju v. Venkataratnam ...	183	518	140	Venkataramangam Naidu v. Jagan-nadha ...	183	377
31	Commissioner of Income-tax, Madras v. Valliammai Achi ...	180	270	143	Palghat Coimbatore Transport Co. Ltd. v. Narayanan ...	183	279
35	Narayanan Chettiar v. Commis-sioner of Income-tax, Madras ...	179	652	147	Raja Shyam Sunder Singh v. Kaluram Agarwala ...	176	2
38	Ialamenna v. Ramarao ...	183	508	152	Ponnuswa i Chettiar v. Obul Reddi ...	181	57
39	Veerammani v. Rajaveerasasava Chikka Royal ...	185	500	154	Ramanathan Chettiar v. Palani-appa Chettiar ...	180	246
43	Chidambaram Chettiar v. Com-missioner of Income-tax, Madras ...	180	133	158	Thimmiah v. Official Receiver of Bellary ...	183	693
45	Commissioner of Income-tax, Madras v. Mathias ...	178	908	163	Ayyappa Naicker v. Kasiperu-mal Nayakar ...	180	267
56	Firm of Gokal Chand-Jagan Nath v. Firm Nand Ram Das-Atma Ram ...	178	425	170	Kadiyala Nagabhushanam v. Movva Anandayya ...	183	503
64	Perumal Naicken v. Kondama Naicken ...	185	217	176	Maduranayakam Pillai v. Secre-tary of State for India in Council ...	185	776
68	Somasundara Edangapurandar v. Narasimhachariar ...	180	49	185	Tenneti Viswanadham v. M. S. Menon ...	183	639
70	Seshayya Rao v. Arundhat-amma ...	183	511	192	Sooniram Ramniranjandas v. Alagu Nachiyar Koil ...	176	906
74	Perumal Mooppan v. Subramania Mudaliar ...	185	768	199	Narayana Mudali v. Periya Kalathi Mudali ...	185	239
75	Narasaraju v. Satyavatamma ...	182	715	205	Balarami Reddi v. Official Re-ceiver, Nellore ...	183	441
80	Perumal Chettiar v. Kondal Chetty ...	183	491	209	Gopalakrishnan v. Official Liqui-dators, T. N. and Quillon Bank, Ltd. ...	183	203
82	Venkata Seshayya v. District Board, East Godavari ...	184	465	227	Obendikamba v. Viswanatha-mayya ...	189	325
87	Municipal Council, Tanjore v. Sundaresan ...	185	412	235	Chokka Dhanamma v. Corom-andal Co. Ltd., Cocanada ...	185	16
88	Gopu China Jogayya v. Manepalli Bapanayya ...	185	154	237	Venkataramnam v. Sambasiva Rao ...	188	815
91	Madhavi Amma v. Nagappan Nair ...	182	75	245	Radharani Dassya v. Brinda-rani ...	179	615
93	Kodandarama Reddiar v. Par-thasarathi Aiyangar ...	180	549	255	Joseph, <i>In re</i> ...	182	228
96	Chidambaram v. Na'araja Mudaliar ...	17	802	259	Avanashi Goundan v. Palani Madari ...	184	134(2)
98	Premila Devi v. Peoples Bank of Northern India, Ltd. ...	178	659	261	Lakshmikutty Kettillamma v. Vishnu Nambisan ...	185	173
111	Sivagami Ammal v. Muthu Aiyar ...	180	902(1)	266	Krishna Aiyar, <i>In re</i> ...	185	3
112	Pabbati Venkata Reddi v. Doredia Venkataratnam & Sons ...	180	44	268	Suryanarayanacharyulu v. Nara-simhaswamy ...	180	640
114	Parandhamayya v. Veerayya ...	183	617	272	Mada Nagaratnam v. Puvvada Seshayya ...	180	991
117	Co-operative Society, Virapandy v. Lakshmanan Chettiar ...	179	820	301	Sankaramurthi v. Sub-amma ...	179	121
120	Venkatarayulu Naidu Bahadur v. Venkata Rattamma ...	189	320	306	Swaminatha Aiyar v. Kuppu-swami Aiyar ...	179	446
123	Kottangodan Alavi, <i>In re</i> ...	179	962	308	Puthiamatathummam Peringadi Assankutti v. Peedikayilakath Mammad ...	186	302
124	Appadorai Aiyangar v. Annan-garachariar ...	183	258				
131	Public Prosecutor v. Natesa Pillai ...	184	370				

(1939) 1 MADRAS LAW JOURNAL, FROM JANUARY TO JUNE—contd.

317	Manaithunainatha Desikar v. Gopala Chettiar ...	186	153	509	Mohammad Shamsudin Ravuthar v. Messrs. Shaw, Wallace and Co ...	184	153
321	Jambulingam Pillai v. Ponnuswami Pillai ...	182	327	518	Duraisami Raju, <i>In re</i> ...	182	415
329	Rentala Ganga Raju v. Bikkina Bulli Ramayya ...	183	596	520	Venkataraman v. Janaki ...	188	826
332	Ambi Aiyar, <i>In re</i> ...	181	51	528	Mottai Meera v. Chinna Sheik Abdul Kadir Rowther ...	186	214
337	Papathi Ammal v. Doraiswamy Naicker ...	183	631	531	Kamakshi Aiyar v. Namberumal Aiyangar ...	185	459
340	Tile Beharani v. Raghubehara ...	184	86	534	Synemodelux Ltd. v. Vannamuthu Pillai ...	185	712
344	Krishnaswami Mudaliar v. Vijiaraghava Pillai ...	189	156	536	Subramania Aiyar v. Venkatarama Aiyar ...	185	328
350	Samuel Koilpillai Skinner v. Arunachalam Pandaram ...	180	651	544	Ram Kinkar Banerjee v. Satya Charan Srimani ...	179	328
352	Nachimuthu Goundan v. Balasubramania Goundan ...	187	735	557	Paramasivam Pillai v. Ramasami Chettiar ...	180	406
365	Prahladrai Chooreewalla v. Commissioners for Port of Calcutta ...	179	321	561	Govindaraja Pillai v. Vanchinatham Pillai ...	184	465
371	Muthappa Chettiar v. Commissioner of Income-tax, Madras ...	180	825	564	An Advocate, <i>In the matter of</i> ...	179	204
379	Minakshi Aiyar v. Noor Muhammad Rowther ...	183	699	568	Kesavan Nambudiri v. Lakshmi Varasyar ...	183	582
392	Munusami Chetti v. Kuppusami Chetti ...	186	1208	573	Veerappa Moopan, <i>In re</i> ...	183	240
396	Corporation of Calcutta v. Moti Chand Chowdhury ...	179	324	575	Official Receiver, West Tanjore v. Samundravijayan Chettiar ...	185	288
402	Muthukaruppan Chettiar v. Commissioner of Income-tax, Madras	181	97	579	Perumal Reddiar, <i>In re</i> ...	183	571
412	Shanmugasundaram Pillai v. Manicka Mudaliar ...	181	86	582	Vijiaraghavalu Naidu v. Arunachalam Chettiar ...	183	537
414	Pothuraju Setty v. Padda Poliah ...	180	473	588	Pauchayat Board, Thiruvothiyur v. Western India Matches Co. ...	182	474
416	Vythilingam Pillai v. Pankajathammal ...	185	850	602	Rajah of Bobbili v. Venkata Suryanarayana ...	186	255
420	Athikesavalu Naidu v. Ekambara Mudaliar ...	186	150	604	Koran v. Govindan Nambiar ...	184	672
426	Lakshmiipathi Naick, <i>In re</i> ...	180	106	608	Govindasami Chetti, <i>In re</i> ...	184	166
429	Annamalai Chettiar v. Lakshmanan Chettiar ...	189	336	610	Balanagayya Chetti v. Varadarajulu Chetti ...	184	832
436	Ramakrishnayya v. Sreeramulu ...	188	691	614	Ganapathi Asari v. Kuppuswamy Asari ...	183	179(1)
444	Karuppiiah Thevan v. Krishna Pillai ...	181	254	615	Lakshminarayana Deo v. Imperial Bank of India, Guntur ...	183	896
445	Narasimha Rao v. Ayyanna Rao ...	184	654	620	Lakshamma v. Subramanyan ...	184	812
451	Gunda Subbayya v. Commissioner of Income-tax, Madras	181	514	625	Nagappa Chettiar v. O. R. M. O. M. S. P. Firm ...	182	673
456	Sitharatnamma v. Seshamma ...	185	30	635	Asiatic Government Society Life Assurance Co. Ltd. v. New Asiatic Life Insurance Co., Ltd. ...	184	537
463	Krishna Aiyar v. Subramania Aiyar ...	180	855	646	Govindan Nambudiri v. Soopahett Amad ...	186	249
473	Madhava Sahu v. Satrugghana Sahu ...	186	606	649	Govinda Goundan v. Aiy Goundan ...	183	567
476	Hussain Batcha Sahib v. Secretary of State for India in Council ...	185	343	652	Oudh Commercial Bank, Ltd., Fyzabad v. Thakurain Bind Basni Kuer ...	180	378
480	Raju Gupta, <i>In re</i> ...	189	25	664	Margaret Lornie v. Abu Backer Sait ...	184	735
482	Commissioner of Income-tax, Madras v. Muthukaruppan Chettiar ...	181	525	678	Veeranna v. Lakshmiipathi Somayajulu ...	186	470
487	Madhavi Ammal v. Subramanian Nambudripad ...	188	852	680	Varadarajam Pillai v. Krishnamurthi Pillai ...	189	390
491	Ramamurti v. Subbarao ...	185	419(2)	683	Oherutty v. Nagamparambil Rara ...	185	26
493	Venkateswara Rao v. Ammayya ...	186	200	687	Ohidambaram Chettiar v. Ramaswami Chettiar ...	184	83
499	Nataraja Pillai v. Subbaroya Chettiar ...	185	677	692	Satyanarayanamurthy v. Gaggayya ...	189	54

(1939) 1 MADRAS LAW JOURNAL, FROM JANUARY TO JUNE—concl'd.

695	Subba Rao v. Calicut Co-operative Urban Bank, Ltd. ...	185	230	812	Ulagalum Perumal Sethurayar v. Rani Subbulakshmi Nachiar ...	180	773
700	Kava, <i>In re</i> ...	183	784	820	Ohandra Kesavalu Chetty v. Perumal Chettiar ...	189	316
702	Kutumba Saastri v. Lakkaraju Bala Tripura Sundaramma ...	183	95	825	Kannayya Reddi v. Muthu Reddi ...	185	62
705	Venkata Sivayya v. Suryanarayana ...	182	888	827	Santhappa v. Siddalingayya Eswarappa Bulla ...	186	449
712	Gopalaswami Odayar v. Swaminatha Odayar ...	184	861	830	Subbayya v. Venkata Narasayya ...	183	743
715	Bannerjee v. Kuchwar Lime and Stone Co., Ltd. ...	178	490	831	Maharajah of Venkatagiri v. Raja Rajeswara Rao ...	189	123
724	Venkayya v. Rattayya ...	184	12	886	Nataraja Goundan, <i>In re</i> ...	183	602(1)
729	Subramania Pillai v. Ponniiah ...	183	560	888	Gopi Reddi v. Rami Reddi ...	183	665
730	Khadar Mohideen Sahib v. Nagu Bai ...	186	279	829	Arunachalam Chettiar v. Sabaratnam Chettiar ...	185	159
742	Seshiah v. Ramiah ...	184	843	894	Natesa Padayachi v. Krishna Padayachi ...	184	641
745	Sithalingachetti v. Ardhanari Chetti ...	189	170	897	Balakrishnan Nambiar v. Ohathu ...	188	183
751	Kalandar Rowther v. Sivapunyam Chettiar ...	188	843	900	Jaggu Naidu, <i>In re</i> ...	183	581
756	Narayana Swami v. King-Emperor ...	180	1	901	Sri Emberumanar Jeer Swamikal v. Board of Commissioner for Hindu Religious Endowments, Madras ...	185	77
770	Krishna Aiyar v. Subba Reddiar ...	189	200	905	Venkatachala Chetty v. Natesa Chetty ...	188	857
775	Venkata Narasimham v. Satyanarayanarao ...	183	595	909	Khaji Dodda Khaji Sahib v. Chigamalla Nanjappa ...	185	554
776	Sadaiammal v. Angammai ...	184	516				
784	Etti v. Secretary of State for India ...	184	887				
791	Varadarajan Chetty v. Kanaiah ...	186	7				
792	Annamalai Chetty v. Muthuswami Maniagaram ...	189	364				
802	Dharapurama Janopakara Nidhi, Ltd. v. Lakshinarayana Chettiar ...	182	999	1	Central Provinces and Berar Sales of Motor, Spirit and Lubricants Taxation Act, 1938, <i>In the matter of</i> ...	180	161

(1939) 2 MADRAS LAW JOURNAL, FROM JULY TO DECEMBER.

1	Ankamma, v. Venkata Subbayya ...	182	833	72	Mahalakshmi v. Somaraju ...	189	17
6	Duraswami Reddiar v. Secretary of State for India in Council ...	189	280	80	United Motor Finance Company v. Fiat Motors Eastern India Agency ...	189	294
11	Ponnuman Dikshitar v. Board of Commissioners for the Hindu Religious Endowments, Madras ...	188	889	86	Veeran Kutti v. Koya Kutti ...	185	578
23	Secretary of State for India in Council v. Arunachala Mudaliar ...	189	228	97	Karumuthu Thiagarajan, <i>In re</i> ...	183	762
33	Ranganadham Chetty v. Corporation of Madras ...	184	490	98	Bhagwati v. Ram Kali ...	181	211
36 (1)	Mekraj Alli Sahib, <i>In re</i> ...	184	452	109	Vyapuri Kevandan, <i>In re</i> ...	184	613
36 (2)	Guruvappa Naicker v. Mounaguruswami Naicker ...	187	731	111	Balakrishna Reddiar v. Syed Jalaluddin Sahib ...	184	451(1)
39	Muthuswami Pillai, <i>In re</i> ...	184	471(1)	112	Vedavalli Thayarammal v. Junus Chettiar ...	186	460
40	Ramanathan Chettiar v. Palaniappa Chettiar ...	188	892	114	Raja of Vizianagaram v. Sanyasiraju ...	185	42
44	Manickavachakam Chettiar v. Official Receiver, East Tanjore at Negapatam ...	186	720	117	Subbiah v. Ramacharlu ...	184	112
45	Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v. Revenue Divisional Officer, Vizagapatam ...	181	230	122	Garland Petroleum Co., (Mad), Ltd., <i>In re</i> ...	189	209
68	Sreeramulu Chetty v. Commissioner of Income-tax, Madras ...	184	268	132	Marudamuthu Mudaliar v. Venkatarama Aiyar ...	184	60
				135	District Magistrate, Trivandrum v. Mammen Mapillai ...	180	216
				169	O. F. Mathen, <i>In the matter of</i> ...	181	502
				181	Bhaya Mohammad Azim Khan v. Raja Saadat Ali Khan ...	180	1001
				195	Hanumantha Rao v. Sitharamayya ...	182	639
				202	Velu Naicken, <i>In re</i> ...	184	302

(1939) 2 MADRAS LAW JOURNAL, FROM JULY TO DECEMBER—contd.

208	Kathoom Bi v. Abdul Wahab Sahib ...	183	289	437	Zamindar of Udayarpalayam v. Sudai Udayam ...	186	350
214	Bapanna v. Jaggiah ...	188	710	444	Trustees of Tribune Press, Lahore v. Commissioner of Income-tax, Punjab, Lahore ...	182	882
226	Karuppana Nadar v. Karuppa Nadar ...	189	289	455	Subbiah Tevar, <i>In re</i> ...	184	593
233	Ponnambalam Chetti v. Ambalam Raman Chetti ...	188	895	460	Kameswaramma v. Thammanna	187	602
236	Appaswammal Pillai v. Thaymal ...	189	215	463	Kunhibi v. Kalliani Amma ...	189	476
253	Mahanth Singh v. U Ba Yi ...	181	1	469	Krishnamachari v. Ohengalraya Naidu ...	189	185
271	Sooranna v. Venkanna ...	189	348	479	Bhupendra Mohan Roy v. Srimati Purna Sashi Debi ...	183	199
279	Satyanarayanamurthi v. Gopalan ...	186	57	487	Veerana Kone, <i>In re</i> ...	184	99
282	Veerasingam v. Subbarayudu	186	316	489	Syed Ibrahim Sahib v. Gurulinga Aiyar ...	188	727
287	Kunbilakshmi Amma v. Krishna Menon ...	186	599	493	Ramakrishna v. Narasimha Kamath ...	187	426
294	Jeeva Ammal v. Ranganatha Mudaliar ...	186	444	495	Swaminatha Odayar v. Srinivasa Aiyar ...	186	424
296	Narayana Mudali v. Kalathi Mudali ...	188	101	499	Lakshminarasimhamurti v. Venkata Jogisomayajulu ...	187	661
304	Chairman, Municipal Council, Anakapalli v. Narayana Gajapatiraju Bahadur Garu ...	189	50	501	Sinnachami Chettiar v. Ramasami Chettiar ...	188	48
308	Kumaraswami Pillai v. Thiruvengadatha Aiyangar ...	186	379	506	Sankara Varma Raja v. Oheria Rama Varma Raja ...	185	628
316	Subramania Chettiar v. Felix Joseph Sarprasadam ...	187	467	509	Sitaramayya v. Venkanna ...	187	30
320	Ramanujachariar, <i>In the matter of</i> ...	184	606	515	Sivasankara Mudaliar v. Radhabai Ammal ...	185	647
325	Travancore National Bank Subsidiary Co., Ltd. Sundaravardan v. Mani Aiyar ...	186	297	518	Public Prosecutor v. N. S. Sharma ...	184	51
329	Satyanarayanamurthy v. Maharajah of Pithapur ...	189	204	522	Sir Hari Sankar Paul v. Kedar Nath Saha ...	181	935
310	Lakshmiddevamma v. Veera Reddi ...	188	696	531	Vira Raghavulu Naidu v. Rajalingam ...	186	327
345	Trichinopoly Varthaga Sangam v. Shanmugasundaram ...	184	387	533	Subbarayudu v. Lakshminarasamma ...	189	435
353	Ramaswami Chettiar v. Meyyappan Servai ...	188	187	551	Vanjiappa Goundan v. Annamalai Chettiar ...	188	379
362	Muthuvasu Chettiar v. Velumruga Nadar ...	188	283	555	Seetha Ramappa v. G. C. Ramappa ...	186	231
366	Monghibai v. Ooverji Umersey	182	1	557	Saminatha Aiyar v. Vageesan ...	185	37
378	Tiruvengada Ramanuja Pedda Jiyangaru Varlu v. Prathivadi Bayankaram Venkatacharlu ...	188	41	568	Natesa Aiyar v. Venkalashmi Ammal ...	189	704
380	Rathnammal v. Secretary of State for India in Council ...	189	490	569	Ram Narain Sahu v. Makhna ...	181	929
388	Gopala Krishnamurthy v. Satyanarayana ...	188	751	579	Sayid Muhammad Jiffri Attakoya Thangal v. Sayid Muhammad Bin Alabi A. K. Thangal ...	188	13
395	Board of Commissioners for Hindu Religious Endowments, Madras v. Trustee of Sri Virupakshaswaraswami ...	185	544	585	Chockalingam Chettiar v. Chinayya Servai ...	189	241
399	Narayana v. Lakshmayya ...	185	421	596	Kannappa Mudali v. Varadachariar ...	188	204
400	Vellayya Konar v. Kamaswami Konar ...	189	301	600	Seethayamma v. Vullipalam ...	188	534
406	O. P. Matthen v. District Magistrate of Trivandrum ...	182	551	604	Subbayya v. Thippa Reddi ...	188	200
414	Venkatayya v. Official Receiver Anantapur ...	186	634	609 (3)	Ramaswami Chettiar, <i>In re</i> ...	186	722
415	Padalinga Mudaliar v. Arumugha Mudaliar ...	189	305	611	Venkateswara Rao v. Subbrahmanyam ...	186	455
420	Kamaswami Goundan v. Lakshmana Reddi ...	186	437	614	Sundaresivudu v. Adinarayana Sastri ...	189	303
423	Krishna Mudaliar v. Marimuthu Mudaliar ...	189	495	618	Kanniah Maistry, <i>In re</i> ...	185	385
435	Seenai Madar Sahib v. Abdul Rahman Sahib ...	186	348	619	Kunhi Kannan v. Kottiath Vazhayil Devaki ...	189	17
				624	Sundaresa Aiyar v. Sarvajana Sowkiabivirdhi Nidhi, Ltd. ...	189	429
				630	Sundaram, <i>In re</i> ...	185	417
				632	Jagannatha Aiyar, <i>In re</i> ...	185	257
				634	Public Prosecutor Madras v. M. S. Menoki of Oalcut ...	185	419
				635	Morranna, <i>In re</i> ...	188	311

(1939) 2 MADRAS LAW JOURNAL, FROM JULY TO DECEMBER—concl'd.

639	Ramayya Goundan v. Kolanda Goundan ...	189	259	793	Jugal Kishore Narain Singh v. Charoo Chandra Sur ...	181	341
645	Karuppan v. Ambalam v. Sundara Raja Aiyar ...	190	167	801	Thyagarajan Chettiar v. Secretary to Government of Madras ...	186	440
649	Ramappa v. Thirumalappa ...	183	831	805	Byra Gouda v. Muniammal ...	187	745
653	Meenakshi Achi v. Ramaswami Chettiar ...	184	163	809	Govinda Chettiar v. Varadappa Chettiar ...	188	263
658	Anandam v. Muthukumaraswami Mudali ...	186	458	812	Veeraraghavaswami v. Mangamma ...	189	685
667	Commissioner of Income-tax, Madras v. Sreeramulu Chetty ...	185	465	814	Thanammal v. Alamelu Ammal ...	187	82
671	Chidambaram Chettiar v. Murugesam Pillai ...	189	411	816	Mahammad Sheriff Sahib v. Hussain Ghouse ...	188	416
680	Sreedevi v. Korikkal ...	188	823	818	District Board of West Tanjore v. Ponnuswami Pallavarayar ...	188	640
686	Krushnacharana Padhi v. Gourochandro Dyano Sumanto ...	189	795	822	Diravyam Pillai v. Veeranan Ambalam ...	185	562
697	Seetha Neithyar v. Kelu Menon ...	188	571	841	Abdul Khadir Saheb v. Pachaiyappa Chetti ...	188	680
708	Viswanathan Chettiar v. Official Receiver of Coimbatore ...	189	681	813	Tulajarama Rao v. Sir James Taylor ...	181	451
714	Bower v. Heesterlow ...	189	96	851	Muhammad Ibrahim v. Kamal Saheb ...	188	145
718	Krishnan v. P. R. N. Ramanatha Aiyar & Co. ...	189	727	853	Jami Venkatappadu v. Kanepalli Ramamurthi ...	186	862
722	Hari Chand v. Secretary of State Coimbatore Venkataramana Vilas Co., Ltd. v. Official Receiver, Coimbatore ...	183	378	859	Veeranna Sha v. Official Receiver of Secunderabad ...	190	172
731	Tan Ma Shwe Zin v. Koo Soo Ohong ...	182	993	864	G. R. Naidu v. Venkataswami Naidu ...	189	822
750	Subba Rao, <i>In re</i> ...	185	753	878	Venkataramayya, <i>In re</i> ...	187	103
751	Thirugnanavilli Ammal v. Venugopala Pillai ...	186	468	882	Mondan Shetti v. Thimmi Avva ...	186	832
757	Kunhi Raman Kitavu v. Kunhi Karnavan Kitavu ...	185	755	884	Chennappa v. Onkarappa ...	185	749
758	Narayanan Chetti v. Panchanathan Chettiar ...	187	252	893	Keshardeo Chamria v. Commissioner of Income-tax, Bengal ...	182	5
759	Sivaswami Chettiar v. Marudaiya Goundan ...	186	632	901	Narayanaraju v. Suryanarayudu ...	184	1
762	Surendra Bahadur Singh v. Thakur Behari Singh ...	181	216	911	Madras and Southern Mahratta Railway Company, Limited v. P. Ranga Rao ...	189	164
773	Dorakannu Ammal v. Ramaswami Mudaliar ...	186	90	920	Sri Veerabhadraswami v. Maya Kone ...	189	749
776	Public Prosecutor v. Amirtham Servai ...	186	103	923	Venkata Rayaniam Varu v. China Bapanna ...	189	695
778	Kondayya Rao v. Naganna ...	188	318	1	United Provinces v. Governor-General in Council ...	180	863
782	Namasivaya Mudaliar v. Srinivasa Aiyangar ...	189	732	23	Dr. Hori Ram Singh v. The Crown ...	181	317
789	Ramaswami Chetti v. Ramachandra Rao ...	188	617	45	Shyamakant Lal v. Rambhajan Singh ...	182	161

49 LAW WEEKLY FROM JANUARY TO JUNE, 1939.

1	Commissioner of Income-tax, Madras v. S. L. Mathias ...	178	906	103	V. V. Vythilingam Pillai v. Seshai ...	185	850
10	S. N. Bannerjee v. Kuchwar Lime & Stone Co., Ltd. ...	178	490	106	V. Subbaramayya v. Yerri Irangam Reddi ...	184	103
17	Pasupati Bharati v. Secretary of State ...	180	547	110	Ayyappa Naicker v. Kasiperumal Naicker ...	180	267
21	Commissioner of Income-tax, Madras v. Velliammal Achi ...	180	270	115	Veerammami v. Rajaveerabasa ...	185	600
23	Jogayya v. Bapanayya ...	185	151	118	S. P. Perumal Chettiar v. M. K. Kondal Chetty ...	183	494
29	P. S. Tuljaram Rao v. Sir James Taylor ...	181	451	120	Khader Mohideen Sahib v. O. Nagu Bai ...	186	279
36	Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, <i>In the matter of</i> ...	180	161	126	Nand Kishore v. Official Receiver, Delhi ...	178	406
102	T. S. Shanmugasundaram Pillai v. A. Manicka Mudaliar ...	181	86	132	Ramanathan Chettiar v. Palaniappa Chettiar ...	189	98
				143	S. V. Subba Rao v. Calicut Co-operative Urban Bank Ltd. ...	185	230

49 LAW WEEKLY, FROM JANUARY TO JUNE, 1932—contd.

147	Vekatarayulu Naidu v. Rattamma Garu ...	189	320	319	T. M. Athikesavalu Naidu v. S. Ekambara Mudaliar ...	186	150
150	Public Prosecutor v. Meenakshi ...	183	232	330	D. S. Raju Gupta, <i>In re</i> ...	189	25
151	Maduranayakam Pillai v. Secretary of State for India in Council ...	185	476	332	Jambulingam Pillai v. Ponnuswami Pillai ...	182	327
158	Marudamuthu Mudaliar v. N. K. Venkatram Ayyar ...	184	60	334	Munusami Chetti v. Kuppasami Chetti ...	186	208
160	G. J. Joseph, <i>In re</i> ...	182	228	338	Beharani v. Raghubebara ...	184	86
163	Avanashi Goundhan v. Palani Madari ...	184	134 (2)	341	Dhanamma v. Ooromandel Company Limited, Oocanada ...	185	16
167	Hanibabeebi Ammal v. Munurdeen Sahib ...	182	22	343	Muhammad Shamsudin Ravuthar v. Shaw Wallace and Company ...	184	153
170	C. Venkatarangam Naidu v. B. Jagannadha Doss ...	183	377	319	Narayana Swami v. The King-Emperor ...	180	1
172	R. D. K. Ohinna Venkatappa Nayanim v. Sundararajulu Naidu ...	185	427	360	Madhava Sahu v. Satrugana Sahu ...	186	606
173	Municipal Council, Tanjore v. Sundaresan ...	185	412	362	Remakrishnayya v. Sreeramulu Subbayya v. Commissioner of Income-tax, Madras ...	188	691
175	Venkadu, <i>In re</i> ...	181	933	369	Perumal Naicken v. Kondama Naicken ...	181	514
178	Hirannayya v. Thippeswami ...	180	783	372	Govardhandas Jamnadas v. Friedmans Diamond Trading Company Limited ...	185	247
181	Travancore National & Quilon Bank Limited, <i>In re</i> ...	183	203	375	Public Prosecutor v. Natasa Pillai ...	188	878
196	Suryanarayanacharyulu v. Narasimhaswamy ...	180	640	381	Annamalai Chettiar v. Lakshmanan Chettiar ...	184	370
199	Lakshmikutty Kethilamma v. Vishnu Nambisan ...	185	173	383	Marud Pillai v. Narayana-swami Pillai ...	189	386
202	K. S. Ambi Iyer, <i>In re</i> ...	181	51	387	Mottai Meera v. Shaik Abdul Kadir Rowther ...	181	557
201	Karupiah Thevan v. N. Krishna Pillai ...	181	264	391	Sitharathamma v. Seshamma ...	186	214
205	Krishna Iyer, <i>In re</i> ...	185	3	393	Commissioner of Income-tax, Madras v. P. R. A. L. M. Muthukaruppan Chettiar ...	185	30
207	Margaret Lornie v. Abu Backer Sait ...	184	735	399	P. S. Venkataraman v. A. C. Janaki ...	181	525
222	Radharani v. Brindarani ...	179	615	403	Rajah of Bobbili v. Venkata Suryanarayana ...	188	826
229	Ram Kinkar Banerjee v. Satya Charan ...	179	328	409	Varadarajam Pillai v. Krishnamurthi Pillai ...	186	255
241	Pattumadammal v. Nanjappa ...	184	824	411	K. P. Madhavi Ammal v. M. Subramaniam Nambudripad ...	189	390
243	K. V. Krishna Iyer v. K. G. Subramania Iyer ...	180	835	413	A. Subramania Iyer v. K. S. Venkatarama Iyer ...	188	852
248	Gokal Chand Jagau Nath Firm v. Nand Ram Das Atma Ram Firm ...	178	425	416	Sundaramma v. Venkatachela-mayya ...	185	326
253	Samuel Koilpillai Skinner v. Arunachalam Pandaram ...	180	651	422	Balarami Reddi v. Official Receiver, Nellore ...	189	335
255	E. M. Muthappa Chettiar v. Commissioner of Income-tax, Madras ...	180	825	427	Garland Petroleum Company (Madras) Ltd, <i>In the matter of</i> Premila Devi v. Peoples Bank of Northern India Limited ...	183	441
257	Nagaratnam v. Seshayya ...	180	994	431	Basappa, <i>In re</i> ...	189	309
268	Pothuraju Setty v. Padda Poliah ...	180	473	444	Ganapathi Asari v. Kuppaswamy Asari ...	178	659
270	K. Manaihunainatha Desikar v. Gopal Chettiar ...	186	153	455	Govindaswami Chetty, <i>In re</i> ...	184	353
273	Chendikamba v. Viswanathamayya ...	189	325	456	Diravyam Pillai v. Veeranan Ambalam ...	183, 179(1)	
280	Mahalakshmi v. Somaraju ...	189	17	458	O. R. Balanagayya Chetti v. Varadarajulu Chetti ...	184	166
287	G. S. Nataraja Pillai v. O. S. Subbaroya Chettiar ...	185	677	460	Veerappa Moopan, <i>In re</i> ...	183	240
295	Narayana Mudali v. Kalathi Mudali ...	185	239	475	Abdul Sattar Sahib, <i>In re</i> ...	183	257
298	Narasimha Rao v. V. Ayyanna Rao ...	184	654	476	Govinda Goundan v. Ayi Goundan ...	183	567
303	Ganga Raju v. Ramayya ...	183	596	478	Perumal Reddiar, <i>In re</i> ...	183	571
305	Pr. Al. M. Muthukaruppan Chettiar v. Commissioner of Income-tax, Madras ...	181	97	481	Kamakshi Ayyar v. Namburamal Ayyangar ...	185	459
309	Nachimuthu v. Balasubramania ...	187	735				

49 LAW WEEKLY, FROM JANUARY TO JUNE, 1939—concl.

483	Sooranna v. Venkanna ...	189	348	597	Krishnaswami Mudaliar v. Vijia- raghava Pillai ...	189	158
491	Cherutty v. Nagamparambil Ravu ...	185	26	602	Natesa Padayachi v. Krishna Padayachi ...	184	611
494	A. T. Kava, <i>In re</i> ...	183	784	605	Ohandra Kesavalu Chetty v. S. P. Perumal Chettiar ...	189	316
496	Lakshamma v. P. S. Subra- manyam ...	184	812	608	P. P. Palaniappa Chettiar v. S. A. Ramanathan Chettiar ...	189	31
500	Lakshmiopathi Naick, <i>In re</i> ...	180	106	620	Gopi Reddi v. Rami Reddi ...	183	865
502	Jalamenna v. Rama Rao ...	183	508	621	Ulagalam Perumal Sethurayar v. Subbulakshmi Nachiar ...	180	773
503	Panchayat Board, Thiruvot- tiyur v. Western India Matches Company ...	182	474	632	Emberumanar Jeer Swamigal v. Board of Commissioners for Hindu Religious Endowments, Madras ...	185	77
514	Lakshminarayana Deo v. Im- perial Bank of India, Guntur ...	183	896	635	P. E. R. M. Annamalai Chetty v. Muthuswami Maniagarar ...	189	334
515	Rm. Ar. Ar. Rm. Arunachalam Chettiar v. Sabaratnam Chet- tiar ...	185	159	644	Sithalinga Chetty v. Ardhanari Chetty ...	189	170
520	Subbanna, <i>In re</i> ...	183	564	651	Sri Minakshi Mills Ltd., Madura, <i>In re</i> ...	183	762
522	Sathalavadan, <i>In re</i> ...	183	561	656	Subba Rao v. Kamaraju ...	183	768
525	Ohidambaram Chettiar, v. R. A. S. Ramaswami Chettiar ...	184	83	657	Krishna Aiyar v. Subba Reddiar ...	189	200
529	Venkateswara Rao v. Ammayya ...	186	300	662	Rajah of Vizianagaram v. San- yasiraju ...	185	42
534	Ramamurti v. Subbarao ...	185	40(2)	681	Narayana Mudali v. Peria Kalathi ...	188	801
536	Duraiswami Raju, <i>In re</i> ...	182	415	671	Dharapuram Janopakara Nidhi Ltd v. K. Lakshminarayana Chettiar ...	182	999
537	Synemodellux Limited v. K. Vannamuthu Pillai ...	185	712	679	Etti v. Secretary of State for India in Council ...	184	887
538	T. S. Gopalaswami Odayar v. T. S. Swaminatha Odayar ...	184	861	684	Ramaswami v. Rudrappa ...	187	328
540	Govindaraja Pillai v. Vanchina- tham Pillai ...	184	485	685	Khaji Dodda Khaji Sahib v. Nanjappa ...	185	554
544 (1)	Pappa, <i>In re</i> ...	183	112	688	N. M. Muthu Vasu Chettiar v. Velu Muruga Nadar ...	188	283
544 (2)	Rangayya, <i>In re</i> ...	183	603	696	United Motor Finance Company v. Fiat Motors Eastern India Agency ...	189	294
545	Parandhamayya v. Nagabhushan- nam ...	183	268	701	A. L. Meenakshi Achi v. L. R. M. Ramaswami Chettiar ...	184	183
546	S. V. Subramanla Pillai v. G. J. Ponnliah ...	183	580	70	K. M. Venkatachala Chetty v. N. D. Natesa Chetty ...	188	857
547 (1)	Venkata Narasimham v. Satya- narayana Rao ...	183	595	707	A. Veeran Kutti v. P. P. Koya Kutti ...	185	578
547 (2)	Kannayya Reddi v. Muthu Raddi ...	185	62	713	S. A. Ramanathan Chettiar v. P. P. Palaniappa Chettiar ...	188	892
549	Venkayya v. Rattayya ...	184	12	717	Maharajah of Venkatagiri v. Rajeswara Rao ...	189	123
552	Jaggu Naidu, <i>In re</i> ...	183	531	782	Kumaraswami Pillai v. Thiru- vengadatha ...	186	379
553	Nataraja Goundan, <i>In re</i> ...	182	602(1)	788	Krishnamachari v. Chengalraya Naidu ...	189	185
554	V. Seetharama Chettiar, <i>In re</i> ...	183	740(1)	773	K. M. Duraiswami Reddiar v. Secretary of State for India in Council ...	189	280
555	Subbayya v. Narasayya ...	183	743	777	Ankamma v. Venkata Subbayya ...	182	833
556	Asiatic Government Security Life Assurance Co., Ltd. v. New Asiatic Assurance Co., Ltd. ...	184	537	781	M. Subbiah v. T. Ramachariu ...	184	112
566	Kutumba Sastri v. Sundaramma ...	183	95	784	Vedavalli Thayarammal v. Junus Chettiar ...	186	460
569	Veeranna v. Lakshmiatisomaya- julu ...	186	470	786	Guruvappa Naicker v. M. Mouna- guruswami Naicker ...	187	731
570	Lakshpat Ram v. Behari Lal Misir ...	180	550				
572	Seshiah v. Ramiah ...	184	843				
576	Govinda Nambudiri v. Sooppia- tath Amad ...	186	249				
578	Satyanarayanamurthy v. Gan- gayya ...	189	54				
581	Machingal Potte Veettu v. Ma- chingal Potte Veettu ...	188	571				
591	Official Receiver, West Tanjore v. Simudravijayan Chettiar ...	185	238				
595	Hussain Batcha Sahib v. Secre- tary of State for India in Council ...	186	313				

50 LAW WEEKLY, FROM JULY TO DECEMBER, 1939.

1	Gajapatiraju v. Revenue Divi- sional Officer, Vizagapatam ...	181	230	23	Surender Singh v. Ghulam Mohammad ...	181	308
19	Lachmeshwar Sahai v. Moti Rani Kunwar ...	181	359	27	Mahanth Singh v. U Ba Yi ...	181	1

50 LAW WEEKLY, FROM JULY TO DECEMBER, 1939—contd.

33	Hari Sankar Paul v. Kedar Nath Saha ...	181	935	260	Krishnamurthy v. Satyanarayana ...	188	751
39	Oudh Commercial Bank Ltd. v. Bind Basni Kuer ...	180	378	270	Saminatha Iyer v. Vagesan ...	185	37
48	Matthen v. District Magistrate of Trivandrum ...	182	551	277	Zamindar of Kirlampudi v. Suryaprakasa Rao ...	189	245
58	Surendra Bahadur Singh v. Behari Singh ...	181	216	232	Krishna Mudaliar v. Marimuthu Mudaliar ...	189	495
66	Bhagwati v. Ram Kali ...	181	211	291	Syed Ibrahim Sahib v. Gurulunga Aiyar ...	188	727
75	Ram Narain Sahu v. Makhna ...	181	929	300	Rathnammal v. Secretary of State ...	189	490
81	Richard Gillie v. Posho Ltd. ...	182	27	306	Sundaravaradan v. Mani Iyer ...	186	297
87	Simon Christopher v. Alfred Christy ...	182	770	309	Zamindar of Udayarpalayam v. Sudai Udayan ...	186	650
95	Dr. Hori Ram Singh v. Emperor ...	181	317	311	Ohidambaram Ohettiar v. Murugesam Pillai ...	189	411
119	Commissioner of Income-tax, Bengal v. Himalaya Assurance Co., Ltd. ...	182	179	318	Subbiah Tevar, <i>In re</i> ...	184	593
126	Ponnuman Dikshitar v. Hindu Religious Endowment Board, Madras ...	188	689	323	Rajarathna Ohettiar v. Shalek Mahboob Sahib ...	190	101
130	Ranganadham Ohetty v. Corporation of Madras ...	184	490	331	Ramappa v. Thirumalappa ...	188	831
133	Sadaiammal v. Angammal ...	184	516	336	Viraraghavulu Naidu v. Rajalingam ...	186	327
136	Sreeramulu Ohetty v. Commissioner of Income-tax, Madras ...	184	263	338	Balakrishna Reddier v. Jalaluddin Sahib ...	184	451(1)
139	Satyanarayanamurthy v. Maharajah of Pithapur ...	189	201	339	Tribune Press v. Commissioner of Income-tax ...	182	882
151	Satyanarayanamurthi v. Gopalan ...	186	57	347	Ramakrishna v. Narasimha Kamath ...	187	426
154	Karuppanna Nadar v. Karuppa Nadar ...	189	289	349	Narayanaraja v. Suryanarayudu ...	184	1
159	Ramaswami Ohettiar v. Meyyappan Servai ...	188	187	357	Sinnachami Ohettiar v. Ramaswami Ohettiar ...	188	48
164	Kunhilakshmi Amma v. Krishnan Menon ...	186	599	360	Anakapalli Municipal Council v. Gajapathiraju ...	189	50
166	Appasami Pillai v. Thayammal ...	189	215	364	Subbayya v. Thippa Reddi ...	188	200
181	Ponnambalam Ohetti v. Ramiah Ohetti ...	188	895	368	Chockalingam Ohettiar v. Ohinnayya Servai ...	189	241
183	Bapanna v. Jaggiah ...	188	710	375	Sankara Varma Raja v. Ramavarma Raja ...	185	628
192	Seethayamma v. Vullipalem ...	188	531	377	Bhupendra Mohan Roy v. Purna Sashi Debi ...	183	199
195	Kameswaramma v. Thammanna ...	187	602	339	Mian Feroz Shah v. Mohammad Akbar Khan ...	182	548
198	Veeresalingam v. Subbarayudu ...	186	316	344	Dawson's Bank Limited v. Maung Mya Thwin ...	182	892
200	Jeeva Ammal v. Ranganatha Mudaliar ...	186	444	400	Kunhibi v. Kalliani Amma ...	189	476
202	Venkatayya v. Official Receiver, Anantapur ...	186	634	404	Lakshminarasimhamurti v. Jogisomayajulu ...	187	851
203	Subramania Ohettiar v. Sarprasadam ...	187	467	406	Hari Ohand v. Secretary of State ...	183	328
206	Ramaswami Goundan v. Lakshmana Keddi ...	186	437	411	Swaminatha Odayar v. Srinivasa Iyer ...	186	421
209	United Provinces v. Governor-General ...	180	863	414	Mauji Ram v. Ohaturbhaj ...	183	196
234	Sri P. Ramanujachariar, <i>In the matter of</i> ...	184	606	418	Sreedevi v. Kurikkul ...	188	822
237	Seeni Madar Sahib v. Abdul Rahman Sahib ...	186	348	423	Kapa Moranna, <i>In re</i> ...	188	311
239	Lakshmiddevamma v. Veera Reddi ...	188	696	426	Mahammad Sheriff Sahib v. Hussain Ghouse ...	188	416
243	Sundaresa Iyer v. Sarvajana Sowkiabivirdhi Nidhi Ltd. ...	189	429	428	Public Prosecutor, Madras v. Menoki of Calicut ...	185	419
248	Vellaya Konar v. Ramaswami Konar ...	189	301	429	Sivaswami Ohettiar v. Marudaiya Goundan ...	186	632
252	Podda Jiyungarlu v. Venkatacharlu ...	188	41	430	Venkateswara Rao v. Subrahmanyam ...	186	455
254	Trichinopoly Varthaga Sangam Ltd. v. T. N. Shanmugasundaram ...	184	387	432	Sitaramayya v. Venkanna ...	187	30
				435	Emperor v. Poligadu ...	185	829
				440	Madura Municipality v. K. Alagirisami Naidu ...	187	780
				448	Haji Maula Bux v. Abdul Latif ...	183	321
				452	Kanakasabal Pillai v. Emperor ...	186	704
				458	Venkatachalam Ohettiar, <i>In re</i> ...	189	811

50 LAW WEEKLY, FROM JULY TO DECEMBER, 1939—contd.

459	Manickavachakam Chettiar v. Official Receiver ...	186	120	640	Palanisami Goundar v. Kaliappa Goundar ...	190	887
466	Jiffiri Attakoya v. Ayidross Kunhikoya ...	188	13	645	Rukmini Ammal v. Subramania Sastrigal ...	190	19
472	Lakshmadu v. Ramudu ...	187	816	651	R. V. and Co v. Hindu Religious Endowments Board ...	186	868
486	Secretary of State v. Arunachalam Mudaliar ...	189	228	654	Narayana v. Lakshmayya ...	185	421
494	Vanjiappa Goundan v. Annamalai Chettiar ...	188	379	655	Nambar v. Chandukutty ...	186	323
497	Moidin Kutti v. Subramanya Iyer ...	187	591	658	Sri Veerabhadraswami v. Maya Kone ...	189	749
500	Sundar ivudu v. Adinarayana Sastri ...	189	303	667	Vyapuri Kavandan, <i>In re</i> ...	184	613
503	District Board of West Tan re v. Ponnuswami ...	188	640	676	Kunbi Ramen Kitavu v. Kunbi Karnavan Kitavu ...	185	755
507	Kannappa Mudali v. Varadachariar ...	188	204	677	Chinnappayan v. Narayana Pattar ...	187	852
511 (1)	Subba Rao, <i>In re</i> ...	185	753	699	Soundararajan v. Khaka Mahmed Ismail Saheb ...	186	118
511 (2)	Krishnan v. Ramanatha Iyer ...	189	727	701	Veeranna Sha v. Official Receiver of Secunderabad ...	190	172
515 (1)	Natesa Ayyar v. Venkalakshmi Ammal ...	189	704	705	Doraikannu Ammal v. Ramaswami Mudaliar ...	186	90
515 (2)	Public Prosecutor v. N. S. Sharma ...	184	51	708	Nitya Nand v. Lala Karam Chand ...	181	471
518	Veerana Kone, <i>In re</i> ...	184	99	719	Thirugnnavalli Ammal v. Venugopala Pillai ...	186	468
520	T. Sivasankara Mudaliar v. Radhabai Ammal ...	185	617	721	Ramaachandra Deo v. Balaji ...	190	42
523	Ramaswami Chettiar, <i>In re</i> ...	186	722	729	Ammannamma v. Venkata Kodanda Rao ...	190	190
529	Ramayya Goundan v. Kolanda Goundan ...	189	259	734	Khaji Muhammad Hussain Sahib v. Mahmood Jamait ...	189	860
534	Edward H. M. Bower v. Hesterlow ...	189	96	743	Chinna Papiah, <i>In re</i> ...	186	484
538	Thyagarajan Chettiar v. Government of Madras ...	186	440	746	Krushnacharana v. Gourochandro ...	189	795
541	Nandesam v. Balakrishnamma ...	189	484	754	Abdul Hameed v. Mohammad Yoonus ...	187	414
548	Jagannatha Ayyar, <i>In re</i> ...	185	257	759	Anantaraman v. Official Liquidators Travancore National & Quilon Bank Ltd. ...	187	531
550	Dinshaw Dadabhai v. Mohamad Mohamood ...	189	505	763	Public Prosecutor v. Amirtham Sarvai ...	186	103
557	Mohideen Pichai Rowther v. Emperor ...	186	525	764	Venkatratnam v. Chennayya ...	187	753
562	Kunhi Kannan v. Devaki ...	189	167	766	Corporation of Calcutta v. Moti Chand Choudhary ...	179	324
566	Sundaram, <i>In re</i> ...	185	417	769	Kanniah Maistry, <i>In re</i> ...	185	355
568	Govinda Chettiar v. Varadappa Chettiar ...	188	263	771	Krishnan Chettiar v. Devarayan Chettiar ...	188	203
571	Alagiri Chetty v. Muthuswami Chetty ...	187	376	782	Lakshmana Rao v. Emperor ...	186	472
576	Namasivaya Mudaliar v. Srinivasa Iyengar ...	189	732	784	Nainamuthu v. Emperor ...	186	479
581	Coimbatore Venkatarama Vilas Co., Ltd. v. Official Receiver, Coimbatore ...	186	123	787	Sreeramulu v. Emperor ...	187	632
587	Anandam v. Muthukumarawami Mudali ...	186	458	790	Public Prosecutor v. Narayana Ayyar ...	186	785
590	Commissioner of Income-tax, Madras v. Sreeramulu Chetty ...	185	455	791	Latchmakka v. Emperor ...	183	332
593	Muthu Goundan, <i>In re</i> ...	186	898	793	G. R. Naidu v. Venkataswami Naidu ...	189	822
594	Byre Gowdu v. Muniammal ...	187	745	796 (1)	Venkanna v. Emperor ...	189	816
597	Ahmad Bux Alla Jovaya v. Fazal Karim ...	190	154	796 (2)	Muhammad Ibrahim v. Kamal Saheb ...	188	145
602	Kondayyarao v. v. Naganna ...	188	318	797	Kalliana Thevan v. Muthuswami Goundan ...	189	775
605	Narayanan Chetti v. Panchanathan Chettiar ...	187	352	799	Perianna Pillai, <i>In re</i> ...	187	92
606	Pitchamma v. Venkataramayya ...	186	714	800	Thegnammal v. Alamelu Ammal ...	187	82
611	Karuppanan Ambalam v. Sundara Raja Ayyar ...	190	161	802	Muthuswami Chettiar, <i>In re</i> ...	185	824
614	Venkataramayya, <i>In re</i> ...	187	103	813	Ramaswamy Chetty v. Rama-chandra Rao ...	188	617
618	Subbarayudu v. Lakshminarasamma ...	189	455	815	Mythili Ammal v. Janaki Ammal ...	189	722
632	Seetha Ramappa v. Ramappa ...	186	231	824	Ramasubbaraya v. Appalana-simharaju ...	188	700
634	Abdul Khader Saheb v. Pachaiyappa Chetti ...	188	680				

50 LAW WEEKLY, FROM JULY TO DECEMBER, 1939—concl'd.

833	Madras and Southern Mahratta Railway Co., Ltd. v. Ranga Rao	190	164	896	Chennappa v. Onkarappa	185	749
837	Mandan Shetti v. Thimmi Avva	186	832	908	Gopal Rao v. Lakshminarasamma	181	388
839	Viswanathan Chettiar v. Official Receiver of Coimbatore	189	881	910	Venkatakrishna Naidu v. Narayanaswami Aiyar	180	396
844	Shiva Rao v. Shanmugasundaraswami	187	243	917	Veeraraghavaswami v. Mangamma	189	685
851	Venkatappadu v. Ramamurthi	186	862	918	Alli Sahib, <i>In re</i>	184	452
867	Natesa Pillai v. Venkatarama Ayyar	188	472	919	Muthuswami Pillai, <i>In re</i>	184	471(1)
872	Shanmugha Nadar v. Shanmughavel Nadar	190	24	920	Velu Naicken, <i>In re</i>	184	302
879	Rowthmall Neopani v. Nagar-mall	190	67	926	Monghi Bai v. Cooverji Umersey	182	1
886	Manickavasaka Thevar v. Chidambaram Pillai	189	829	933	Ramasubramanya Pattar v. Karimbil Pati	186	474
893	Ammanan v. Raja Reddi	188	171	938	Venkata Rayanim Varu v. Chinna Papanna	189	695
				944	Nayar Modern Bank v. Official Liquidators	189	824

(1939) MADRAS WEEKLY NOTES, FROM JANUARY TO DECEMBER.

1	Firm of Gokal Chand-Jagan Nath v. Firm Nand Ram Das-Atma Ram	178	425	113	Tuljaram Rao v. Sir James Taylor	181	451
4	Assankutti v. Mammad	186	302	117	Aranashi Goundan v. Palani Madari	184	134(2)
9	Veerammanni v. Chikka Royal	185	500	118	Yogambamma v. Emperor	181	569
11	Senthappa v. Eswarappa	186	449	119	Marudai Pillai v. Narayanaswami Pillai	181	557
13	Narasaraju v. Satyavatamma	182	715	121	Narasimha Rao v. Ayyanna Rao	184	654
15	Mahbub Singh v. Haji Abdul Aziz Khan	178	386	124	Public Prosecutor v. Natesa Pillai	184	370
18	S. N. Bannerjee v. Kuchwar Lime and Stone Co. Ltd.	178	490	125	Public Prosecutor v. Meenakshi	183	282
24	Mohammad Ismail v. Hanuman Parshad	178	476	126	Joseph v. Emperor	182	228
25	O. P. & Berar Motor Spirit & Lubricants Taxation Act, 1938, <i>In re</i>	180	161	127	Komari Pothuraju Setty v. Krishnapatnam Padda Polish	180	473
67	Ramanathan Chettiar v. Palaniyappa Chettiar	180	246	129	Perumal Chettiar v. Kondal Chetty	183	494
69	Ponnuswamy Chettiar v. Obul Reddy	181	67	130	Jogayya v. Rapanayya	185	154
70	Nagabhushanam v. Anandayya	183	503	131	Ayyappa Naicker v. Kasiperumal Naykar	180	267
73	Secretary of State for India in Council v. Seshavataaram	184	447	134	Venkatakrishna Naidu v. Narayanaswami Ayyar	180	396
76	Bala Chengiah v. Subbayya	183	871	138	Khader Mohideen Sahib v. Nagu Bai	186	279
78	Premila Devi v. Peoples Bank of Northern India	178	659	142	Attorney General of Alberta v. Attorney General of Canada	180	807
85	Martin Cashin v. Peter J. Cashin	182	419	148	Kamalaranjan Roy v. Secretary of State	178	472
93	Lala Nand Kishore v. Azmat Ulla	178	406	152	Suryanarayanacharyulu v. Narasimhaswamy	180	640
95	Subbanagalu Naidu v. Balanagamayya Chettiar	180	340	154	Marudamuthu Mudaliar v. Venkatrama Ayyar	184	60
98	Narayana Swami Naidu v. Lakshmi Narasimha Rao	183	587	155	Muthukaruppa Chettiar v. Commissioner of Income-tax, Madras	181	37
102	Chidambaram Chettiar v. Commissioner of Income-tax, Madras	180	133	157	Muthappa Chettiar v. Commissioner of Income-tax, Madras	180	825
103	Narayanan Chettiar of Commissioner of Income-tax, Madras	179	652	159	Mahalakshmi v. Somaraju	189	17
104	Hejmady Co-operative Society v. Veeraiya Naik	181	425	164	Ganga Raju v. Ramayya	183	596
106	Perianna Goundan v. Sellappa Goundan	182	879	165	Venkata Seshayya v. District Board, East Godavari	184	465
107	Thimmiah v. Official Receiver of Bellary	183	693	168	Balarami Reddi v. Official Receiver, Nellore	183	441
110	Perumal Naicken v. Kondamma Naicken	185	247	170	Ramanathan Chettiar v. Palaniappa Chettiar	189	98
112	Commissioner of Income-tax, Madras v. Ramaswami Chettiar	180	370	180	Nataraja Pillai v. Subbaroya Chettiar	185	677
				185	Narayana Swami v. King-Emperor	180	1

(1939) MADRAS WEEKLY NOTES, FROM JANUARY TO DECEMBER—contd.

192(1)	Shanmugasundaram Pillai v. Manicka Mudaliar ...	181	89	300	Madhavi Ammal v. Subramanian Nambudripad ...	188	852
192(2)	Mada Nagaratnam v. Puvvada Seshayya ...	180	994	302	Varadarajam Pillai v. Krishna-murthi Pillai ...	189	390
200	Maduranayakam Pillai v. Secretary of State for India in Council ...	185	478	303	Kamakshi Ayyar v. Namberumal Ayyangar ...	185	459
205	Maniithunainatha Desikar v. Gopala Chettiar ...	186	153	305	Sooranna v. Venkanna ...	189	348
209	Muhammad Shamsudin Ravuthar & Bros v. Shaw Wallace & Co. ...	184	153	309	Gopalaswami Odayar v. Swaminatha Odayar ...	184	861
214	Commissioner of Income-tax, Madras v. Muthukaruppan Chettiar ...	181	525	311	Pattumadammal v. Nanjappa ...	184	824
216	Dhanamma v. Coromandel Company Limited ...	185	16	313	Perumal Reddiar v. Emperor ...	183	571
217	Raja Ajai Verma v. Vijai Kumari ...	179	620	315	Jambulingam Pillai v. Ponnu-swami Pillai ...	182	327
223	Prahladrai Chooreewalla v. Commissioners for the Port of Calcutta ...	179	321	316	Subbanna v. Emperor ...	183	564
226	Ghinna Venkatappa Nayanim v. Sundarajulu Naidu ...	185	427	318	Govindaraja Pillai v. Vanchinatham Pillai ...	184	485
228	Lakshmikutty Kettilamma v. Vishnu Nabisan ...	185	173	319	Basappa v. Emperor ...	184	353
233	Chung Chi Cheung v. The King ...	180	20	320	Ganapathi Asari v. Kuppusewamy Asari ...	183	179(1)
239	Ambi Ayyar v. Emperor ...	181	51	321	Lakshammamma v. Subramanyam ...	184	812
240	Karuppiah Thevan v. Krishna Pillai ...	181	254	323	Ramamurti v. Subbarau ...	185	440(2)
241	Michael Burns v. Mabel Burns ...	181	993	324	Synemodelux Ltd. v. Vannamuthu Pillai ...	185	712
243	Raju Gupta v. Emperor ...	189	25	325	Rajah of Bobbili v. Venkata Suryanarayana ...	186	255
244	Krishna Ayyar v. Emperor ...	185	3	326	Venkateswara Rao v. Ammayya ...	186	200
245	Venkatathnam v. Sambesiva Rao ...	188	815	329	Diraviyam Pillai v. Veeranan Ambalam ...	185	562
249	Radharani Dassya v. Brindarani ...	179	615	338	Kava v. Emperor ...	183	783
256	Skinner v. Arunachalam Pandaram ...	180	651	339	Abdul Sattar Sahib v. Emperor ...	183	257
257	Athikesavalu Naidu v. Ekambaram Mudaliar ...	186	150	340	Emperor v. Veerappa Mooppin ...	183	240
259	Munusami Chetti v. Kuppusemi Chetti ...	186	208	341	Sethalavadan v. Emperor ...	183	561
262	Venkataraman v. Janaki ...	188	826	343	Duraiswami Bajju v. Emperor ...	182	415
263	Subbaya v. Commissioner of Income-tax, Madras ...	181	514	344	Nagaratnam Pillai v. Ramaswami Iyer ...	180	674
268	Beharani v. Raghubehara ...	184	86	346	Khatoun Bi Bi v. Abdul Wahab Sahib ...	184	778
270	Sundaramma v. Venkatachelayya ...	189	335	353	Balanaggayya Chetti v. Varadarajulu Chetti ...	184	832
273	Narayana Mudali v. Kalathi Mudali ...	185	239	354	Cherutty v. Nangamparambil Raru ...	185	26
275	Ohendikamba v. Viswanathamayya ...	189	325	356	Pashupati Bharti v. Secretary of State for India in Council ...	180	547
279	Mottai Meera v. Abdul Kadir Rowther ...	186	214	359	Lakshpat Ram v. Behari Lal Misir ...	180	550
284	Krishnaswami Mudaliar v. Vijayaraghava Pillai ...	189	158	360	Palaniappa Chettiar v. Ramannathan Chettiar ...	189	31
288	Chidambaram Chettiar v. Ramaswami Chettiar ...	184	83	367	Arunachalam Chettiar v. Subarattnam Chettiar ...	185	159
290	Govardhandas Jamnadas v. Friedmans Diamond Trading Co. Ltd. ...	188	878	370	Panchayat Board, Thiruvorthiyur v. Western India Matches Co. ...	182	474
295	Vythilingam Pillai v. Pankajathammal ...	185	850	377	Varadarajam Chetty v. Kanakiah ...	186	7
297	Govindasami Chetti, In re ...	184	166	378	Official Receiver, West Tanjore v. Samudravijian ...	185	288
298	Hussain Batocha Sahib v. Secretary of State for India ...	186	343	380	Lakshminarayana Deo v. Imperial Bank of India, Guntur ...	183	896
				381	Koran v. Govindan Nambiar ...	184	672
				383	Satyanarayanamurthy v. Gangayya ...	189	54

(1939) MADRAS WEEKLY NOTES, FROM JANUARY TO DECEMBER—contd.

385	Seetha v. Kelu Menon	188	571	473	Khaji Dodda Khaji Sahib v. Nanjappa	185	554
391	Govindan Nambudiri v. Soopiatath Amad	186	249	480	Venkatachela Chetty v. Natesa Chetty	188	857
392	Subbaramayya v. Iragam Reddi	184	108	481	Surayya v. Krishnamurthi	185	434
397	Subba Rao v. Calicut Co-operative Urban Bank Ltd.	185	230	483	Sivasankara Mulaliar v. Radhabai Ammal	185	647
401	Kannayya Reddi v. Muthu Reddi	185	62	488	Dharapuram Janopakara Nidhi Ltd. v. Lakshminarayana Chettiar	182	999
403	Venkayya v. Rattayya	184	12		Meenakshi Achi v. Ramaswami Chettiar	184	183
405	Seshiah v. Ramiah	184	843	493	Balakrishnan Nambiar v. Chatha	188	183
407	Kutumba Sastri v. Sundaramma	183	95	496	Hori Ram Singh v. Crown	181	317
409	Govinda Goundan v. Ayi Goundan	183	567	497	Gurusami Tevan v. Emperor	184	336
410	Pappa v. Emperor	183	112	513	Vira Reddy v. Emperor	184	460
411	Jaggu Naidu v. Emperor	183	581		Veerana Kone v. Emperor	184	99
412	Subbayya v. Venkata Narasayya	183	743	514	Kumaraswami Pillai v. Thiruvengadatha Ayyangar	186	379
413	Rangayya v. Emperor	183	603	519	Maharaja of Venkatagiri v. Raja Rajeswara Rao	189	123
414	Nataraja Goundan v. Emperor	183	602(1)	521	Pestonjee Bhicajee Firm v. Anderson	179	995
415	Venkata Narasimham v. Satyanarayana Rao	183	595	551	Margaret Lornie v. Abu Backer Sait	184	735
416	Seetharama Chettiar v. Emperor	183	740(1)	555	Veeran Kutti v. Koya Kutty	185	578
417	Veeranna v. Lakshmiopathi Somayajulu	186	470	563	Sithalinga Chetty v. Ardhanari Chetty	189	170
418	Aiyanaachariar v. Sadagopachariar	189	190	564	Commissioner of Income-tax, Madras v. Mathias	178	906
426	Municipal Council, Tanjore v. Sundaresan	185	412	567	Balusami v. Official Assignee of Madras	189	406
427	Krishna Iyer v. Subramania Iyer	180	855	573	Utagalum Perumal Sethurayar v. Subbulakshmi Nachiar	180	773
430	Subramania Iyer v. Venkatarama Iyer	185	326	576	Sadaiammal v. Angammal	184	516
433	Jalamanna v. Ramarao	183	508	582	Etti v. Secretary of State for India in Council	184	887
436	Natesa Padayachi v. Krishna Padayachi	184	641	585	Raja of Vizianagaram v. Sanyasiraju	185	42
437	Kesavalu Chetty v. Perumal Chettiar	189	316	598	Krishna Ayyar v. Subba Reddiar	189	200
441	Gopi Reddi v. Rami Reddi	183	865		Narayana Mudali v. Kalathi Mudali	188	801
442	Emberumanar Jeer Swamigal v. Board of Commissioners, for Hindu Religious Endowments, Madras	185	77	593	Ramanathan Chettiar v. Palaniappa Chettiar	188	892
443	Venkatarayulu Naidu v. Venkatta Ratamma	189	320	597	Ankamma v. Venkata Subbayya	182	833
445	Annamalai Chettiar v. Lakshmanan Chettiar	189	386	601	Ram Kinkar Banerjee v. Satya Charan Srimani	179	328
447	Madhava Sahu v. Satrugana Sahu	186	606	607	Guruswami Naicker v. Mounaguruswami Naicker	187	731
451	Ramakrishnayya v. Sreeramulu	188	691	608	Manickavachakam Chettiar v. Official Receiver, Negapatam	186	120
458	Manavedan v. Veerayian Unni	189	66	609	Mekraj Alli Sahib v. Emperor	184	452
464	Ramaswami v. Rudrappa	187	338		Hajee Mahomed Kadir Sheriff v. Rahimatullah	188	327
465	Seetha Rami Reddi v. Emperor	184	327	610	Emperor v. Velu Naicken	184	302
468	Public Prosecutor v. N. S. Sharma	184	51	611	Muthusamy Pillai v. Emperor	184	471(1)
469	Subramania Pillai v. Pon-niah	183	560	615	Hori Ram Singh v. Crown	181	947
470	Ohittiboyina v. Danduboyina Narappa	184	280	616	Thayarammal v. Junus Chettiar	186	460
471	Appaji Goundan v. Emperor	184	188	617	Duraiswamy Reddiar v. Secretary of State for India in Council	189	280
472	Vyapuri Kavandan v. Emperor	184	613	618	Kalandar Rowther v. Sivapunyam Chettiar	188	813
473	Annamalai Chetty v. Muthuswami Maniagaran	189	364	622			

(1939) MADRAS WEEKLY NOTES, FROM JANUARY TO DECEMBER—contd.

624	Krishnamachari v. Chengalva- raya Naidu	189	185	775	Hindu Religious Endowments, Board v. Trustee of Sri Virupa- kataswami	185	544
627	United Motor Finance Co. v. Flat Motors Eastern India Agency	189	294	778	Vellaya Konar v. Ramaswami Konar	189	301
633	Muthuvasu Chettiar v. Velumu- ruga Nadar	188	283	80	Lakshmiddevamma v. Veera Reddi	188	696
639	Basappa v. Rudrappa	180	126(2)	784	Zamindar of Kirlampudi v. Sur- yaprakasarao Garu	189	245
640	Sitharathnamma v. Seshamma	185	30	787	Sandaresa Ayyar v. Sarvajana Sowkiabivirthi Nidhi	189	429
643	Ponnuman Dikshtar v. Board of Commissioner Hindu Religious Endowment, Madras	188	889	790	Kameswaramma v. Tham- manna	187	602
646	Secretary of State for India v. Arunachala Mudaliar	189	223	792	Ramaswami Goundan v. Laksh- mana Reddi	186	437
668	Balarama Reddi v. Viswana- than	189	309	794	Rathnammal v. Secretary of State for India	189	490
671	Lachhmeshwar Sahai v. Moti Rani Kunwar	181	359	798	Rajaratna Chettiar v. Shari Shaick Mahboob	190	101
674	Shyamakant Lal v. Rambhajan Singh	182	161	803	Krishna Mudaliar v. Marimuthu Mudaliar	189	495
686	Asiatic Government Security Life Assurance Co. v. New Asiatic Assurance Co.	184	537	809	Kunhilakshmi Amma v. Krishna Menon	186	599
692	Oudh Commercial Bank v. Bind Bansi Kuer	180	378	810	Seethayamma v. Vullipalam	188	534
698	Sreeramulu Chetty v. Commis- sioner of Income-tax, Madras	184	268	812	Trichinopoly Varthaga Sangam v. Shanmugasundaram	184	387
700	Ramaswami Chettiar v. May- yappan Servai	188	187	816	Pedda Jiyangarlu v. Venkata- charlu	188	41
702	Venkatasubbu Mudaliar v. Nara- yanaswami Chetty	184	378	817	Seeni Madar Sahib v. Abdul Rahman Sahib	186	348
708	Narayana Gajapathiraja v. Reve- nue Divisional Officer, Vizaga- patam	181	230	818	Veeresalingam v. Subbarayudu	186	316
720	Karuppanna Nadar v. Karuppa Nadar	189	289	819	Chairman Municipal Council v. Narayana Gajapathiraja	189	50
725	Satyanarayanamurthi v. Go- palan	186	57	821	Madura Municipality v. Alagi- risami Naidu	187	780
727	Mahanth Singh v. U Ba Yi	181	1	827	Saminatha Ayyar v. Vagesan	185	37
731	Ponnambalam Chetti v. Raman- chetti	188	895	831	Jeeva Ammal v. Ranganatha Mudaliar	186	444
733	Subramania Chettiar v. Sarprasa- dam	187	467	832	Sankara Varma Raja v. Rama Varma Raja	185	628
734	Venkatayya v. Official Receiver, Anantapur	186	634	834	Sinnachami Chettiar v. Rama- sami Chettiar	188	48
735(1)	Gooru Narayana v. Vaikuntam Chinna Lakshmayya	185	421	835	Zamindar of Udayarpalam v. Sudi Udayan	186	350
736(2)	Hanumanthappa v. Goolappa	179	894	848	Krishnamurthy v. Satya- narayana	188	751
737(1)	Balakrishna Reddiar v. Jalalud- din Sahib	184	451(1)	857	Padalinga Mudaliar v. Arumugha Mudaliar	189	305
737(2)	Ranganatham Chetty v. Corpora- tion of Madras	184	490	860	Bapanna v. Jaggiiah	188	710
739(1)	Doraswami Naidu v. Em- peror	184	609(1)	866	Ramappa v. Thirumalappa	188	851
739(2)	Paidi Subbaya v. Emperor	185	440(1)	867	Surendra Bahadur Singh v. Behari Singh	181	216
740	Rama Krishna v. Sest- hamma	186	224	873	Emperor v. Taduturu Poli- gadu	185	829
741	Subbiah v. Ramacharu	184	112	876	Public Prosecutor v. Appala- narasayya	187	118
742	Subba Rao v. Kamaraju	183	708	877	Morranna v. Emperor	188	311
743	Thiagarajan v. Emperor	183	762	879	Mohideen Pichai Rowther v. Emperor	186	525
744	Matthen v. District Magistrate, Thivandrum	182	551	883	Kanakasabai Pillai v. Em- peror	186	704
750	United Provinces v. Governor- General-in Council	180	883	888(1)	Banalamudu Parandhamayya v. Nagabhushanam	183	268
766	Ramanujachariar, In re	184	606	888(2)	Venkatachalam Chettiar v. Em- peror	189	811
769	Chidambaram Chettiar v. Muru- gesam Pillai	189	411	889	Ramakrishna v. Narasimha Kamath	187	426
774	Vira Raghavulu Naidu v. Chinna Rajalingam	186	337	890	Viyathan Sreedevi v. Aydroos Kpurikkal	188	822

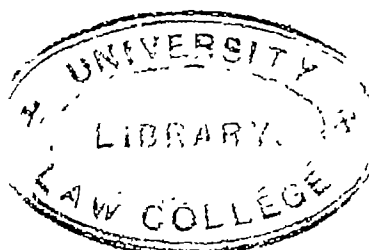
(193) MADRAS WEEKLY NOTES, FROM JANUARY TO DECEMBER—contd.

892	Syed Ibrahim Sahib v. Gurulinga Ayyar	188 727	1046(2)	Vasanth Rao Ananda Rao v. Gopal Rao Sethu Rao	188 626
894	Bhagwati v. Ram Kali	181 211	1066	Nayar Modern Bank v. Official Liquidators Travancore National & Quilon Bank	189 824
900	Kunhibi v. Kalliani Amma	189 476		Secretary All India Spinners Association v. Official Liquidators Travancore National & Quilon Bank	186 773
903	Ramayya v. Satyenarayana Jagapathi Raju	188 881	1071	New Field & Co. v. Official Liquidators Travancore National & Quilon Bank	189 801
907	Subbayya v. Thippa Reddi	188 200		Govinda Chettiar v. Varadappa Chettyar	188 263
910	Swaminathar Odayar v. Srinivasa Iyer	186 424		Abdul Khadir Sahib v. Pachiyappa Chetti	188 620
911	Chockalingam Chettiar v. Ohinnayya Servai	189 241	1072	Palanisami Goundar v. Kaliappa Goundar	189 887
917	Lakshminarasimhamurti v. Venkata Jogisomayajulu	187 861	1080	Krishnan v. Ramanatha Ayyar	189 727
918	Lakshmadu v. Ramudu	187 816		Kondayyarao v. Naganna	188 318
947	Natesa Ayyar v. Venkalakshmi Ammal	189 704	1082	Ramayya Goundan v. Kolanda Goundan	189 259
948	Vanjiappa Goundan v. Annamalai Chettiar	188 379	1084	Venkataramana Vilas Co. v. Official Receiver, Coimbatore	186 125
950	Mahommad Sheriff Sahib v. Hussain Ghouse	188 416	1087	Anantaraman v. Official Liquidators Travancore National & Quilon Bank	187 531
951	Venkateswara Rao v. Subrahmanyam	186 455	1090	Sundararajan v. Mahomed Ismail Sahib	186 118
952	Subbarayudu v. Lakshminarasamma	189 435	1092	Perumal Moopan v. Subramania Mudaliar	185 768
961	Sitaramayya v. Venkanna	187 30	1094	Bhupendra Mohan Roy v. Purna Sashi Debi	183 199
962	Sivaswami Chettiar v. Marudaiya Goundan	186 632	1096	Nandesam Chowdari v. Balakrishnama Chowdari	189 484
963	Judgal Kishore Narain Singh v. Charoo Chandra Sur	181 341	1115(1)	J. S. Dhass v. Emperor	187 33
967	Trustees of Tribune Press v. Commissioner of Income-tax	182 882	1115(2)	Public Prosecutor v. Mooki	185 419
972	District Board, West Tanjore v. Ponnuswami Pallavarayar	188 640	1116	Public Prosecutor v. Narayana Ayyar	186 785
975	Seetha Ramappa v. Ramappa	186 231	1118	Addagalla Venkanna v. Emperor	189 816
984	Kunhi Kannan v. Devaki	189 167	1121	Sreeramulu v. Emperor	187 632
986	Kannappa Mudali v. Varadachariar	188 204	1125	Latchmakka v. Emperor	188 332
988	Jhorama v. Latchanna Dora	187 334	1127	Lakshmana Rao v. Emperor	186 472
990	Ramaswami Chettiar, In re	186 722	1132	Nainamuthu v. Emperor	186 479
991	Dawson's Bank Ltd. v. Maung Mya Thwin	182 892	1124	Papiiah v. Emperor	186 484
994	Sundarasivudu v. Adinarayana Sastri	189 303	1136	Kunhi Raman Kitavu v. Kunhi Kanaran	185 755
996	Moidin Kutti v. Subramanya Ayyar	187 591	1137	Sri Veerabhadraswami v. Maya Kone	189 749
998	Corporation of Calcutta v. Moti Chand Choudhury	179 324	1145	Ohinnappayyan v. Narayana Patter	187 852
1000	Subbiah Tevar v. Emperor	184 593	1148	Namasivaya Mudaliar v. Srinivasa Ayyangar	189 732
1003	Kanniah Maistry v. Emperor	185 385	1150	Dinshaw Dadabhai Italia v. Mohammad Mohamood	189 505
1004	Public Prosecutor v. Amirtham Servai	186 103	1154	Rukmani Ammal v. Subramania Sastrigal	190 19
1005	Tubal Uraih, Butler v. The King	185 461	1160(2)	Abdul Hameed v. Mohammed Yoonus	187 414
1012	Subba Rao v. Emperor	185 753	1163	Doraikannu Ammal v. Ramaswami Mudaliar	186 90
1013	Thyagaraja Chettiar v. Secretary to Government of Madras	186 440	1165	Thirugnanavalli Ammal v. Venugopala	186 468
1015	Edward H. M. Bower v. Hesterlow	189 96	1166	Hari Sankar Paul v. Kedar Nath Sahu	181 935
1017	Pitchamma v. Venkataramayya	186 714	1170	Byre Gowdu v. Muniammal	187 745
1037	Sundaram, In re	185 417	1171	Alla Jovaya v. Fazal Karim	190 154
1038	Jagannatha Ayyar, In re	185 257			
1039	Venkataramanayya v. Emperor	187 103			
1041	Nambar v. Chandukutty	186 323			
1042	R. V. & Co. v. Hindu Religious Endowments Board	186 868			
1044	Anandam v. Muthukumaraewami Mudali	186 458			
1046(1)	Narayanan Chetti v. Panchanathan Chettiar	187 352			

(1939) MADRAS WEEKLY NOTES, FROM JANUARY TO DECEMBER—concl'd.

1174	Nayar Modern Bank v. Official Liquidators Travancore National & Quilon Bank ...	188	583	1213	King-Emperor v. Krishnan ...	190	123
1177	Surendar Singh v. Ghulam Mohammad ...	181	308	1223	Perianna Pillai v. Emperor ...	187	92
1179	Karuppanna Ambalam v. Sundara Raja Ayyar ...	190	161	1224(1)	Appanna v. Emperor ...	188	195
1181	Ammanamma v. Kodanda Rao Panthulu ...	190	190	1224(2)	Delhi Bather v. Corporation of Madras ...	188	150
1185	Jiffiri Attakoya Thangal v. Ayidross Kunhikoya ...	188	13	1225	Alagiri Chetty v. Muthusami Chetty ...	187	376
1183	Narayanaraju v. Suryanarayudu ...	184	1	1237	Mythili Ammal v. Janaki Ammal ...	189	722
1193	Mani Iyer v. Official Liquidators Travancore National Bank Subsidiary Co. ...	186	297	1243	Kaliana Thevan v. Muthuswami Goundan ...	189	775
1195	Ammanamma v. Raja Reddi ...	188	171	1244	Venkatratnam v. Chennayya ...	187	758
1196	Ramaswamy Chetty v. Ramchandra Rao ...	188	617	1245	Krishan Chettiar v. Devarayan Chettiar ...	188	208
1197	Venkata Rayanim Varu v. Ohiona Bapanna ...	189	695	1248	Crown Prosecutor v. Sellamuthu ...	187	122
1198	Mandan Shetti v. Thimmi Ayva ...	186	832	1250	Sanyasiraju v. Emperor ...	189	779
1199	Ram Narain Sahu v. Makha ...	181	929	1251	Shanbagaperumal Naicker v. Emperor ...	186	601
1205	Muhammad Ibrahim v. Kamal Saheb ...	188	145	1252	Satyanarayanamurthy v. Manikyala Rao ...	187	126
1206	G. R. Naidu v. Venkataswami Naidu ...	189	822	1254	Suryanarayanamurti v. Emperor ...	189	827
1207	Veeraraghaswami v. Mangamma ...	189	685	1255	Sundarammal v. Palaniandi Mudali ...	188	32
1209	Muthuswami Chettiar v. Emperor ...	185	824	1256	Venkatratnam v. Ramasastrulu ...	190	366
				1259	Muthu Goundar v. Emperor ...	186	896
				1260	Veeraswami v. Emperor ...	187	120

NOTES:—Page of (1939) M. W. N. which do not appear in the above Comparative Table belong to cases which are either not sanctioned by the High Court or considered not reportable—[Ed.]



Alphabetical List of Cases reported in Volume 135 of Indian Cases (1940) with references to the Volumes and Pages of other Law Journals and Reports.

Names of cases reported.	Parallel references.	Page.
A. James v. Achaibar Singh ...	A I R 1940 Pat. 119; 6 B R 150; 21 P L T 416; 12 R P 346 ...	297
A. Ranganatham Ohetti v. M. Ethirajulu Nayudu ..	A I R 1940 P O 17; 6 B R 268; 12 R P O 107; (1940) 1 M L J 24; 51 L W 96; 1940 O L R 53; (1940) M W N 107; 70 O L J 507; I L R (1940) Mad. 172; (1940) Kar. (P O) 43 Sup.; 67 I A 25 P C	571
A. Subramania Iyer v. K. S. Venkatarama Iyer ..	A I R 1939 Mad. 599; 49 L W 416; I L R (1939) Mad. 54; (1939) 1 M L J 536; (1939) M W N 430; 12 R M 530	326
A. Veeran Kutti v. P. P. Koya Kutti ...	A I R 1939 Mad. 735; 49 L W 707; (1939) M W N 563; (1939) 2 M L J 86; I L R (1939) Mad. 828; 12 R M 561	578
Abdul Latif v. Abdul Gani Serang ...	A I R 1939 Cal. 730; 43 O W N 1221; 12 R O 358; I L R (1940) 1 Cal. 133	393
Abdul Latif v. Habibulla ...	A I R 1939 Cal. 351; 69 O L J 28; 12 R O 401	714
Abdul Sattar v. Dinaipur Trading and Bakning Co., Ltd. ...	A I R 1939 Cal. 490; 69 O L J 229; 42 O W N 1153; 12 R O 343	145
Ah Li v. U San Baw ...	A I R 1939 Rang. 446; 1939 Rang. 581; 12 R Rang. 232	802
Ah Phut v. The King ...	A I R 1939 Rang. 402; 1940 Rang. 104; 41 Or. L J 129; 12 R Rang. 185	205
Ahmad Hussain v. Amir Bano ...	A I R 1940 All. 63; 12 R A 356	837
Ahmed Ibrahim Singapori v. Collector of Surat ...	A I R 1939 Bom. 447; I L R (1939) Bom. 611; 41 Bom. L R 934; 12 R B 278	870
Aisha Bibi v. Begum Bibi ...	A I R 1939 Sind 263; (1939) Kar. 475; 12 R S 143	87
Ajam Ibram Modan v. Bai Hava Bibi ...	A I R 1939 Bom. 485; I L R (1939) Bom. 472; 41 Bom. L R 892; 12 R B 266	813
Akbar Hussain Khan v. Emperor ...	A I R 1940 All. 7; (1939) A L J 962; 41 Or. L J 227; 12 R A 371; I L R (1939) All. 975	700
Akella Surayya v. Thummalapalli Krishna-murthi ...	A I R 1939 Mad. 583; (1939) M W N 481; 12 R M 510	431
Akoojee Jadwet and Co. v. A. V. and Son ...	A I R 1939 Rang. 423; 12 R Rang. 219	705
Amar Nath Khosla v. M. C Mohan ...	A I R 1939 Lah. 433; 41 P L R 879; 12 R L 265	65
Ambica Prosad Sanyal v. Messrs. Soorajmull Naga-rmull Firm ...	A I R 1939 Cal. 620; I L R (1939) 2 Cal. 291; 43 O W N 999; 12 R O 378	523
Ambika Prasad v. Maqbulunnissa ...	A I R 1940 Oudh 207; 1940 O W N 129; 1940 R D 66; 1940 O L R 39; 12 R O 255	728
Ambika Thakur v. Emperor ...	A I R 1939 Pat. 611; 18 Pat. 544; 6 B R 203; 41 Or. L J 191; 12 R P 389; 21 P L T 45	529
Anand Behari Lal Khandelwal v. Deputy Com-missioner, Bara Banki ...	A I R 1940 Oudh 107; 1939 O W N 1145; 12 R O 212; 1939 O L R 723 (2); 1939 R D 635	290
Anandi Prasad v. Dulhin Kishori Kuer ...	A I R 1940 Pat. 251; 6 B R 224; 12 R P 401	626
Angelo v. Kandan Manjhi ...	A I R 1940 Pat. 316; 6 B R 241; 41 Or. L J 221; 12 R P 440	738
Arunachalam Chettyar v. Sabaratnam Chettiar..	A I R 1939 Mad. 572; (1939) M W N 367; 49 L W 515; (1939) 1 M L J 839; I L R (1939) Mad. 585; 12 R M 520	159
Asian Assurance Co., Ltd. v. Asa Ram ...	A I R 1940 Oudh 212; 1940 O W N 149; 1940 O L R 62; 12 R O 266	793
Ayancheri Kovilakath Sanakra Varma Raja v. Ayancheri Kovilakath Oheria Rama Varma Raja ..	A I R 1939 Mad. 902; (1939) M W N 832; 50 L W 375; (1939) 2 M L J 506; 12 R M 566	628

B. L. Chouda v. B. K. Rai	...	A I R 1939 Nag. 274; 1939 N L J 421; 12 R N 141	210
Babu v. Emperor	...	A I R 1940 Oudh 241; 1940 O L R 43; 41 Cr. L J 228; 1940 O W N 118; 12 R O 278	745
Babu Govind Das v. Indrawati	...	A I R 1940 All. 38; (1939) A L J 919; 12 R A 359; I L R (1940) All 11	854
Baburali Sardar v. Kala Chand Bepari	...	A I R 1939 Cal. 728; I L R (1939) 1 Cal. 567; 41 Cr. L J 125; 12 R O 347 (2)	177
Bachai v. Hayat Mohammad	...	A I R 1940 Oudh 119; 1939 O W N 1118; 12 R O 219; 1939 O L R 728; 15 Luck 265	337
Bachan Lal v. Gobardhan	...	A I R 1940 Oudh 118; 1940 R D 13; 1939 O L R 749; 1940 O W N 13; 12 R O 227; 15 Luck. 288	373 (1)
Bai Hakimbu v. Dayabhai Rugnath	...	A I R 1939 Bom. 508; 41 Bom. L R 1104; 12 R B 258	655
Baker Ali v. Amir Ali Meah	...	A I R 1939 Rang. 396; 12 R Rang. 216	641
Baldev Singh v. Sher Singh	...	A I R 1939 Lah. 556; 41 P L R 524; 12 R L 306	609
Bansidhar v. Emperor	...	A I R 1940 All. 18; (1939) A L J 671; 41 Cr. L J 220; 12 R A 368; I L R (1939) All 865	689
Banwari Lal v. Hussaini	...	A I R 1939 Lah. 455; 41 P L R 457; 12 R L 326	858
Baptist De Souza v. Emperor	...	A I R 1939 Bom. 465; 41 Bom. L R 974; 41 Cr. L J 127; 12 R B 229	203
Barq Raza v. Akbari	...	A I R 1940 Oudh 152; 1940 O L R 3; 12 R O 229	441
Basant Kaur v. Ram Singh	...	A I R 1939 Lah. 544; 41 P L R 657; 12 R L 279	343
Basappa Chanbasappa Chekki v. Hanmappa Ramappa Manaur	...	A I R 1939 Bom. 492; 41 Bom. L R 943; 12 R B 235	225
Behari Lal Sud v. Emperor	...	A I R 1939 Lah. 529; 41 P L R 652; 41 Cr. L J 204; 12 R L 313	588
Benares Bank Ltd., Benares, <i>In the matter of</i>	...	A I R 1939 All. 726; (1939) A L J 1009; 12 R A 317 (2); I L R (1939) All. 938	398
Bepin Chandra Gorain v. Hem Chandra Mukherjee	...	A I R 1939 Cal. 709; I L R (1939) 2 Cal. 63; 43 O W N 692; 12 R O 368	424
Bhagwan Das v. Muhammad Nawaz Shah	...	A I R 1939 Lah. 349; I L R (1939) Lah. 408; 41 P L R 765; 12 R L 295	489
Bhagwan Din v. Gir Har Saroop	...	A I R 1940 P O 7; 1939 O W N 1078; 6 B R 179; 12 R P O 89; 1939 O L R 729; (1940) 1 M L J 1; 51 L W 4; (1940) M W N 3; 42 Bom. L R 190; 44 C W N 294; 71 O L J 199; 15 Luck. 1; (1940) Kar. (F O, 25 Sup.; 67 I A 1; 42 P L R 457 P C	305
Bhairo Dutt Bhandari, an Advocate, Ranikhet, <i>In the matter of</i>	...	A I R 1940 All. 1; (1939) A L J 957; 41 Cr. L J 211; I L R (1940) All. 60; 12 R A 367 S B	611
Bhairo Kumar v. Markande Gir	...	A I R 1939 All. 679; (1939) A L J 820; 1939 R D 444; 12 R A 347; I L R (1939) All 822	767
Bhawani Shankar v. Mohammad Hasan	...	A I R 1940 Oudh 182; 1940 O W N 167; 1940 O L R 79; 12 R O 269	895
Bhudeo Prasad v. Sri Nath	...	A I R 1939 All 657; 12 R A 343	660
Bibhabati Devi v. Kumar Ramendra Narayan Roy	...	A I R 1939 Cal 672; I L R (1939) 1 Cal. 399; 43 O W N 333; 12 R O 354; 41 Cr. L J 148	286
Bishan Lal v. Banwari Lal	...	A I R 1939 All. 713; (1939) A L J 943; 12 R A 327	487
Bishun Singh v. Palakdhari Singh	...	A I R 1939 Pat. 592; 6 B R 109; 12 R P 304	129
Board of Commissioners for H. R. E., Madras v. Trustee of Sri Virupakshaswami Swami	...	A I R 1939 Mad. 801; (1939) M W N 775; (1939) 2 M L J 325; 12 R M 551	544
Boomiah v. R. M. N. R. M. Chettyar Firm	...	A I R 1939 Rang. 406; 1939 Rang. 508; 12 R Rang. 205	552
Brij Raj Kumari v. Subh Karan Das	...	A I R 1940 F O 5; 6 B R 333; (1939) Kar. (F O) 190; 1940 O L R 97; 71 O L J 86; 12 R F O 21 F C	804
Bulak Ram v. Ganga Bishun Chaudhuri	...	A I R 1940 Pat. 133; 6 B R 104; 12 R P 301	123
Buxar Central Co-operative Bank, Ltd. v. Akhouri Bindhyachal Prasad Singh	...	A I R 1940 Pat. 261; 6 B R 222; 12 R P 387; 21 P L T 173	608
C. Fleming v. Official Receiver, Ferozepore District	...	A I R 1939 Lah. 183; I L R (1939) Lah. 499; 41 P L R 78; 12 R L 801	571

O. Kanniah Maistry, <i>In re</i>	...	A I R 1939 Mad. 976; (1939) M W N 1023; (1939) 2 M L J 618; 50 L W 769; 41 Cr. L J 181; 12 R M 565	385
C. N. Maduranayakam Pillai v. Secretary of State	...	A I R 1939 Mad. 386; 49 L W 151; (1939) M W N 200; I L R (1939) Mad. 483; (1939) 1 M L J 176; 12 R M 546	476
O. S. Nataraja Pillai v. C. S. Subbaroya Chettyar	...	A I R 1939 Mad. 693; (1939) M W N 180; 49 L W 287; (1939) 1 M L J 499; I L R (1939) Mad. 507; 12 R M 509	677
Central Talkies Circuit v. Commissioner of Income-tax, Bombay	...	A I R 1939 Bom. 448; I L R (1939) Bom. 574; 41 Bom. L R 919; 12 R B 257	556
Chandan Mull Indra Kumar v. Chiman Lal Girdhar Das Parekh	..	A I R 1940 P O 3; 1939 O W N 1086; 6 B R 189; 12 R P O 94; 1939 O L R 741; 21 P L T 1; 44 O W N 205; (1940) A L J 70; 42 P L R 81; 51 L W 135; 42 Bom. L R 367; (1940) Kar P O 15 Sup P C	219
Chandrika Prasad v. Bhagwan Das	...	A I R 1940 Oudh 93; 1939 O W N 1028; 1939 O W N 1028; 1939 O L R 692; 12 R O 180; 15 Luck 167	105
Chekka Dhanamma v. Caramandel Company Limited, Cocanada	...	A I R 1939 Mad. 401; (1939) 1 M L J 235; (1939) M W N 216; 49 L W 341; 12 R M 517	16
Cherutty v. Nagamparambil Ravu	...	A I R 1939 Mad. 513; (1939) M W N 354; 49 L W 491; (1939) 1 M L J 683; 12 R M 504	22
Chhotelal v. Gopaldas	..	A I R 1940 Nag. 78; 12 R M 168; I L R (1940) Nag. 130	624
Chiranji Lal v. Chheda Lal	...	A I R 1940 All. 8; (1939) A L J 1040; 12 R A 362	661
Chiranji Lal v. Emperor	...	A I R 1939 All. 734; (1939) A L J 990; 41 Cr. L J 141; 12 R A 312 (1)	256 (2)
Commissioner of Income-tax, Bihar and Orissa v. Jug Sah Muni Lal Sah	...	A I R 1940 Pat. 239; 6 B R 101; 12 R P 297	83
Commissioner of Income-tax, Bombay Presidency, Sind and Aden v. Central Popular Assurance Co. Ltd.	...	A I R 1939 Sind 364; (1940) Kar 130; 12 R S 172	683
Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan v. Ahmedabad Advance Mills Ltd.	...	A I R 1940 P O 36; 51 L W 61; (1940) A L J 63; 6 B R 334; 12 R P O 124; 1940 O L R 98; (1940) 1 M L J 137; (1940) M W N 115; 44 O W N 379; 21 P L T 177; 42 Bom. L R 318; 71 O L J 156; (1940) Kar (P O) 97 Sup; 67 I A 115; I L R (1940) Bom. 332; 42 P L R 464 P C	821
Commissioner of Income-tax, Bombay Presidency Sind and Baluchistan v. Karachi Chamber of Commerce	...	A I R 1939 Sind 308; (1940) Kar 140; 12 R S 157	323
Commissioner of Income-tax, Madras v. Voodra Sreeramulu Chetty	...	A I R 1939 Mad. 903; 50 L W 590; (1939) 2 M L J 667; I L R (1939) Mad. 770; 12 R M 544 S B	465
Commissioner of Waqf, Bengal v. Narsinsingh Chandra Daw & Co.	...	A I R 1939 Cal. 648; I L R (1939) 1 Cal. 462; 43 O W N 415; 12 R O 366	438
Dalmia Cement Ltd. v. Narsindas Anandji Bechar	...	A I R 1939 Sind 256; 12 R S 139	57
Dattatraya Vishnu Dabholkar v. Sadashiv Shivram Nisal	...	A I R 1939 Bom. 513; 41 Bom. L R 882; 12 R B 271	839
Debendra Chandra De v. Jamini Kumar Dey	...	A I R 1939 Cal 744; 43 O W N 1209; 12 R C 402; I L R (1940) 1 Cal. 153	704
Deputy Commissioner, Theri, Manager, Court of Wards, Mahewa Estate v. Kr. Khushwaqt Rai	...	A I R 1940 Oudh 180; 1940 O W N 22; 1940 O L R 31; 12 R O 253; 1940 R D 26; 15 Luck 298	731

Dharmon v. Ran Singh	...	A I R 1939 Lah. 563; 41 P L R 620; 12 R L 323	828
Dhirendra Nath Das v. Indra Chandra Kisriwala	...	A I R 1939 Cal. 578; 12 R O 418	871
Digambar Ponda v. Satish Chandra Das	...	A I R 1939 Cal. 717; 43 O W N 1108; 12 R O 357	368
Diravyam Pillai v. Veeranan Ambalam	...	A I R 1939 Mad. 702; I L R (1939) Mad. 853; 49 L W 460; (1939) M W N 329; (1939) 2 M L J 822; 12 R M 551	562
District Magistrate, Kheri v. M. Hamid Ali Gardish	--	A I R 1940 Oudh 137; 1939 O W N 1132; 12 R O 242; 1939 O L R 734; 41 Cr L J 169; 15 Luck 268	342
District Magistrate, Sultanpur v. Mr. Ramjas Yadava	...	A I R 1940 Oudh 178; 1940 O L R 40; 41 Cr L J 233; 12 R O 280	754
Dolaram Aretmal v. Mulomal Radhakishindas	..	A I R 1939 Sind 272; 12 R S 181	835
Doman Sahu v. Gangu Nayek	..	A I R 1940 Pat. 300; 6 B R 229; 21 P L T 165; 12 R P 404	638
Dulhin v. Harihar Gir	...	A I R 1939 Pat. 607; 18 Pat. 395; 20 P L T 932; 6 B R 172 (2); 12 R P 364	372 (2)
Durga Das v. Hanifa Begam	...	A I R 1940 Oudh 104; 1939 O W N 1010; 1939 O L R 746; 12 R O 221	369
Durga Prasad v. Seetta Prasad Tewari	...	A I R 1940 Oudh 80; 1939 O W N 1107; 1939 O L R 727; 12 R O 209 (1); 15 Luck 287	301
Durga Singh v. Kesho Lal	..	A I R 1940 Pat 170; 18 Pat. 839; 6 B R 195; 12 R P 376	514
E. M. Joseph v. Official Assignee	...	A I R 1939 Rang. 401; 12 R Rang. 191	352
Emperor v. Abdullah Karim	...	A I R 1939 Sind 335; (1940) Kar 83; 41 Cr. L J 143; 12 R S 161	266
----- v. Jiwan Das Milawa Ram	...	A I R 1939 Lah. 521; I L R (1939) Lah. 305; 12 R L 293; 41 Cr. L J 174	380
----- v. Jhina Soma	...	A I R 1939 Bom. 457; 41 Bom. L R 965; I L R (1939) Bom. 648; 41 Cr. L J 176; 12 R B 248	382
----- v. Kallappa Gurappa Kotagumshi	..	A I R 1939 Bom. 481; 41 Bom. L R 970; 12 R B 231; I L R (1939) Bom. 679; 41 Cr. L J 157	315
----- v. Karbalai Huseain	--	A I R 1940 Nag. 75; 1939 N L J 537; 12 R N 149; 41 Cr. L J 155; I L R (1940) Nag. 61; ...	318
----- v. Lavji Mandan	...	A I R 1939 Bom. 452; 41 Bom. L R 980; 41 Cr. L J 183; 12 R B 253	413 (2)
----- v. Miro Ghulam Hussain	..	A I R 1939 Sind 339; (1940) Kar 88; 41 Cr. L J 187; 12 R S 168	428
----- v. Mahanand Kherajmal	...	A I R 1939 Sind 341; (1940) Kar 123; 41 Cr. L J 190; 12 R S 189	543
----- v. Qudrat	...	A I R 1939 All. 708; (1939) A L J 980; 41 Cr. L J 142; 12 R A 310; I L R (1939) All. 871	271
----- v. Taduturu Poligadu	...	A I R 1940 Mad. 12; (1939) M W N 873; 50 L W 437; 41 Cr L J 242; 12 R M 612	829
Errol Mackay v. Oswald Forbes	...	A I R 1940 P C 16; 1940 O L R 47; 6 B R 265; 1940 O W N 32; 12 R P O 103; (1940) 1 M L J 64; 51 L W 93; (1940) A L J 60; (1940) M W N 114; 21 P L T 199; 42 P L R 117; 44 O W N 317; 42 Bom. L R 315; 70 O L J 566; I L R (1940) 1 Cal. 286; (1940) Kar. (P U) 72 Sup; 67 I A 61 P C	549
Farok Ahmed Meah v. Lalit Mohan Choudhury	...	A I R 1939 Cal. 582; 69 O L J 335; 12 R O 329	94
Fatmabi, <i>In re</i>	...	A I R 1940 Nag. 65; 1939 N L J 563; 12 R N 154	372
Firm Harchandrai Anandram v. Firm Kedarnath Nirmal Chandra Guha	...	A I R 1940 Pat. 353; 6 B R 259; 12 R P 418	796
Firm Jethu Mal-Hari Parshad v. Telu	..	A I R 1939 Lah. 510; 41 P L R 596; 12 R L 283 (1)	233
Firm Ruldu Ram-Daulat Ram v. Basant Ram	..	A I R 1939 Lah. 356; 41 P L R 809; 12 R L 321	805
Ganesh Datta v. Model Town Society Ltd.	..	A I R 1939 Lah. 508; 12 R L 268	125
Ganesh Mahto v. Bhawan Mahto	..	A I R 1940 Pat. 151; 6 B R 96; 12 R P 293	73
Gangubai Pandurang Domba v. Pagubai Narayan Kore	...	A I R 1939 Bom. 403; 41 Bom. L R 815; 12 R B 220	81
Ghulam Hussain v. Secretary of State	...	A I R 1939 Lah. 510; 12 R L 270	137 (1)

Ghulam Mohammad v. Allah Rakhi	..	A I R 1939 Lah. 533; 41 P L R 605; 41 Cr. L J. 107; 13 R L 273 (1)	69
Giani Meher Singh v. Emperor	...	A I R 1939 Cal. 714; I L R (1939) 2 Cal. 42; 43 O W N 639; 41 Cr. L J 138; 12 R O 349	249
Gobind Ram v. Kaju Ram	..	A I R 1939 Lah. 504; 42 P L R 232; 12 R L 310	652
Gokaran Singh v. Brij Bhukan Singh	...	A I R 1939 All. 717; (1939) A L J 928; 1939 R D 516; 12 R A 319; I L R (1939) All. 892	402
Golab Daye, <i>In the goods of</i>	...	A I R 1939 Cal. 718; 43 O W N 1193; 12 R O 358	341
Gomti v. Jugal Kishore	..	A I R 1940 Oudh 84; 1939 O W N 1134; 12 R O 204; 1939 O L R 715; 1939 R D 628; 15 Luck 270	280
Gooru Narayana v. Vaikuntam Ohinna Lakshmayya	...	A I R 1939 Mad. 927; (1939) M W N 735 (1); (1939) 2 M L J 399; 50 L W 654; 12 R M 543	421
Gopu China Jogayya v. Manapalli Bapanayya	...	A I R 1939 Mad. 374; 49 L W 23; (1939) 1 M L J 88; (1939) M W N 130; I L R (1939) Mad. 194; 12 R M 518	154
Government of Bengal v. Corporation of Calcutta	...	A I R 1939 Cal. 708; I L R (1939) 2 Cal. 23; 43 O W N 789; 12 R O 381	546
Government of Burma v. Arunachallam	..	A I R 1939 Rang. 408; 12 R Rang 203	526
Govind Ram v. A. U. John	..	A I R 1939 All. 668; (1939) A L J 675; 1939 R D 372; 12 R A 353	791
Gul Zaman Mir Zaman v. Emperor	..	A I R 1939 Pesh. 47; 41 Cr. L J 132; 12 R Pesh 33	208
Gurappa Bhimanna Ohidguppi v. Madwalappa Ramchandrapa Dumane	...	A I R 1939 Bom. 392; 41 Bom. L R 832; 12 R B 239	429
Haliman Bibi v. Muhammad Tajamul Hussain	...	A I R 1939 Pat. 504; 6 B R 141; 12 R P 332	250
Hans Hotz v. Emperor	..	A I R 1940 All. 5; (1939) A L J 1032; 41 Cr. L J 230; 12 R A 370; I L R (1940) All. 67	709
Hans Raj Gupta v. Ram Lal Baldeo Parshad	...	A I R 1939 Lah. 498; 12 R L 317	711
Har Govind Prasad v. Mahraj Kunwar	..	A I R 1940 Oudh 234; 1940 O W N 123; 1940 O L R 50; 1940 R D 62; 12 R O 263	774
Har Narain Lal v. Udan Singh	..	A I R 1940 Oudh 83; 1939 O W N 1109; 1939 O L R 735 (1); 12 R O 220; 15 Luck 285 S B	347
Harballav Prasad Chowdhury v. Jagballav Prasad Chowdhury	...	A I R 1940 Pat. 7; 18 Pat. 777; 20 P L T 859; 6 B R 248; 12 R P 416	769
Hardwari Lal v. Ohhotey Lal	...	A I R 1940 Oudh 205; 1940 O L R 48; 1940 O W N 146; 12 R O 262	771
Hari Ram v. Munshi Singh	...	A I R 1939 All. 660; (1939) A L J 559; 12 R A 301	126
Harihar Dora v. Upendra Fati	...	A I R 1939 Pat. 497; 6 B R 218; 12 R P 384	602
Hassan Bi v. Nek Alam	...	A I R 1940 Lah. 9; 41 P L R 678; 12 R L 320	809
Himayatullah v. Parbhoo Dayal	...	12 R O 228; 1940 O L R 2; 1940 O W N 18 S B	401
Hussainbi v. Khairuddin Kutubuddin	...	A I R 1939 Bom. 487; 41 Bom. L R 875; 12 R B 265	675
Indu Proya Debi v. Durga Charan Mitra	...	A I R 1940 Pat. 40; 20 P L T 757; 18 Pat. 828; 6 B R 274; 12 R P 436	865
Ismail Piperdi v. Momin Bi Bi	...	A I R 1940 Rang. 12; 1939 Rang. 668; 12 R Rang. 234 F B	819
Iasar Husain v. Emperor	...	A I R 1939 All. 730; (1939) A L J 895; 12 R A 314; 41 Cr. L J 152; I L R (1940) All. 23	302
Jadunandan Das v. Maho	..	A I R 1939 Pat. 428; 6 B R 148; 12 R P 337	284
Jadunath Roy v. Parameswar Mullick	...	A I R 1940 P O 11; 21 P L T 237; 6 B R 251; 1940 O L R 26; 1940 O W N 96; 12 R P O 98; 44 O W N 233; (1940) 1 M L J 97; 42 Bom. L R 331; 70 O L J 546; I L R (1940) 1 Cal. 255; (1940) Kar (P O) 33 Sup; 67 I A 11 P C	231
Jagan Nath v. Allah Dad	...	A I R 1939 Lah. 539; 41 P L R 631; 12 R L 273 (2)	317
Jagdish Jha v. Aman Khan	...	A I R 1940 F O 3; 6 B R 194; 12 R F O 16; 1940 O L R 1; 21 P L T 142; 71 O L J 55; 1939 F L J 7 F C	294
Jai Mangal Tewari v. Bindeshuri Singh	...	A I R 1940 Oudh 134; 1939 O W N 1005; 1940 O L R 36; 12 R O 257; 15 Luck 157	736

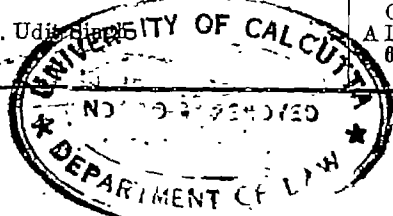
Jaimal Singh v. Emperor	..	A I R 1939 Lah. 523; I L R (1939) Lah. 307; 41 P L R 763; 12 R L 275; 41 Cr L J 146	266
Janak Dulari v. Sri Gopal	..	A I R 1939 All. 706; (1939) A L J 875; 12 R A 328; I L R (1939) All. 912	420
Janba v. Manno	...	A I R 1939 Nag. 312; 1939 N L J 488; 12 R N 177	888
Jannatun-Nissa Begam v. Parshadi	...	A I R 1940 All. 28; (1939) A L J 1014; 12 R A 355	808
Jarnail Singh v. Bahadur Singh	...	A I R 1939 Lah. 581; 41 P L R 593; 12 R L 315	701
Jehangir Oursetji Mistri v. Kastur Pannaji Oswal	..	A I R 1939 Bom. 344; I L R (1939) Bom. 493; 41 Bom. L R 583; 12 R B 245	542
Jnanada Govinda Chaudhury v. Birendra Nath Goswami	...	A I R 1939 Cal. 595; 69 O L J 34; 12 R O 387	631
K. J., a Vakil, Madras, <i>In the matter of</i>	..	A I R 1939 Mad. 906, 50 L W 548; (1939) M W N 1038; (1939) 2 M L J 632; 12 R M 527; 41 Cr. L J 163; I L R (1940) Mad. 81 S B	257
K. K. N. K. A. R. Ohettyar Firm v. Aga M. Shreerazee	...	A I R 1939 Rang. 436; 1939 Rang. 606; 12 R Rang. 211	663
Kala Mohammad Akbar v. Emperor	...	A I R 1939 Lah. 534; 12 R L 277; 41 Cr. L J 150; I L R (1940) Lah. 217	274
Kaluwanti v. Udhavdas Girdharidas	...	A I R 1939 Sind. 305; (1940) Kar. 1; 12 R S 154	244
Kamakshi Ayyar v. Namberumal Ayyangar	...	A I R 1939 Mad. 506; (1939) M W N 303; (1939) 1 M L J 531; 49 L W 481; 12 R M 542	459
Kanayalal Mohanlal Gujar v. Emperor	...	A I R 1939 Bom. 455; 41 Bom. L R 977; 41 Cr. L J 172; 12 R B 241	228
Kanhai Singh v. Basdeo Sahai	..	A I R 1939 All. 387; (1939) A L J 391; 12 R A 312 (2)	334
Kanhaiya Lal v. Hamid Ali	...	A I R 1940 Oudh. 181; 12 R O 243; 1940 O L R 16; (1940) O W N 462	467
Kannayya Reddi v. Muthu Reddi	...	A I R 1939 Mad. 508, 49 L W 547 (2); (1939) M W N 401; (1939) 1 M L J 825; 12 R M 515	62
Kanshi Ram v. Mrs. Owen Roberts	...	A I R 1939 Lah. 585; 12 R L 302; I L R (1940) Lah. 135	599
Kanti Chandra Ghosal v. Suchitra Sundari Dassi	..	A I R 1939 Cal. 606; I L R (1939) 2 Cal. 285; 43 O W N 855; 12 R O 385	560
Karangiseti Onkarappa v. Karingiseti Ohennappa	..	A I R 1940 Mad. 33; 50 L W 896; (1939) 2 M L J 884; 12 R M 575; (1940) M W N 9; I L R (1940) Mad. 358 F B	749
Karbalai Gulam v. Ebrahim Busheri & Co.	..	A I R 1939 Bom. 342; 41 Bom. L R 518; 12 R B 225	149
Kauleshar Shukul v. Ram Kishore Lal	...	A I R 1939 All. 699; 12 R A 339	644
Kedar Nath Tushnial v. Raj Kumar Das	...	A I R 1939 Cal. 674; 69 O L J 394; 12 R O 321	17
Keshav Ramkrishna Bhatt Phadke v. Subba Manga Naik	...	A I R 1939 Bom. 490; 41 Bom. L R 994; 12 R B 263	669
Khaji Dodda Khaji Sahib v. Chigamalla Nanjappa	...	A I R 1939 Mad. 642; I L R (1939) Mad. 633, 49 L W 635; (1939) M W N 478; (1939) 1 M L J 909; 12 R M 553	554
Knanchand Mayaram v. Pessumal Lakhumal	...	A I R 1939 Sind. 360; (1939) Kar. 312; 12 R S 165	486
Khedu Mahto v. Khonka Mahto	...	A I R 1939 Pat. 591; 6 B R 142; 20 P L T 929; 12 R P 330	214
Khemchand Ramdas Wadhwa v. Mathradas Girdharidas	...	A I R 1939 Sind. 289; (1940) Kar. 41; 12 R S 179	845
Khirode O. Ghose v. Narendra N. Sanyal	...	A I R 1939 Cal. 599; 12 R O 347 (1); 44 O W N 485 S B	256 (1)
Khodromal Jeramdas v. Menghomal Jessomal	...	A I R 1939 Sind. 303; (1939) Kar. 428; 12 R S 141	67
Kishen Gopal v. Abdul Latif Khan	...	A I R 1940 Oudh. 97; 1939 O W N 1045; 1939 O L R 694; 12 R O 185; 15 Luck. 175	114

Kishori Lal v. Governor-in-Council, Punjab	...	A I R 1940 F O 4; (1939) Kar. F O 191; 6 BR 336; 1940 O L R 100; (1940) M W N 180; 71 O L J 108; 12 R F O 17 F C	801
Kitab Ali v. Anil Behary Dutta	...	A I R 1939 Cal 723; 70 C L J 93; 43 O W N 877; 12 R O 361	408
Krishna Chandra Sharma v. Rishabha Kumar	...	A I R 1939 Nag. 265; 1939 N L J 324; 12 R N 136; I L R (1940) Nag. 55	156
Krishna Iyer, <i>In re</i>	...	A I R 1939 Mad. 384; 49 L W 205; (1939) 1 M L J 266; (1939) M N W 244; 41 Cr. L J 106; 12 R M 524	3
Krishna Vitnak Mahar v. Shankar Krishna Gandhi	...	A I R 1939 Bom. 419; 41 Bom. L R 863; 12 R B 269	607
Kumar Raghava Surendra Sahi v. Babui Lachmi Koar	...	A I R 1939 Pat. 636; 18 Pat. 590; 6 B R 117; 12 R P 307	179
Kumtrapran v. The King	...	A I R 1939 Rang. 427; 41 Cr. L J 216; 12 R Rang. 240	614
Kurella Ramamurti v. Nalam Subbarao	...	A I R 1939 Mad. 481; (1939) 1 M L J 491; (1939) M W N 323; 49 L W 534; 12 R M 539	440 (2)
Lachmi Narain v. Musaheb Ali	...	A I R 1940 Oudh 214; 1940 O L R 42; 1940 O W N 80; 1940 R D 60; 12 R O 259	758
Lachmeshwar Prasad Shukul v. Girdhari Lal Chaudhuri	...	A I R 1939 Pat. 667; 20 P L T 905; 6 B R 159; 19 Pat. 123; 12 R P 353 F B	353
Ladli Parshad v. Chaman Lal	...	A I R 1939 Lah. 473; 41 P L R 632; 12 R L 324; I L R (1940) Lah. 231	843
Lal Din v. Official Receiver, Lyallpur	...	A I R 1939 Lah. 536; I L R (1939) Lah. 275; 41 P L R 741; 12 R L 300	520
Lal Tirathnath Sahi Deo v. Lal Mirtunjaya Nath Sahi Deo	...	A I R 1940 Pat. 153; 21 P L T 645; 6 B R 98; 12 R P 295	79
Lalumal Dholumal v. Harumal Lalsing	...	A I R 1939 Sind 332; 12 R S 153	155
Laxman v. Emperor	...	A I R 1939 Nag. 281; 1939 N L J 455; 12 R N 156; 41 Cr. L J 168	348
Laxman Manjunathaya Balwalli v. Venkatrao Mangeshrao	...	A I R 1939 Bom. 386; 41 Bom. L R 836; 12 R B 222	13
Lee Shi v. Consolidated Tin Mines of Burma Ltd., Lokmanya Mills Ltd., Barsi v. Municipal Borough, Barsi	...	A I R 1939 Rang. 428; 12 R Rang. 237	847
Lyallpur Bank, Ltd. v. Ramji Das	...	A I R 1939 Bom. 477; I L R (1939) Bom. 571; 41 Bom. L R 937; 12 R B 247	519
M. A. Bhagvati v. Emperor	...	A I R 1940 Oudh 237; 1940 O W N 132; 1940 O L R 75; 12 R O 270	889
Maddukuri Subba Rao, <i>In re</i>	...	A I R 1939 Bom. 460; I L R (1939) Bom. 496; 41 Bom. L R 878; 41 Cr. L J 188; 12 R B 251	506
Mahadeo Prasad v. Jagannath Kuar	...	A I R 1940 Mad. 55; 50 L W 511 (1); (1939) M W N 1012; (1939) 2 M L J 750; 41 Cr. L J 225; 12 R M 593	753
Mammili Kunhi Raman Kitavu, Karnavan and Manager of Thavazhi v. Vengilethi Thanancheri Kunhi Karanavan Kitavu	...	A I R 1940 Oudh 67; 1939 O W N 1087; 1939 O L R 704; 12 R O 194; 1939 R D 616; 15 Luok 209 F B	258
Man Singh v. Baij Nath Sahai	...	A I R 1940 Mad. 80; 50 L W 676; (1939) M W N 1136; (1939) 2 M L J 757; 12 R M 579	755
Mandir Gita Bhawan, Shiri Kurukhsetra Jiran Uddar Kurukhsetra v. Sadhu Ram	...	A I R 1939 All 694; (1939) A L J 830; 1939 R D 513; 12 R A 341; I L R (1939) All. 888	668
Mangalmal Aganmal v. Muhammad Usif Bhoro	...	A I R 1939 Lah. 554; 12 R L 291	422
Manghanmal Gianchand v. Emperor	...	A I R 1939 Sind 315; (1939) Kar. 597; 12 R S 151	11
Mariam Bibi v. Cassim Ebrahim Malin	...	A I R 1939 Sind 310; (1940) Kar. 102; 41 Cr. L J 179; 12 R S 170	392
Maung Aye Maung v. A Scott & Co.	...	A I R 1939 Rang. 375; 1939 Rang. 474; 12 R Rang. 210	623
Maung Kan v. Maung Po Tok	...	A I R 1940 Rang. 1; 1939 Rang. 649; 12 R Rang. 225 F B	757
Maung Maung v. V. V. R. Chettyar Firm	...	A I R 1939 Rang. 388; 1940 Rang. 157; 41 Cr. L J 123; 12 R Rang. 183	119
Meghji Hirjee & Co. v. Bengal Nagpur Railway Company, Ltd.	...	A I R 1939 Rang. 296; 1940 Rang. 82; 12 R Rang. 178	70
	...	A I R 1939 Nag. 141; 1939 N L J 124; 12 R N 145	241

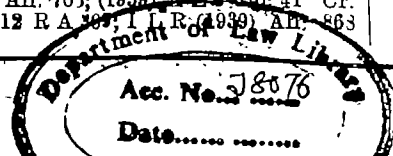
Mishrilal v. Barik	...	A I R 1939 Nag. 305; 1939 N L J 487; 12 R N 169; I L R (1939) Nag. 665	727
Mo Maung U v. Ma Bla On	...	A I R 1939 Rang. 399; 1939 Rang. 543; 12 R Rang. 222	733
Mohammad Abdul Sattar v. Rahimuddin	...	A I R 1940 Nag. 87; 12 R N 158	545
Mohammad Murtaza v. Cyril Indernath Dey	...	A I R 1940 Pat. 432; 6 B R 232; 19 Pat. 111; 12 R P 407	671
Mohiuddin v. Khatijabi	...	A I R 1939 Bom. 469; 41 Bom. L R 1020; 12 R B 236	390
Mon Mohan Bhattacharjee v. Bidhu Bhusan Dutta	...	A I R 1939 Cal. 460; 69 O L J 188; 43 O W N 295; 12 R O 334	8
Motilal v. Emperor	...	A I R 1940 Nag. 66; 12 R N 150; 41 Or. L J 158	310
Mrs. N. A. Alexander v. M. S. Jalil	...	A I R 1940 Oudh. 279; 12 R O 274; 1940 O L R 71; 1940 O W N 139	684
Mrs. Violet Peterson v. Mrs. Adelaide Elizabeth Forbes	...	A I R 1940 Oudh. 113; 12 R O 224; 1939 O L R 750; 1940 O W N 1; 15 Luck. 290	377
Mukhan Singh v. Chandrika Prasad Singh	...	A I R 1940 Pat. 371; 6 B R 115; 19 Pat. 269; 12 R P 333	278
Mul Raj v. Tulsi Ram	...	A I R 1939 Lah. 542; 12 R L 309; I L R (1939) Lah. 541	632
Mulchand Jivraj v. D. Low	...	A I R 1939 Bom. 350; 41 Bom. L R 521; 12 R B 226	252
Municipal Corporation of Rangoon v. Ram Behari	...	A I R 1939 Rang. 432; 1939 Rang. 504; 12 R Rang. 191	460
Municipal Council, Tanjore v. Sundaresan	...	A I R 1939 Mad. 499; (1939) 1 M L J 87; 49 L W 173; (1939) M W N 426; 12 R M 538	412
Murari Lal v. Emperor	...	A I R 1940 All. 3; (1939) A L J 1037; 41 Or. L J 236; 12 R A 372	799
Muslim Bank of India, Ltd., <i>In the matter of</i>	...	A I R 1939 Lah. 515; 41 P L R 739; I L R (1939) Lah. 299; 12 R L 371	176
Muthuswami Chettiar, <i>In re</i>	...	A I R 1940 Mad. 23; 50 L W 802; (1939) M W N 1209; 41 Or. L J 238; (1940) 1 M L J 11; 12 R M 584; I L R (1940) Mad. 335 F B	824
Muzafferpur Municipality v. Tara Prasad	...	A I R 1940 Pat. 313; 6 B R 226; 41 Cr. L J 217; 12 R P 433	630
Nand Kishore v. Emperor	...	A I R 1939 All. 710; (1939) A L J 911; 41 Or. L J 111; 12 R A 304	151
Nandlal Bhandari Mills, Ltd., Cawnpore v. Commissioner of Income-tax, Central and United Provinces	...	A I R 1939 All. 593; (1939) A L J 631; 12 R A 294; I L R (1939) All. 832	99
Nandlal Rampratap v. Deorao	...	A I R 1940 Nag. 94; 12 R N 178	881
Nani Gopal Mukherjee v. Srish Chandra Nandy	...	A I R 1939 Cal. 600; 1 L R (1939) 1 Cal. 233; 12 R O 353	300
Nani Lal Das, <i>In the goods of</i>	...	A I R 1939 Cal. 737; I L R (1939) 2 Cal. 1; 12 R O 364	431
Narayana Mudali v. Peria Kalathi Mudali	...	A I R 1939 Mad. 494; (1939) 1 M L J 199; 49 L W 295; (1939) M W N 273; 12 R M 534	239
Narhar Sonajee Jahagirdar v. Trimbak Shri-dhar Jahagirdar	...	A I R 1940 Bom. 12; 41 Bom. L R 1174; 12 R B 255	608
Nariman Edulji Contractor v. Pirojbai Nariman Contractor	...	A I R 1939 Bom. 367; 41 Bom. L R 625; 12 R B 219	56
Narsidasji Balmukunddasji v. Pai Jamna	...	A I R 1939 Bom. 354; 41 Bom. L R 787; 12 R B 211	44
Narsingh Singh v. Emperor	...	A I R 1939 Pat. 659; 20 P L T 655; 6 B R 215; 41 Or. L J 279; 12 R P 431	594
Nabhandas Hollaram v. Emperor	...	A I R 1939 Sind. 337; (1940) Kar. 91; 41 Or. L J 240; 12 R S 192	832
Nga Sar Kee v. The King	...	A I R 1939 Rang. 390; 1940 Rang. 203; 41 Or. L J 153; 12 R Rang. 189	303
Ninkileri Lakshmi Kutty Kettillamma v. Thekka Madathil Vishnu Nambisan	...	A I R 1939 Mad. 411; 49 L W 199; (1939) 1 M L J 261; (1939) M W N 228; I L R (1939) Mad. 415; 12 R M 522	173
Noor Ahmad v. Mahmud Ali	...	A I R 1939 Lah. 531; I L R (1939) Lah. 201; 41 P L R 713; 12 R L 282 (2)	227
Noor Bibi v. Municipal Committee, Ambala City	...	A I R 1939 Lah. 453; 12 R L 319; 42 P L R 109	772
Nripendra Nath Chatterji v. Arun Chandra Chatterji	...	A I R 1940 Pat. 129; 6 B R 153; 12 R P 351	339

Nripendra Nath Chatteeji v Jugal Prasad Mandal Official Assignee, Karachi v. Dhanoomal Mohan- lal	A I R 1939 Pat. 396; 6 B R 108; 12 R P 308 ..	144
Official Receiver, West Tanjore v. Samudra- vijayan Chettiar	A I R 1939 Sind 361; (1940) Kar. 235; 12 R S 177	778
Paidi Subbayya, <i>In re</i>	A I R 1939 Mad. 509; (1939) M W N 378; (1939) 1 M L J 575; 49 L W 591; 12 R M 528 ..	288
Pancham Singh v Deb Ram	A I R 1939 Mad. 905; (1939) W N 739 (2); 41 Cr. L J 203; 12 R M 573	440 (1)
Pannalal v. Sumaranlal	A I R 1939 All. 751; (1939) A L J 1053; 12 R A 333; 1939 R D 579	521
Paragji Bhulabhai v. Bhagwaji Bawabhai	A I R 1939 Nag. 260; 1939 N L J 391; I L R (1939) Nag. 624; 12 R N 133	108
Parbhu Dayal v. Bisheeshwar Nath	A I R 1940 Bom. 14; 41 Bom. L R 1231; 41 Cr. L J 245; 12 R B 311	795
Patipal Singh v. Rampal Singh	A I R 1940 Oudh. 117; 1939 O W N 1111; 12 R O 203; 1939 O L R 713 (1)	272
Pattu Kumari Bibi v. Nirmal Kumar Singh Nawlakha	A I R 1940 Oudh. 63; 1939 O W N 997; 1939 O L R 695; 12 R O 190; 15 Luck 112	137 (2)
People Bank of Northern India Ltd., Lahore, <i>In the matter of</i>	A I R 1939 Cal. 569; 70 C L J 5; 43 C W N 907; 12 R O 332	691
Peoples Bank of Northern India Ltd. v Nanikram Charatsing	A I R 1939 Lah. 497; 12 R L 274; I L R (1939) Lah. 324; 41 P L R 737	314
Perumal Mooppan v. Subramania Mudaliar	A I R 1939 Sind 270; (1939) Kar. 401; 12 R S 166	573
Perumal Naicken v. Kondama Naicken	A I R 1939 Mad. 299; (1939) 1 M L J 74; (1939) M W N 1115 (2); 12 R M 588	768
Pitambar Ramchandra Paliye v. "Saheb Chand Harakchand Shop"	A I R 1939 Mad. 385; (1939) 1 M L J 64; (1939) M W N 110; 49 L W 372; 12 R M 525	247
Prabhavati Devi v. Mrs. Lila Singh	A I R 1939 Nag. 277; 1939 N L J 472; 12 R N 155; I L R (1939) Nag. 697	418
Prafulla Kumar Maity v. Uday Chandra Pradhan	A I R 1940 Pat. 75; 20 P L T 796; 6 B R 267; 12 R P 428	652
Prahlad Chandra Singh v. Bhim Mahato	A I R 1939 Cal. 736; 43 C W N 1192; 12 R O 391	587
Prem Parkash Sharma v. Federal India Assurance Co., Ltd.	A I R 1940 Pat. 341; 6 B R 336; 19 Pat. 172; 12 R P 411	685
Prebodb Kumar Das v. The Dantmara Tea Co. Ltd.	A I R 1939 Lah. 509; 41 P L R 569; 12 R O 269	122
Public Prosecutor, Madras v. M S. Menoki	A I R 1940 P O 1; 1939 O W N 1075; 12 R P O 87; 6 R B 176; 70 C L J 483; 44 C W N 145; (1939) O L R 739; (1940) 1 M L J 75; 51 L W 1; (1940) M W N 1; 42 Bom. L R 199; 42 P L R 156; 1940 A L J 226; I L R (1940) 1 Cal. 250, 66 I A 293, (1940) Kar. P O 11 Sup P C	211
Pulin Ohandra Chattapadhyaya v. Khatra Mohan Ghose	A I R 1939 Mad. 914; 50 L W 428; (1939) 2 M L J 631; (1939) M W N 1127; 41 Cr. L J 156; 12 R M 563	419
Purushottam Damodar Raichurkar v. Gangadhar Kashinath Sakhare	A I R 1939 Cal. 748; 70 C L J 4; 12 R O 363 ..	413 (1)
R. D. K. Chinna Venkatappa Nayanam Bahadur Varu v. Gubba Sundararajulu Naidu	A I R 1939 Bom. 415; I L R (1939) Bom. 560, 41 Bom. L R 931; 12 R B 256	560
R. Ezekiel v. The Province of Bengal	A I R 1939 Mad. 431; 49 L W 172; (1939) M W N 226; 12 R M 541	427
Radhey Lal v. Kanhaj Lal	A I R 1939 Cal. 746; I L R (1939) 2 Cal. 52, 41 Cr. L J 134; 12 R O 350	211
Rai Indra Narsin v. Mohammad Ismail	A I R 1939 Pat. 526; 18 Pat. 193; 6 B R 88, 12 R P 287	52
Rai Kissenji v. Sri Kissen Mackar	A I R 1939 All. 687; (1939) A L J 849; 12 R A 337; I L R (1939) All. 885	597
Rai Sri Krishna Mohan Ji v. Purshotam Das	A I R 1940 Cal. 26; I L R (1939) 2 Cal. 370; 12 R O 415	811
Raichand Gulabchand Aocha v. Secretary of State	A I R 1939 All. 695; (1939) A L J 751; 12 R A 346	690
	A I R 1939 Bom. 505; 41 Bom. L R 1077; 12 R B 242	495

Raja of Vizianagaram v. Mudumooru Sanyasiraju ...	A I R 1939 Mad. 653; 49 L W 662; (1939) M W N 588; (1939) 2 M L J 114; 12 R M 510 ...	42
Raja Ram v. Allahabad Bank, Ltd. ...	A I R 1939 Lah. 79; 41 P L R 26; I L R (1939) Lah. 313; 12 R L 263 (3) ...	75
Raja Singh v. Chaichoo Singh ...	A I R 1940 Pat. 201; 6 B R 262; 20 P L T 957; 12 R P 423 ...	816
Ram Bilas Sharma v. Emperor ...	A I R 1940 Pat. 375; 21 P L T 194; 6 B R 221; 41 Or. L J 214; 12 R P 429 ...	598
Ram Chander v. Rure Kunwar ...	A I R 1939 All. 738; (1939) A L J 961; 12 R A 316 ...	233
Ram Chandra Singh v. Baldeo Singh ...	A I R 1940 Pat. 184; 6 B R 217; 41 Or. L J 232; 12 R P 446 ...	748
Ram Kailash Kunwari v. Ishwar Saran ...	A I R 1939 All. 715; (1939) A L J 996; 12 R A 321; I L R (1939) All. 917 ...	406
Ram Kishan Ram Bhakat v. Satya Narain Bhakat...	A I R 1939 Cal. 741; 69 O L J 52; 43 O W N 185; 12 R O 359 ...	441
Ram Kumar Lal v. Bam Charittar Lal ...	A I R 1939 All. 725; (1939) A L J 803; 1939 R D 491; 12 R A 315 ...	338
Ram Kumar Ram Saraff v. Mohan Lal Maharaj ...	A I R 1940 Pat. 270; 6 B R 256; 21 P L T 383; 12 R P 421 ...	788
Ram Oudh v. Government of Burma ...	A I R 1939 Rang. 448; 1939 Rang. 591; 12 R Rang. 207 ...	574
Ram Pershad v. Dhanna ...	A I R 1939 Lah. 513; 41 P L R 198; 41 Or. L J 184; 12 R L 308 ...	415
Ram Pratapji v. Hari Kishan Dass ...	6 B R 172 (1); 12 R F O 15; 1939 O L R 723 (1); 71 O L J 84 F C ...	4
Ram Ran Bijaya Prasad Singh v. Abdul Ghani Khan ...	A I R 1939 Pat. 682; 20 P L T 771; 6 B R 157; 12 R P 349 (2) ...	350
Ram Ranbijay Prasad Singh v. Bachia Kuari ...	A I R 1939 Pat. 683; 20 P L T 777; 6 B R 152; 12 R P 349 (1) ...	336
Ram Ranbijaya Prasad Singh v. Madho Turha ...	A I R 1939 Pat. 623; 20 P L T 715; 6 B R 187; 12 R P 375 ...	498
Ram Rattan v. Gobind Ram ...	A I R 1939 Lah. 501; 12 R L 289; I L R (1940) Lah. 84; 42 P L R 366 ...	426
Ram Rattan v. Municipal Committee, Amritsar ...	A I R 1939 Lah. 511; 12 R L 316; I L R (1940) Lah. 392 ...	713
Ram Sarup v. Court of Wards ...	A I R 1940 P C 16; 6 B R 278; 1940 O W N 66; 12 R P O 109; 51 L W 86; (1940) A L J 54; 1940 O L R 58; I L R (1940) Lah. 1; (1940) 1 M L J 278; 42 P L R 174; 44 O W N 345; 42 Bom. L R 307; (1940) M W N 278; 71 O L J 134; (1940) Kar. (P O) 63 sup; 67 I A 50 P C ...	590
Ram Sarup Singh v. Mohan Singh ...	A I R 1939 All. 672; I L R (1939) All. 713; (1939) A L J 678; 1939 R D 485; 12 R A 348 ...	783
Ram Sarup Singh v. Sarju Ahir ...	A I R 1940 Oudh 88; 1939 O W N 1036; 1939 O L R 689; 12 R O 178; 1940 R D 34 ...	111
Rambriohh Singh v. Emperor ...	A I R 1940 Pat. 365; 6 B R 110; 41 Or. L J 114; 12 R P 539 ...	162
Ramchand Kimatrai v. Udhalmal Dwarkadas ...	A I R 1939 Sind 279; (1939) Kar. 469; 12 R S 163 ...	384
Ramchand Virmal v. Lilaram ...	A I R 1939 Sind 291; 12 R S 175 ...	765
Ramdeyal Babu Lal Firm v. Lakhu Sao ...	A I R 1940 Pat. 53; 20 P L T 768; 6 B R 270; 12 R P 427 ...	857
Ramji Lal v. Mandai ...	A I R 1940 Oudh 226; 1940 O W N 15; 1940 O L R 25; 12 R O 252 ...	650
Ramkhalawan Singh v. Monilal Sahu ...	A I R 1939 Pat. 678; 20 P L T 833; 6 B R 184; 19 Pat. 159; 12 R P 371 F B ...	480
Ramuandan Prasad Narain Singh v. Goshwami Madhwanand Ramji ...	A I R 1940 F O 1; 1939 O L R 721; 6 B R 170; 12 R F O 13; 21 P L T 24; (1940) M W N 7; 71 O L J 49 F C ...	1
Ramsagar Yadav v. M. Yunus ...	A I R 1940 Pat. 32; 20 P L T 712; 6 B R 250; 41 Or. L J 234; 12 R P 451 ...	773
Rani Dhandei Kuer v. Fatma Zuhra ...	A I R 1939 All. 698; (1939) A L J 897; 12 R A 312; I L R (1939) All. 921 ...	649
Ranjit Singh y. Nawab Khan ...	A I R 1939 Lah. 548; 41 P L R 826; 12 R L 284 ...	395
Rauf Ahmad v. Fahmida Begum ...	A I R 1940 Oudh 116; 1939 O W N 1129; 12 R O 307; 1939 O L R 718 (2); 15 Luck 261 ...	277
Razaar Rahman v. Udit Singh ...	A I R 1939 Pat. 570; 20 P L T 492; 18 Pat. 694; 6 B R 108; 12 R P 303 ...	135



Razia Begum v. Kashimund...	...	A I R 1940 Pat. 286; 6 B R 177; 21 P L T 541; 12 R P 387	404
Renukabai v. Bheosan...	...	A I R 1939 Nag. 132; 1939 N L J 129; 12 R N 129	33
Rewashankar Moolchand...	...	A I R 1940 Nag. 72; 1939 N L J 562; 41 Or. L J 182; 12 R N 167	400
Roshan N M A. Karim Omer & Co. v. Mohamed Ebrahim	...	A I R 1939 Rang. 315; 1939 Rang. 194; 12 R Rang. 198	508
S., an Advocate, <i>In re</i>	...	A I R 1939 Mad. 917; 50 L W 566; (1939) M W N 1037; (1939) 2 M L J 630; I L R (1940) Mad. 84; 41 Or. L J 185; 12 R M 564 S B	417
S. T. R. M. Chettyar Firm v. Andathal	...	A I R 1939 Rang. 434; 1939 Rang. 594; 12 R Rang. 192 S B	386
S. V. Subba Rao v. Calicut Co-operative Bank Ltd.	...	A I R 1939 Mad. 304; 49 L W 143; (1939) M W N 397; (1939) 1 M L J 695; 12 R M 536	220
Saheb Din v. Gauri Shankar	...	A I R 1940 Oudh 92; 1939 O W N 980; 1939 O L R 683; 12 R O 177; 15 Luck 92	25
Sahibzadi v. Abdul Ghafoor	...	A I R 1939 Lah. 454; 41 P L R 887; 12 R L 318	744
Sakina Begum v. Durga Sahai	...	A I R 1940 Oudh 132; 1939 O W N 1141; 12 R O 209 (2); 1939 O L R 718; 1939 R D 632 (2); 15 Luck 279	295
Salig Ram v. Oharan Dass	...	A I R 1939 Lah. 492; 41 P L R 610; 12 R L 329	877
Saminatha Iyer v. Vageesan	...	A I R 1939 Mad. 849; 50 L W 270; (1939) M W N 827; (1939) 2 M L J 557; 12 R M 511; I L R (1940) Mad. 98	37
Sarat Chandra Roy Chaudhury Bahadur v. Arjun Mandal	...	A I R 1939 Cal. 742; 43 O W N 1191; 12 R O 360	416
Sardar Khan v. Mohammad Akram Khan	...	A I R 1939 Lah. 560; 12 R L 336	894
Sarju Prasad v. Deoki Singh	...	A I R 1940 Pat. 147; 6 B R 94; 12 R P 284	59
Sat Narain v. Emperor	...	A I R 1939 All. 746; (1939) A L J 1011; 41 Or L J 121; 12 R A 307; I L R (1939) All. 934	172
Satish Chandra Giri v. Dharanidhar Singha Roy	...	A I R 1940 P O 24; 44 O W N 177; 6 B R 291; 51 L W 49; 21 P L T 91; 1940 O W N 104; 42 R P 117; 1940 O L R 64; (1940) M W N 172 (2); 43 P L R 158; 71 O L J 1; 42 Bom. L R 295; (1940) 1 M L J 371; I L R (1940) 1 Cal. 266; (1940) A L J 409; (1940) Kar. P O 47 Sup; 67 I A 32 P C	616
Secretary, Municipal Committee, Nagpur v. Ram-chandra	...	A I R 1940 Nag. 174; 12 R N 179	893
Secretary of State v. District Board, Rangpur	...	A I R 1939 Cal. 758; 70 O L J 126; 12 R O 373	454
_____ v. Sadho Lal Jaiswal	...	A I R 1939 All. 748; (1939) A L J 905; 12 R A 323	435
Shaban Ali v. Mohammad Ishaq	...	A I R 1939 All. 724; (1939) A L J 800; 12 R A 317 (1)	391
Shambhoo Dayal v. Kundan Lal	...	A I R 1940 Oudh 87; 1939 O W N 1034; 1939 O L R 688; 12 R O 183; 1940 R D 33; 15 Luck 188	5
Shankar Dyamangonda Patil v. Puttabai Gurusathgonda K. Patil	...	A I R 1939 Bom. 483; I L R (1939) Bom. 556; 41 Bom. L R 247; 12 R B 237	410
Shantranji Ji v. Deputy Commissioner, Manager, Court of Wards, Mahewa Estate, Kheri	...	A I R 1940 Oudh 183; 1940 O W N 26; 1940 O L R 46; 1940 R D 26; 12 R O 261	766
Sheo Prasad v. Kalka Prasad Dhawan	...	A I R 1939 All. 617; (1939) A L J 544; 1939 R D 405; 12 R A 293	41
Sheonarain Prasad Singh v. Ganga Prasad Sahu	...	A I R 1940 Pat. 155; 6 B R 92; 12 R P 291	63
Shib Lal v. Gobindi	...	A I R 1939 Lah. 562; 41 P L R 513; 12 R L 305	613
Shibba Mal v. Gulab Rai	...	A I R 1939 All. 735; (1939) A L J 964; 12 R A 299; I L R (1940) All. 26 S B	113
Shobhalal v. Sidhalal	...	A I R 1939 Nag. 210; 1939 N L J 252; I L R (1939) Nag. 636; 12 R N 139	169
Singaram v. S. P. R. Somasundaram	...	A I R 1939 Rang. 444; 12 R Rang. 241	883
Sitla Sahai v. Sri Ram	...	1939 O W N 1026; 1939 O L R 694; 12 R O 184	10
Sohan Lal v. Mubarak Ali Khan	...	A I R 1939 All. 705; (1939) A L J 540; 41 Cr. L J 137; 12 R A 309; I L R (1939) All. 863	224



Sri Emberumanar Jeer Swamigal v. Board of Commissioners for Hindu Religious Endowments, Madras	...	A I R 1939 Mad. 511; 49 L W 632; (1939) M W N 442; (1939) 1 M L J 901; 12 R M 516; 1 L R (1939) Mad 904	77
Sri Narain Khanna v. Secretary of State	...	A I R 1939 All. 723; (1939) A L J 736; 12 R A 334	513
Sripat Singh Dugar v. Mohini Sundari	...	A I R 1939 Cal. 626; 1 L R (1939) 2 Cal. 440; 12 R O 420	880
Star Trading and Investment, Ltd v. Ashutosh Mukherjee	...	A I R 1939 Cal. 627; 70 C L J 158; 43 C W N 1116; 12 R O 401	648
Sukhdeo Pandey v. Rameshwar Prasad Agarwala	...	A I R 1939 Pat. 522; 6 B R 200; 12 R P 381	557
Sunil Kumar Kerr v. Sisir Kumar Kerr	...	A I R 1940 P O 30; 6 B R 271; 1940; O W N 35; 12 R P O 105; 51 L W 44; (1940) A L J 66; 1940 O L R 55; 21 P L T 133; (1940) M W N 137; 42 P L R 120; 44 C W N 289; 42 Bom. L R 394; (1940) 1 M L J 795; (1940) Kar. (P O) 76 Sup; 67 1 A 102 P C	575
Superintendent and Remembrancer of Legal Affairs, Bengal v. L. N. Birla	...	A I R 1939 Cal. 724; 43 C W N 1223; 70 C L J 463; 12 R O 389; 41 Or. L J 164; 1 L R (1940) 1 Cal. 121	319
Surat Borough Municipality v. Sarifa Karunissa	...	A I R 1939 Bom 494; 41 Bom. L R 1002; 12 R B 233; 1 L R (1939) Bom. 685	366
Surathu Sitharathnamma v. Pillarisetti Seshamma	...	A I R 1939 Mad 586; 49 L W 393; (1939) 1 M L J 456; (1939) M W N 640; 12 R M 506	30
Synemodelux, Ltd., Tinnevely v. K. Vannamuthu Pillai	...	A I R 1939 Mad. 498; (1939) 1 M L J 534; (1939) M W N 324; 49 L W 537; 12 R M 574	712
T. H. Chandler v. Mrs. A. Chandler	...	A I R 1939 All. 696; (1939) A L J 572; 12 R A 358; 1 L R (1939) All. 819	834
T. Sivasankara Mudaliar v. Radhabai Ammal	...	A I R 1939 Mad. 611; (1939) M W N 483; (1939) 2 M L J 515; 50 L W 520; 12 R M 567	647
Tan Sit Shan v. U Po Nyun	...	A I R 1939 Rang. 421; 1940 Rang. 93; 12 R Rang. 208	605
Tarabai Shriniwas Naick Guttal v. Murtacharya Anantacharya	...	A I R 1939 Bom 414; 1 L R (1939) Bom. 576; 41 Bom L R 924; 12 R B 275	874
Tarak Nath Kundu v. Panchanon Dutt	...	A I R 1939 Cal. 164; 69 C L J 530; 43 C W N 886; 12 R O 338; 1 L R (1939) 2 Cal. 381	131
Tejpal Marwari v. Kedarnath Himatsingka	...	A I R 1939 Pat. 597; 20 P L T 700; 6 B R 144; 12 R P 336	273
Thakur Prasad Saksena v. Firm Sadiq Husain Mehdi Husain	...	A I R 1940 Oudh 129; 12 R O 215; 1940 O W N 7; 1939 O L R 735 (2); 15 Luck 253	330
The King v. Nga Ba Saing	...	A I R 1939 Rang. 392; 1940 Rang. 145; 41 Or. L J 108; 12 R Rang. 181	142
Tikamdas Hotumal v. Kishnomal Jessomal	...	A I R 1939 Sind 367; (1940) Kar 36; 12 R S 174	702
Trimbak v. Bhagu Bai	...	A I R 1939 Nag. 249; 1939 N L J 409; 12 R N 159	580
Tubal Uriah Butler v. The King	...	(1939) M W N 1005; 43 C W N 1121; 41 Or. L J 206; 1940 O L R 33; 6 B R 287; 12 R P O 113 P C	461
U Thiseitta v. U Eindawuntha	...	A I R 1939 Rang. 385; 1940 Rang. 97; 12 R Rang. 196	483
V. V. Vythilingam Pillai v. Seshan	...	A I R 1939 Mad. 477; 49 L W 103; (1939) 1 M L J 416; (1939) M W N 295; 12 R M 580	850
Veerammanni v. Veerabasava Chikka Royal	...	A I R 1939 Mad. 278; 1 L R (1939) Mad. 338; (1939) 1 M L J 39; (1939) M W N 9; 49 L W 115; 12 R M 550	500
Virbhandas Shamsing v. Dasumal Keshowdas	...	A I R 1939 Sind 288; (1939) Kar. 314; 12 R S 135	28
Vishwanath Prasad Jallan v. Holyland Cinetone, Ltd., Benares	...	A I R 1939 All. 739; (1939) A L J 950; 12 R A 330	501
Zafar Ahsan v. Jugeshwar Bux Roy	...	A I R 1940 Pat. 135; 6 B R 155; 41 Or. L J 171; 12 R P 369	346
Zalliram v. Mangalsingh	...	A I R 1939 Nag. 302; 1939 N L J 477; 12 R N 173	760

Table showing serially the Pages of Volume 185 of Indian Cases (1940) and the corresponding pages of other Law Journals and Reports.

Page.	Names of cases reported.	Parallel references.
1	Ramnandan Prasad Narain Singh v. Goshwami Madhwanand Ramji ...	A I R 1940 F O 1; 1939 O L R 721; 6 B R 170; 12 R F O 13; 21 P L T 24; (1910) M W N 7; 71 O L J 49 F C.
3	Krishna Iyer, <i>In re</i> ...	A I R 1939 Mad. 384; 49 L W 205; (1939) 1 M L J 266; (1939) M N W 244; 41 Cr. L J 106; 12 R M 521.
4	Ram Pratapji v. Hari Kishan Dass ...	6 B R 172 (1); 12 R F O 15; 1939 O L R 723 (1); 71 O L J 84 F C.
5	Shambhoo Dayal v. Kundan Lal ...	A I R 1940 Oudh 87; 1939 O W N 1034; 1939 O L R 688; 12 R O 183; 1940 R D 33; 15 Luck. 188.
6	Mon Mohan Bhattacharjee v. Bidhu Bhusan Dutta ...	A I R 1939 Cal. 460; 69 O L J 188; 43 O W N 295; 12 R O 334
10	Sitla Sahai v. Sri Ram ...	1939 O W N 1028; 1939 O L R 691; 12 R O 184.
11	Mangalmal Aganmal v. Muhammad Usif Bhoro ...	A I R 1939 Sind 815; (1939) Kar. 597; 12 R S 151
13	Laxman Manjunathaya Balwalli v. Venkatrao Mangeshrao ...	A I R 1939 Bom. 386; 41 Bom. L R 836; 12 R B 223.
16	Chekkha Dhanamma v. Coromandel Company Limit- ed, Cocanada ...	A I R 1939 Mad. 401; (1939) 1 M L J 235; (1939) M W N 216; 49 L W 341; 12 R M 517.
17	Kedar Nath Tushnial v. Raj Kumar Das ...	A I R 1939 Cal. 674; 69 O L J 394; 12 R O 321.
25	Seheb Din v. Gauri Shankar ...	A I R 1940 Oudh 92; 1939 O W N 980; 1939 O L R 683; 12 R O 177; 15 Luck 92.
26	Oherutty v. Nagamparambil Ravu ...	A I R 1939 Mad. 513; (1939) M W N 354; 49 L W 491; (1939) 1 M L J 633; 12 R M 504.
28	Virbhandas Shamsing v. Dasumal Keshowdas ...	A I R 1939 Sind 288; (1939) Kar. 344; 12 R S 134.
30	Surathu Sitharathnamma v. Pillarisetti Seshamma ...	A I R 1939 Mad 586; 49 L W 393; (1939) 1 M L J 456; (1939) M W N 640; 12 R M 506.
33	Renukabai v. Bheosan Hapsaji Junghare ...	A I R 1939 Nag. 132; 1939 N L J 129; 12 R N 129.
37	Saminatha Iyer v. Vageesan ...	A I R 1939 Mad 849; 50 L W 270; (1939) M W N 827; (1939) 2 M L J 557; 12 R M 511; 1 L R (1940) Mad. 98.
41	Sheo Prasad v. Kalka Prasad Dhawan ...	A I R 1939 All. 617; (1939) A L J 541; 1939 R D 405; 12 R A 293.
42	Raja of Vizianagaram v. Mudumooru Sanyasiraju ...	A I R 1939 Mad. 653; 49 L W 662; (1939) M W N 568; (1939) 2 M L J 114; 12 R M 510
44	Narsidasji Balmukunddasji v. Bai Jamna ...	A I R 1939 Bom 354; 41 Bom. L R 787; 12 R B 211.
52	Radhey Lal v. Kanhai Lal ...	A I R 1939 Pat. 526; 18 Pat. 193; 6 B R 88, 12 R P 287.
56	Nariman Edulji Contractor v. Pirojbai Nariman Contractor ...	A I R 1939 Bom. 367; 41 Bom. L R 625; 12 R B 219.
57	Dalmia Cement Ltd. v. Naraindas Anandji Bechar ...	A I R 1939 Sind 256; 12 R S 139.
59	Sarju Prasad v. Deoki Singh ...	A I R 1940 Pat. 147; 6 B R 94; 12 R P 284.
62	Kannayya Reddi v. Muthu Reddi ...	A I R 1939 Mad. 508 49 L W 547 (2); (1939) M W N 401; (1939) 1 M L J 825; 12 R M 515.
63	Sheonarain Prasad Singh v. Ganga Prasad Sahu ...	A I R 1940 Pat. 155; 6 B R 92, 12 R P 291.
65	Amar Nath Khosla v. M. O. Mohan ...	A I R 1939 Lah. 433; 41 P L R 879; 12 R L 265.
67	Khodromal Jeramdas v. Menghomal Jessomal ...	A I R 1939 Sind 303; (1939) Kar. 423; 12 R S 141.
69	Ghulam Mohammad v. Allah Rakhi ...	A I R 1939 Lah. 533; 41 P L R 605; 41 Cr. L J. 107; 12 R L 273 (1).

70	Maung Maung v. V. V. R. Chettyar Firm ..	A I R 1939 Rang. 298; 1940 Rang. 82; 12 R Rang. 178.
73	Ganesh Mahto v. Bhawan Mahto ...	A I R 1940 Pat. 151; 6 B R 98; 12 R P 293
75	Raja Ram v. Allahabad Bank, Ltd. ...	A I R 1939 Lah. 79; 41 P L R 26; I L R (1939) Lah. 313; 12 R L 263 (2).
77	Sri Emberumanar Jeer Swamigal v. Board of Commissioners for Hindu Religious Endowments, Madras ...	A I R 1939 Mad. 511; 49 L W 632; (1939) M W N 442; (1939) 1 M L J 901; 12 R M 516; I L R (1939) Mad. 904.
79	Lal Tirathnath Sahi Deo v. Lal Mirtunjoya Nath Sahi Deo ...	A I R 1940 Pat. 153; 21 P L T 645; 6 B R 98; 12 R P 295.
81	Gangubai Pandurang Dombé v. Pagubai Narayan Kore ...	A I R 1939 Bom. 403; 41 Bom. L R 815; 12 R B 220.
83	Commissioner of Income-tax, Bihar and Orissa v. Jug Sah Muni Lal Sah	A I R 1940 Pat. 239; 6 B R 101; 12 R P 297.
87	Aisha Bibi v. Begum Bibi ...	A I R 1939 Sind 263; (1939) Kar. 475; 12 R S 113.
94	Farok Ahmed Meah v. Lalit Mohan Choudhury ...	A I R 1939 Cal. 582; 69 O L J 335; 12 R O 323.
99	Nandal Bhandari Mills, Ltd., Cawnpore v. Commissioner of Income-tax, Central and United Provinces ...	A I R 1939 All. 593; (1939) A L J 631; 12 R A 294; I L R (1939) All. 832.
105	Chandrika Prasad v. Bhagwan Das ...	A I R 1940 Oudh 93; 1939 O W N 1028; 1939 O W N 1028; 1939 O L R 692; 12 R O 180; 15 Luck 167.
108	Pannalal v. Sumranlal ...	A I R 1939 Nag. 260; 1939 N L J 391; I L R (1939) Nag. 624; 12 R N 133.
111	Ram Sarup Singh v. Sarju Ahir ...	A I R 1940 Oudh 88; 1939 O W N 1038; 1939 O L R 689; 12 R O 175; 1940 R D 34.
113	Shibba Mal v. Galab Rai ...	A I R 1939 All. 735; (1939) A L J 984; 12 R A 299; I L R (1940) All. 26 S B.
114	Kishen Gopal v. Abdul Latif Khan ...	A I R 1940 Oudh 97; 1939 O W N 1045; 1939 O L R 692; 12 R O 185; 15 Luck. 175.
119	Maung Kan v. Maung Po Tok ...	A I R 1939 Rang. 388; 1940 Rang. 157; 41 Cr. L J 123; 12 R Rang. 183.
122	Prem Parkash Sharma v. Federal India Assurance Co., Ltd. ...	A I R 1939 Lah. 509; 41 P L R 569; 12 R O 269.
123	Bulak Ram v. Ganga Bishun Chaudhuri ...	A I R 1940 Pat. 133; 6 B R 104; 12 R P 301.
125	Ganesh Datta v. Model Town Society Ltd ...	A I R 1939 Lah. 508; 12 R L 288.
126	Hari Ram v. Munshi Singh ...	A I R 1939 All. 660; (1939) A L J 559; 12 R A 301.
129	Bishun Singh v. Palakdhari Singh ...	A I R 1939 Pat. 592; 6 B R 109; 12 R P 304.
131	Tarak Nath Kundu v. Panchanon Dutt ...	A I R 1939 Cal. 564; 69 O L J 530; 43 O W N 886; 12 R O 338; I L R (1939) 2 Cal. 381.
135	Razaur Rahman v. Udit Singh ...	A I R 1939 Pat 570; 20 P L T 492; 18 Pat. 694; 6 B R 106; 12 R P 303.
137 (1)	Ghulam Hussain v. Secretary of State ...	A I R 1939 Lah. 510; 12 R L 270.
137 (2)	Patipal Singh v. Rampal Singh ...	A I R 1940 Oudh 63; 1939 O W N 997; 1939 O L R 695; 12 R O 190; 15 Luck 113.
142	The King v. Nga Ba Saing ...	A I R 1939 Rang. 392; 1940 Rang. 145; 41 Cr. L J 108; 12 R Rang. 181.
144	Nripendra Nath Chatterji v. Jugal Prasad Mandal	A I R 1939 Pat. 386; 6 B R 108; 12 R P 306.
145	Abdul Sattar v. Dinajpur Trading and Banking Co., Ltd. ...	A I R 1939 Cal. 490; 69 O L J 229; 42 O W N 1153; 12 R O 343.
149	Karbalai Gulam v. Ebrahim Busheri & Co. ...	A I R 1939 Bom. 342; 41 Bom. L R 518; 12 R B 225.
151	Nand Kishore v. Emperor ...	A I R 1939 All. 710; (1939) A L J 941; 41 Cr. L J 111; 12 R A 304.
154	Gopu China Jogayya v. Manapalli Rapanayya ...	A I R 1939 Mad. 374; 49 L W 23; (1939) 1 M L J 88; (1939) M W N 130; I L R (1939) Mad. 194; 12 R M 518.
155	Lalumal Dholumal v. Harumal Lalsing ...	A I R 1939 Sind 332; 12 R S 153.
156	Krishna Chandra Sharma v. Rishabha Kumar ...	A I R 1939 Nag. 265; 1939 N L J 324; 12 R N 136; I L R (1940) Nag. 55.
159	Arunachalam Chettyar v. Sabaratnam Chettiar ...	A I R 1939 Mad. 572; (1939) M W N 367; 49 L W 515; (1939) 1 M L J 889; I L R (1939) Mad. 585; 12 R M 520.

162	Rambrichh Singh v Emperor	...	A I R 1940 Pat. 365; 6 B R 110; 41 Cr. L J 114; 12 R P 339.
169	Shobhalal v. Sidhalal	...	A I R 1939 Nag. 210; 1939 N L J 252; I L R (1939) Nag. 636; 12 R N 139.
172	Sat Narain v. Emperor	...	A I R 1939 All. 746; (1939) A L J 1011; 41 Cr. L J 121; 12 R A 307; I L R (1939) All. 934.
173	Ninkileri Lakshmikutty Kettilamma v. Thekka Madathil Vishnu Nambisan	...	A I R 1939 Mad. 411; 49 L W 199; (1939) 1 M L J 261; (1939) M W N 228; I L R (1939) Mad. 415; 12 R M 522.
176	Muslim Bank of India, Ltd., <i>In the matter of</i>	...	A I R 1939 Lah. 515; 41 P L R 739; I L R (1939) Lah. 299; 12 R L 271.
177	Baburahi Sardar v. Kala Chand Bepari	...	A I R 1939 Cal. 728; I L R (1939) 1 Cal. 567; 41 Cr. L J 125; 12 R O 347 (2).
179	Kumar Raghava Surendra Sahi v. Babui Lachmi Koer	...	A I R 1939 Pat. 636; 18 Pat. 590; 6 B R 117; 12 R P 307.
203	Baptist De Souza v. Emperor	...	A I R 1939 Bom. 465; 41 Bom. L R 974; 41 Cr. L J 127; 12 R B 229.
205	Ah Phut v. The King	...	A I R 1939 Rang. 402; 1940 Rang. 104; 41 Cr. L J 129; 12 R Rang. 185.
208	Gul Zaman Mir Zaman v. Emperor	...	A I R 1939 Pesh. 47; 41 Cr. L J 132; 12 R Pesh. 33.
210	B. L. Chouda v. B. K. Rai	...	A I R 1939 Nag. 274; 1939 N L J 421; 12 R N 141.
214	R. Ezekiel v. The Province of Bengal	...	A I R 1939 Cal. 746; I L R (1939) 2 Cal. 52; 41 Cr. L J 134; 12 R O 350.
217	Probdh Kumar Das v. The Dantmara Tea Co. Ltd.	...	A I R 1940 P O 1; 1939 O W N 1075; 12 R P O 87; 6 R B 176; 70 O L J 483; 44 O W N 145; (1939) O L R 739; (1940) 1 M L J 75; 51 L W 1; (1940) M W N 1; 42 Bom. L R 199; 42 P L R 156; 1940 A L J 226; I L R (1940) 1 Cal. 250; 66 I A 293; (1940) Kar. P O 11 Sup P C.
219	Ohandan Mull Indra Kumar v. Ohiman Lal Girdhar Das Parekh	...	A I R 1940 P O 3; 1939 O W N 1086; 6 B R 189; 12 R P O 84; 1939 O L R 741; 21 P L T 1; 44 O W N 205; (1940) A L J 70; 42 P L R 81; 51 L W 135; 42 Bom. L R 387; (1940) Kar. P O 15 Sup P C.
224	Sohan Lal v. Mubarak Ali Khan	...	A I R 1939 All. 705; (1939) A L J 640; 41 Cr. L J 137; 12 R A 309; I L R (1939) All. 868.
225	Basappa Chanbasappa Ohekki v. Hanmappa Ramappa Manaur	...	A I R 1939 Bom. 492; 41 Bom. L R 943; 12 R B 235.
227	Noor Ahmad v. Mahmud Ali	...	A I R 1939 Lah. 531; I L R (1939) Lah. 201; 41 P L R 713; 12 R L 282 (2);
228	Kanayalal Mohanlal Gujar v. Emperor	...	A I R 1939 Bom. 455; 41 Bom. L R 977; 41 Cr. L J 172; 12 R B 241.
230	S. V. Subba Rao v. Calicut Co-operative Bank Ltd.	...	A I R 1939 Mad. 304; 49 L W 143; (1939) M W N 397; (1939) 1 M L J 695; 12 R M 536.
232	Firm Jethu Mal-Hari Parshad v. Telu	...	A I R 1939 Lah. 510; 41 P L R 526; 12 R L 282 (1).
233	Ram Chander v. Rure Kunwar	...	A I R 1939 All. 738; (1939) A L J 961; 12 R A 316.
234	Jadunath Roy v. Parameswar Mullick	...	A I R 1940 P O 11; 21 P L T 237; 6 B R 251; 1940 O L R 26; 1940 O W N 96; 12 R P O 98; 44 O W N 233; (1940) 1 M L J 97; 42 Bom. L R 331; 70 O L J 546; I L R (1940) 1 Cal. 255; (1940) Kar. (P O) 33 Sup; 67 I A 11 P C.
239	Narayana Mudali v. Peria Kalathi Mudali	...	A I R 1939 Mad. 494; (1939) 1 M L J 199; 49 L W 295; (1939) M W N 273; 12 R M 534.
241	Meghji Hirjee & Co. v. Bengal Nagpur Railway Company, Ltd.	...	A I R 1939 Nag. 141; 1939 N L J 124; 12 R N 145.
244	Kalawanti v. Udhavdas Girdharidas	...	A I R 1939 Sind 305; (1940) Kar. 1; 12 R S 154.
247	Perumal Naicken v. Kondama Naicken	...	A I R 1939 Mad. 385; (1939) 1 M L J 64; (1939) M W N 110; 49 L W 372; 12 R M 525.
249	Giani Meher Singh v. Emperor	...	A I R 1939 Cal. 714; I L R (1939) 2 Cal. 42; 43 O W N 639; 41 Cr. L J 138; 12 R O 349.

250	Haliman Bibi v. Muhammad Tajamul Hussain	..	A I R 1939 Pat. 504; 6 B R 141; 12 R P 332.
252	Mulchand Jivraj v. D. Low	...	A I R 1939 Bom. 350; 41 Bom. L R 521; 12 R B 226,
254	Khedu Mahto v. Khonka Mahto	...	A I R 1939 Pat 591; 6 B R 142; 20 P L T 929; 12 R P 330.
256 (1)	Khirode C. Ghose v. Narendra N. Sanyal	...	A I R 1939 Cal. 599; 12 R O 347 (1); 44 O W N 485 S B.
256 (2)	Chiranjil Lal v. Emperor	...	A I R 1939 All. 734; (1939) A L J 990; 41 Cr. L J 141; 12 R A 312 (1).
257	K. J., a Vakil, Madras, <i>In the matter of</i>	...	A I R 1939 Mad 906; 50 L W 548; (1939) M W N 1038; (1939) 2 M L J 632; 12 R M 527; 41 Cr. L J 163; I L R (1940) Mad. 81 S B.
258	Mahadeo Prasad v. Jagannath Kuvar	..	A I R 1940 Oudh 67; 1939 O W N 1087; 1939 O L R 704; 12 R O 194; 1939 R D 616; 15 Luck 209 F B
266	Jaimal Singh v. Emperor	...	A I R 1939 Lah 523; I L R (1939) Lah. 307; 41 P L R 763; 12 R L 275; 41 Cr L J 146.
266	Emperor v. Abdullah Karim	...	A I R 1939 Sind 335; (1940) Kar 83; 41 Cr. L J 143; 12 R S 161.
271	Emperor v. Qudrat	...	A I R 1939 All 708; (1939) A L J 980; 41 Cr. L J 142; 12 R A 310; I L R (1939) All 871.
272	Parbhu Dayal v. Bisheshwar Nath	..	A I R 1940 Oudh 117; 1939 O W N 1111; 12 R O 203; 1939 O L R 713 (1).
273	Tejpal Marwari v. Kedarnath Himatsingka	...	A I R 1939 Pat. 597; 20 P L T 700; 6 B R 144; 12 R P 336.
274	Kala Mohammad Akbar v. Emperor	...	A I R 1939 Lah 534; 12 R L 277; 41 Cr. L J 150; I L R (1940) Lah 217.
277	Rauf Ahmad v. Fahmida Begum		A I R 1940 Oudh 116; 1939 O W N 1129; 12 R O 207; 1939 O L R 713 (2); 15 Luck 261
278	Mukhan Singh v. Chandrika Prasad Singh	...	A I R 1940 Pat. 371; 6 B R 145; 19 Pat. 269; 12 R P 333.
280	Gomti v. Jugal Kishore	..	A I R 1940 Oudh 84; 1939 O W N 1134; 12 R O 201; 1939 O L R 715; 1939 R D 628; 15 Luck 270.
281	Jadunandan Das v. Maho	..	A I R 1939 Pat 428; 6 B R 148; 12 R P 337.
286	Bibhabati Devi v. Kumar Ramendra Narayan Roy	..	A I R 1939 Cal. 672; I L R (1939) 1 Cal. 399; 43 O W N 333; 12 R O 354; 41 Cr. L J 148.
288	Official Receiver, West Tanjore v. Samudra-vijayan Ohettiar	...	A I R 1939 Mad. 509; (1939) M W N 378; (1939) 1 M L J 575; 49 L W 591; 12 R M 538.
290	Anand Bahari Lal Khandelwal v. Deputy Commissioner, Bara Banki	...	A I R 1940 Oudh 107; 1939 O W N 1145; 12 R O 212; 1939 O L R 723 (2); 1939 R D 635.
294	Jagdish Jha v. Aman Khan	...	A I R 1940 F O 3; 6 B R 194; 12 R F O 16; 1940 O L R 1; 21 P L T 142; 71 O L J 55; 1939 F L J 7 F C
295	Sakina Begum v. Durga Sahai	..	A I R 1940 Oudh 132; 1939 O W N 1141; 12 R O 203 (2); 1939 O L R 718; 1939 R D 632 (2); 15 Luck 279.
297	A. James v. Achaibar Singh	...	A I R 1940 Pat 119; 6 B R 150; 21 P L T 416; 12 R P 346.
300	Nani Gopal Mukherjee v. Srish Chandra Nandy	...	A I R 1939 Cal. 600; 1 L R (1939) 1 Cal. 233; 12 R O 353
301	Durga Prasad v. Seetta Prasad Tewari	..	A I R 1940 Oudh 80; 1939 O W N 1107; 1939 O L R 727; 12 R O 209 (1); 15 Luck 287.
302	Israr Husain v. Emperor	...	A I R 1939 All. 730; (1939) A L J 895; 12 R A 314; 41 Cr L J 152; I L R (1940) All. 23.
303	Nga Sar Kee v. The King	..	A I R 1939 Rang. 330; 1940 Rang. 203; 41 Cr. L J 153; 12 R Rang. 189.
305	Bhagwan Din v. Gir Har Saroop	...	A I R 1940 P O 7; 1939 O W N 1078; 6 B R 179; 12 R P O 89; 1939 O L R 729; (1940) 1 M L J 1; 51 L W 4; (1940) M W N 3; 42 Bom. L R 140; 44 C W N 294; 71 O L J 189; 15 Luck. 1; (1940) Kar. (F O, 25 Sup.; 67 I A 1; 42 P L R 457 P C.
310	Motilal v. Emperor	...	A I R 1940 Nag. 68; 12 R N 150; 41 Cr. L J 158
314	People Bank of Northern India Ltd., Lahore, <i>In the matter of</i>	...	A I R 1939 Lah. 497; 12 R L 274; I L R (1939) Lah 324; 41 P L R 737.
315	Emperor v. Kallappa Gurappa Kotagunshi	...	A I R 1939 Bom. 481; 41 Bom. L R 970; 12 R B 231; I L R (1939) Bom. 679; 41 Cr. L J 157.

317	Jagan Nath v. Allah Dad	..	A I R 1939 Lah. 539; 41 P L R 631; 12 R L 273 (2).
318	Emperor v. Karbalai Hussain	..	A I R 1940 Nag. 75; 1939 N L J 537; 12 R N 149; 41 Cr. L J 155; I L R (1940) Nag. 61.
319	Superintendent and Remembrancer of Legal Affairs, Bengal v. L. N. Birla	...	A I R 1939 Cal. 724; 43 O W N 1223; 70 O L J 463; 12 R O 369; 41 Cr. L J 164; I L R (1940) 1 Cal. 121.
323	Commissioner of Income-tax, Bombay Presidency Sind and Baluchistan v. Karachi Chamber of Commerce	...	A I R 1939 Sind 308; (1940) Kar 140; 12 R S 157.
326	A. Subramania Iyer v. K. S. Venkatarama Iyer	..	A I R 1939 Mad. 599; 49 L W 416; I L R (1939) Mad. 54; (1939) 1 M L J 536; (1939) M W N 430; 12 R M 530.
330	Thakur Prasad Saksena v. Firm Sadiq Husain Mehdi Husain	...	A I R 1940 Oudh 129; 12 R O 215; 1940 O W N 7; 1939 O L R 735 (2); 15 Luck 253.
334	Kanhai Singh v. Basdeo Sahai	..	A I R 1939 All. 387; (1939) A L J 391; 12 R A 312 (2).
336	Ram Ranbijay Prasad Singh v. Baohia Kuari	...	A I R 1939 Pat. 688; 20 P L T 777; 6 B R 152; 12 R P 349 (1).
337	Bachai v. Hayat Mohammad	...	A I R 1940 Oudh 119; 1939 O W N 1112; 12 R O 219; 1939 O L R 728; 15 Luck 265.
338	Ram Kumar Lal v. Bam Charittar Lal	...	A I R 1939 All. 725; (1939) A L J 803; 1939 R D 491; 12 R A 315.
339	Nripendra Nath Chatterji v. Arun Chandra Chatterji	...	A I R 1940 Pat. 129; 6 B R 153; 12 R P 351.
341	Golab Daye, <i>In the goods of</i>	...	A I R 1939 Cal. 718; 43 O W N 1193; 12 R O 356.
342	District Magistrate, Kheri v. M. Hamid Ali Gardish	..	A I R 1940 Oudh 137; 1939 O W N 1132; 12 R O 242; 1939 O L R 734; 41 Cr. L J 169; 15 Luck 268.
343	Basant Kaur v. Ram Singh	...	A I R 1939 Lah. 544; 41 P L R 657; 12 R L 279.
346	Zafar Ahsan v. Jugeshwar Bux Roy	...	A I R 1940 Pat. 135; 6 B R 155; 41 Cr. L J 171; 12 R P 369.
347	Har Narain Lal v. Udan Singh	..	A I R 1940 Oudh 63; 1939 O W N 1109; 1939 O L R 735 (1); 12 R O 220; 15 Luck 235 S B.
348	Laxman v. Emperor	...	A I R 1939 Nag. 281; 1939 N L J 455; 12 R N 156; 41 Cr. L J 168.
350	Ram Ran Bijaya Prasad Singh v. Abdul Ghani Khan	...	A I R 1939 Pat. 682; 20 P L T 771; 6 B R 157; 12 R P 349 (2).
352	E. M. Joseph v. Official Assignee	...	A I R 1939 Rang. 401; 12 R Rang. 191.
353	Lachmeshwar Prasad Shukul v. Girdhari Lal Chaudhuri	...	A I R 1939 Pat. 667; 20 P L T 905; 6 B R 159; 19 Pat. 123; 12 R P 353 F B.
364	Ramchand Kimatrai v. Udhalmal Dwarkadas	...	A I R 1939 Sind 279; (1939) Kar. 469; 12 R S 163.
366	Surat Borough Municipality v. Sarifa Karunissa	...	A I R 1939 Bom. 49; 41 Bom. L R 1002; 12 R B 233; I L R (1939) Bom. 685.
368	Digambar Ponda v. Satish Chandra Das	...	A I R 1939 Cal. 717; 43 O W N 1103; 12 R O 357.
369	Durga Das v. Hanifa Begam	...	A I R 1940 Oudh 104; 1939 O W N 1010; 1939 O L R 746; 12 R O 221.
372	Fatmabi, <i>In re</i>	...	A I R 1940 Nag. 65; 1939 N L J 563; 12 R N 154.
373 (1)	Bachan Lal v. Gobardhan	..	A I R 1940 Oudh 118; 1940 R D 13; 1939 O L R 749; 1940 O W N 13; 12 R O 227; 15 Luck. 288.
373 (2)	Dulhin v. Harihar Gir	...	A I R 1939 Pat. 607; 18 Pat. 395; 20 P L T 932; 6 B R 172 (2); 12 R P 384.
377	Mrs. Violet Peterson v. Mrs. Adelaide Elizabeth Forbes	...	A I R 1940 Oudh 113; 12 R O 224; 1939 O L R 750; 1940 O W N 1; 15 Luck. 290.
380	Emperor v. Jiwan Das Milawa Ram	...	A I R 1939 Lah. 521; I L R (1939) Lah. 305; 12 R L 293; 41 Cr. L J 174.
382	— v. Jhina Soma	...	A I R 1939 Bom. 457; 41 Bom. L R 965; I L R (1939) Bom. 648; 41 Cr. L J 176; 12 R B 248.

385	O. Kanniah Maistry, <i>In re</i>	—	A I R 1939 Mad. 976; (1939) M W N 1003; (1939) 2 M L J 618; 50 L W 769; 41 Cr. L J 181; 12 R M 565
386	S. T. R. M. Chettyar Firm v. Andathal	...	A I R 1939 Rang. 434; 1939 Rang. 594; 12 R Rang. 192 S B.
389	Benares Bank Ltd., Benares, <i>In the matter of</i>	...	A I R 1939 All. 726; (1939) A L J 1009; 12 R A 317 (2); I L R (1939) All. 938.
390	Mohiuddin v. Khatijabi	...	A I R 1939 Bom. 489; 41 Bom. L R 1020; 12 R B 236.
391	Shaban Ali v. Mohammad Ishaq	...	A I R 1939 All. 724; (1939) A L J 800; 12 R A 317 (1).
392	Maughanmal Gianchand v. Emperor	...	A I R 1939 Sind 340; (1940) Kar. 102; 41 Cr. L J 179; 12 R S 170
393	Abdul Latif v. Abdul Gani Serang	...	A I R 1939 Cal. 730; 43 C W N 1221; 12 R O 358; I L R (1940) 1 Cal. 133.
395	Ranjit Singh v. Nawab Khan	...	A I R 1939 Lah. 518; 41 P L R 826; 12 R L 284
400	Rewashankar Moolchand v. Emperor	...	A I R 1940 Nag. 72; 1939 N L J 562; 41 Cr. L J 182; 12 R N 167.
401	Himayatullah v. Parbhoo Dayal	...	12 R O 228; 1940 O L R 2; 1940 O W N 18 S B.
402	Gokaran Singh v. Brij Bhukan Singh	...	A I R 1939 All. 717; (1939) A L J 928; 1939 R D 516; 12 R A 319; I L R (1939) All. 892.
404	Razia Begum v. Kishundeo Narain Mahtha	...	A I R 1940 Pat. 286; 6 B R 177; 21 P L T 541; 12 R P 397.
406	Ram Kailash Kunwari v. Ishwar Saran	..	A I R 1939 All. 715; (1939) A L J 996; 12 R A 321; I L R (1939) All. 917.
408	Kitab Ali v. Anil Behary Dutta	...	A I R 1939 Cal. 723; 70 C L J 93; 43 C W N 877; 12 R O 361.
410	Shankar Dyamangonda Patil v. Puttabai Gurusathgonda K. Patil	...	A I R 1939 Bom. 483; I L R (1939) Bom. 556; 41 Bom. L R 917; 12 R B 237.
411	Ram Kishan Ram Bhakat v. Satya Narain Bhakat...	...	A I R 1939 Cal. 741; 69 C L J 562; 43 C W N 185; 12 R O 359.
412	Municipal Council, Tanjore v. Sundaresan	...	A I R 1939 Mad. 429; (1939) 1 M L J 87; 49 L W 173; (1939) M W N 426; 12 R M 538.
413 (1)	Pulin Chandra Chattapadhyaya v. Khatra Mohan Ghose	...	A I R 1939 Cal. 748; 70 C L J 4; 12 R O 363.
413 (2)	Emperor v. Lavji Mandan	...	A I R 1939 Bom. 452; 41 Bom. L R 980; 41 Cr. L J 183; 12 R B 253.
415	Ram Pershad v. Dhanna	...	A I R 1939 Lah. 513; 41 P L R 198; 41 Cr. L J 181; 12 R L 308.
416	Sarat Chandra Roy Chaudhury Bahadur v. Arjun Mandal	...	A I R 1939 Cal. 742; 43 C W N 1191; 12 R O 360
417	S, an Advocate, <i>In re</i>	...	A I R 1939 Mad. 917; 50 L W 566; (1939) M W N 1037; (1939) 2 M L J 630; I L R (1940) Mad. 84; 41 Cr. L J 185; 12 R M 564 S B.
418	Pitambar Ramchandra Paliye v. "Saheb Chand Harakchand Shop"	...	A I R 1939 Nag. 277; 1939 N L J 472; 12 R N 155; I L R (1939) Nag. 697.
419	Public Prosecutor, Madras v. M. S. Menoki	...	A I R 1939 Mad. 914; 50 L W 428; (1939) 2 M L J 631; (1939) M W N 1127; 41 Cr. L J 186; 12 R M 563.
420	Janak Dulari v. Sri Gopal	...	A I R 1939 All. 706; (1939) A L J 875; 12 R A 326; I L R (1939) All. 912.
421	Gooru Narayana v. Vaikuntam Chinna Lakshmayya	...	A I R 1939 Mad. 927; (1939) M W N 735 (1); (1939) 2 M L J 399; 50 L W 654; 12 R M 543.
422	Mandir Gita Bhawan, Shiri Kurukhsetra Jiran Uddar Kurukhsetra v. Sadhu Ram	...	A I R 1939 Lah. 554; 12 R L 291.
424	Bepin Chandra Gorain v. Hem Chandra Mukherjee	...	A I R 1939 Cal. 709; I L R (1939) 2 Cal. 63; 43 C W N 692; 12 R O 368.
426	Ram Rattan v. Gobind Ram	...	A I R 1939 Lah. 501; 12 R L 289; I L R (1940) Lah. 84; 42 P L R 366.
427	R. D. K. Chinna Venkatappa Nayanam Bahadur Varu v. Gubba Sundararajulu Naidu	...	A I R 1939 Mad. 431; 49 L W 172; (1939) M W N 226; 12 R M 541.
428	Emperor v. Miro Ghulam Hussain	...	A I R 1939 Sind 339; (1940) Kar. 88; 41 Cr. L J 187; 12 R S 168.
429	Gurappa Bhimanna Ohidguppi v. Madwalappa Ramchandrappe Dumane	...	A I R 1939 Bom. 392; 41 Bom. L R 833; 12 R B 239.

431	Nani Lal Das, <i>In the goods of</i> ...	A I R 1939 Cal. 737; I L R (1939) 2 Cal. 1; 12 R O 364.
434	Akella Surayya v. Thummalapalli Krishnamurthi ...	A I R 1939 Mad. 583; (1939) M W N 481; 12 R M 540.
435	Secretary of State v. Sadho Lal Jaiswal	A I R 1939 All. 748; (1939) A L J 905; 12 R A 323.
438	Commissioner of Waqf, Bengal v. Narainsingh Chandra Daw & Co. ...	A I R 1939 Cal. 648; I L R (1939) 1 Cal. 462; 43 C W N 415; 12 R O 366.
440 (1)	Paidi Subbayya, <i>In re</i> ...	A I R 1939 Mad. 905; (1939) W N 739 (2); 41 Cr. L J 203; 12 R M 573.
440 (2)	Kurella Ramamurti v. Nalam Subbarao	A I R 1939 Mad. 481; (1939) 1 M L J 491; (1939) M W N 323; 49 L W 534; 12 R M 539
441	Barq Raza v. Akbari ...	A I R 1940 Oudh 152; 1940 O L R 3; 12 R O 229.
454	Secretary of State v. District Board, Rangpur ...	A I R 1939 Cal. 758; 70 C L J 126; 12 R C 373.
459	Kamakshi Ayyar v. Namberumal Ayyangar ...	A I R 1939 Mad. 508; (1939) M W N 303; (1939) 1 M L J 531; 49 L W 481; 12 R M 542.
460	Municipal Corporation of Rangoon v. Ram Behari	A I R 1939 Rang. 432; 1939 Rang. 504; 12 R Rang. 194.
461	Tubal Uriah Butler v. The King ...	(1939) M W N 1005; 43 C W N 1121; 41 Cr. L J 206; 1940 O L R 33; 6 B R 287; 12 R P O 113 P C.
465	Commissioner of Income-tax, Madras v. Voora Sreeramulu Chetty	A I R 1939 Mad. 903; 50 L W 590; (1939) 2 M L J 667; I L R (1939) Mad. 770; 12 R M 544 S B.
467	Kanhaiya Lal v. Hamid Ali ...	A I R 1940 Oudh 164; 12 R O 243; 1940 O L R 16; (1940) O W N 462.
476	J. N. Maduranayakam Pillai v. Secretary of State ...	A I R 1939 Mad. 386; 49 L W 151; (1939) M W N 200; I L R (1939) Mad. 483; (1939) 1 M L J 176; 12 R M 546.
480	Ramkhalawan Singh v. Monilal Sahu ...	A I R 1939 Pat. 678; 20 P L T 883; 6 B R 16; 19 Pat. 159; 12 R P 371 F B.
483	U Thiseitta v. U Eindawuntha ...	A I R 1939 Rang. 385; 1940 Rang. 97; 12 R Rang. 196.
486	Khanchand Mayaram v. Pessumal Lakhumal ...	A I R 1939 Sind 360; (1939) Kar. 312; 12 R S 165.
487	Bishan Lal v. Banwari Lal	A I R 1939 All. 713; (1939) A L J 945; 12 R A 327.
489	Bhagwan Das v. Muhammad Nawaz Shah	A I R 1939 Lah. 319; I L R (1939) Lah. 408; 41 P L R 785; 12 R L 295.
495	Raichand Gulabchand Accha v. Secretary of State	A I R 1939 Bom. 505; 41 Bom. L R 1077; 12 R B 242.
498	Ram Ranbijaya Prasad Singh v. Madho Turha ...	A I R 1939 Pat. 623; 20 P L T 715; 6 B R 187; 12 R P 375.
500	Veerammami v. Veerabasava Chikka Royal ...	A I R 1939 Mad. 278; I L R (1939) Mad. 338; (1939) 1 M L J 39; (1939) M W N 9; 49 L W 115; 12 R M 550.
501	Vishwanath Prasad Jallan v. Holyland Cinetone, Ltd., Lenares ...	A I R 1939 All. 739; (1939) A L J 950; 12 R A 330.
508	M. A. Bhagvati v. Emperor ...	A I R 1939 Bom. 480; I L R (1939) Bom. 496; 41 Bom. L R 878; 41 Cr. L J 188; 12 R B 251.
508	Roshan N M A. Karim Omer & Co. v. Mohamed Ebrahim ...	A I R 1939 Rang. 315; 1939 Rang. 194; 12 R Rang. 198.
513	Sri Narain Khanna v. Secretary of State ...	A I R 1939 All. 723; (1939) A L J 736; 12 R A 334.
514	Durga Singh v. Kesho Lal	A I R 1940 Pat. 170; 18 Pat. 839; 6 B R 195; 12 R P 376.
519	Lokmanya Mills Ltd., Barsi v. Municipal Borough, Barsi ...	A I R 1939 Bom. 477; I L R (1939) Bom. 571; 41 Bom. L R 937; 12 R B 247.
520	Lal Din v. Official Receiver, Lyallpur ...	A I R 1939 Lah. 536; I L R (1939) Lah. 275; 41 P L R 741; 12 R L 300.
521	Pancham Singh v. Deb Ram ...	A I R 1939 All. 751; (1939) A L J 1053; 12 R A 333; 1939 R D 579.

523	Ambica Prosad Sanyal v. Messrs. Soorajmull Nagarmull Firm	...	A I R 1939 Cal. 620; I L R (1939) 2 Cal. 291; 43 O W N 999; 12 R O 378.
526	Government of Burma v. Arunachallam	...	A I R 1939 Rang. 408; 12 R Rang 203.
529	Ambika Thakur v. Emperor	...	A I R 1939 Pat. 611; 18 Pat. 544; 6 B R 203; 41 Cr. L J 191; 12 R P 389; 21 P L T 45.
542	Behangir Oursetji Mistri v. Kastur Pannaji Oswal	...	A I R 1939 Bom. 344; I L R (1939) Bom. 493; 41 Bom. L R 583; 12 R B 245.
543	Emperor v. Mahanand Kherajmal	...	A I R 1939 Sind 341; (1940) Kar. 123; 41 Cr. L J 180; 12 R S 169.
544	Board of Commissioners for H. R. E., Madras v. Trustee of Sri Virupakshaswami Swami	...	A I R 1939 Mad. 801; (1939) M W N 775; (1939) 2 M L J 325; 12 R M 551.
545	Mohammad Abdul Sattar v. Rahimuddin	...	A I R 1940 Nag. 87; 12 R N 158.
546	Government of Bengal v. Corporation of Calcutta	...	A I R 1939 Cal. 706; I L R (1939) 2 Cal. 23; 43 O W N 789; 12 R O 381.
549	Errol Mackay v. Oswald Forbes	...	A I R 1940 P O 16; 1940 O L R 47; 6 B R 265; 1940 O W N 32; 12 R P C 103; (1940) 1 M L J 64; 51 L W 93; (1940) A L J 60; (1940) M W N 114; 21 P L T 199; 42 P L R 117; 44 O W N 317; 42 Bom. L R 315; 70 O L J 566; I L R (1940) 1 Cal. 286; (1940) Kar. (P O) 72 Sup; 67 I A 64 P C.
551	C. Fleming v. Official Receiver, Ferozepore District	...	A I R 1939 Lah. 183; I L R (1939) Lah. 429; 41 P L R 78; 12 R L 301.
552	Booniah v. R. M. N. R. M. Chettyar Firm	...	A I R 1939 Rang. 406; 1939 Rang. 508; 12 R Rang. 205.
554	Khaji Dodda Khaji Sahib v. Ohigamalla Nanjappa	...	A I R 1939 Mad. 642; I L R (1939) Mad. 833; 49 L W 635; (1939) M W N 478; (1939) 1 M L J 909; 12 R M 553.
556	Central Talkies Circuit v. Commissioner of Income-tax, Bombay	...	A I R 1939 Bom. 448; I L R (1939) Bom. 574; 41 Bom. L R 919; 12 R B 257.
557	Sukhdeo Pandey v. Rameshwar Prasad Agarwala	...	A I R 1939 Pat. 522; 6 B R 200; 12 R P 381.
560	Kanti Chandra Ghosal v. Suchitra Sundari Dassi	...	A I R 1939 Cal. 606; I L R (1939) 2 Cal. 285; 43 O W N 855; 12 R O 385.
562	Diravyam Pillai v. Veeranan Ambalam	...	A I R 1939 Mad. 702; I L R (1939) Mad. 853; 49 L W 460; (1939) M W N 329; (1939) 3 M L J 822; 12 R M J 551.
569	Purushottam Damodar Raichurkar v. Gangadhar Kashinath Sakhare	...	A I R 1939 Bom. 445; I L R (1939) Bom. 560; 41 Bom. L R 931; 12 R B 256.
571	A. Ranganatham Chetti v. M. Ethirajulu Nayudu	...	A I R 1940 P O 17; 6 B R 268; 12 R P O 107; (1940) 1 M L J 24; 51 L W 96; 1940 O L R 53; (1940) M W N 107; 70 O L J 507; I L R (1940) Mad. 172; (1940) Kar. (P O) 43 Sup; 67 I A 25 P C.
573	Peoples Bank of Northern India Ltd. v. Nanikram Charatsing	...	A I R 1939 Sind 270; (1939) Kar. 401; 12 R S 166.
574	Ram Oudh v. Government of Burma	...	A I R 1939 Rang. 448; 1939 Rang. 591; 12 R Rang. 207.
575	Sunil Kumar Kerr v. Sieir Kumar Kerr	...	A I R 1940 P O 30; 6 B R 271; 1940 O W N 35; 12 R P O 105; 51 L W 44; (1940) A L J 66; 1940 O L R 55; 21 P L T 133; (1940) M W N 137; 42 P L R 120; 44 O W N 289; 42 Bom. L R 394; (1940) 1 M L J 795; (1940) Kar. (P O) 76 Sup; 67 I A 102 P C.
578	A. Veeran Kutti v. P. P. Koya Kutti	...	A I R 1939 Mad. 735; 49 L W 707; (1939) M W N 563; (1939) 2 M L J 86; I L R (1939) Mad. 828; 12 R M 561.
580	Trimbak v. Bhagu Bai	...	A I R 1939 Nag. 249; 1939 N L J 409; 12 R N 159.
587	Prafulla Kumar Maity v. Uday Chandra Pradhan	...	A I R 1939 Cal. 736; 43 O W N 1192; 12 R O 391.
588	Behari Lal Sud v. Emperor	...	A I R 1939 Lah. 529; 41 P L R 652; 41 Cr. L J 201; 12 R L 313.

590	Ram Sarup v. Court of Wards	...	A I R 1910 P O 18; 6 B R 278; 1940 O W N 66; 12 R P O 109; 51 L W 86; (1940) A L J 54; 1940 O L R 58; I L R (1940) Lah. 1; (1940) 1 M L J 278; 42 P L R 174; 44 O W N 345; 42 Bom. L R 307; (1940) M W N 278; 71 O L J 34; (1940) Kar. (P O) 63 sup; 67 I A 50 P C.
594	Narsingh Singh v. Emperor	...	A I R 1939 Pat. 659; 20 P L T 655; 6 B R 215; 41 Cr. L J 209; 12 R P 431.
597	Rai Indra Narsin v. Mohammad Ismail	...	A I R 1939 All. 687; (1939) A L J 819; 12 R A 337; I L R (1939) All. 885.
598	Ram Bilas Sharma v. Emperor	...	A I R 1940 Pat. 375; 21 P L T 194; 6 B R 221; 41 Cr. L J 214; 12 R P 429.
599	Karshi Ram v. Mrs. Owen Roberts	...	A I R 1939 Lah. 565; 12 R L 302; I L R (1940) Lah. 135.
602	Harihar Dorai v. Upendra Fati	...	A I R 1939 Pat. 497; 6 B R 218; 12 R P 384.
605	Tan Sit Shan v. U Po Nyun	...	A I R 1939 Rang. 421; 1940 Rang. 93; 12 R Rang. 208.
606	Buxar Central Co-operative Bank, Ltd. v. Akhoury Bindhyachal Prasad Singh	...	A I R 1940 Pat. 261; 6 B R 222; 12 R P 387; 21 P L T 173.
608	Narhar Sonajee Jahagirdar v. Trimbak Shri-dhar Jahagirdar	...	A I R 1940 Bom. 12; 41 Bom. L R 1174; 12 R B 255.
609	Baldev Singh v. Sher Singh	...	A I R 1939 Lah. 556; 41 P L R 524; 12 R L 306.
611	Bhairo Dutt Bhandari, an. Advocate, Ranikhet, <i>In the matter of</i>	...	A I R 1940 All. 1; (1939) A L J 957; 41 Cr. L J 211; I L R (1940) All. 60; 12 R A 367 S B.
613	Shib Lal v. Gobindi	...	A I R 1939 Lah. 562; 41 P L R 513; 12 R L 305.
614	Kumarapan v. The King	...	A I R 1939 Rang. 427; 41 Cr. L J 216; 12 R Rang. 240.
616	Satish Chandra Giri v. Dharanidhar Singha Roy	...	A I R 1940 P O 24; 44 O W N 177; 6 B R 291; 51 L W 49; 21 P L T 91; 1940 O W N 104; 12 R P 117; 1940 O L R 64; (1940) M W N 172 (2); 42 P L R 158; 71 O L J 1; 42 Bom. L R 293; (1940) 1 M L J 371; I L R (1940) 1 Cal. 266; (1940) A L J 409; (1940) Kar. P O 47 Sup; 67 I A 32 P C.
623	Mariam Bibi v. Cassim Ebrahim Malin	...	A I R 1939 Rang. 375; 1939 Rang. 474; 12 R Rang. 210.
624	Ohhotelal v. Gopaladas	...	A I R 1940 Nag. 78; 12 R M 168; I L R (1940) Nag. 130.
626	Anandi Prasad v. Dulhin Kishori Kuer	...	A I R 1940 Pat. 254; 6 B R 224; 12 R P 401.
628	Ayancheri Kovilakath Sanakra Varma Raja v. Ayancheri Kovilakath Oheria Rama Varma Raja	...	A I R 1939 Mad. 902; (1939) M W N 832; 50 L W 375; (1939) 2 M L J 506; 12 R M 566.
630	Muzafferpur Municipality v. Tara Prasad	...	A I R 1940 Pat. 313; 6 B R 226; 41 Cr. L J 217; 12 R P 433.
632	Mul Raj v. Tulsai Ram	...	A I R 1939 Lah. 542; 12 R L 309; I L R (1939) Lah. 541.
634	Jnanada Govinda Chaudhury v. Birendra Nath Goswami	...	A I R 1939 Cal. 595; 69 O L J 347; 12 R O 387.
638	Doman Sahu v. Gangu Nayek	...	A I R 1940 Pat. 300; 6 B R 229; 21 P L T 165; 12 R P 404.
641	Baker Ali v. Amir Ali Meah	...	A I R 1939 Rang. 396; 12 R Rang. 216.
644	Kauleahar Shukul v. Ram Kishore Lal	...	A I R 1939 All. 699; 12 R A 339.
647	T. Sivasankara Mudaliar v. Radhabai Ammal	...	A I R 1939 Mad. 611; (1939) M W N 483; (1939) 2 M L J 515; 50 L W 520; 12 R M 567.
648	Star Trading and Investment, Ltd. v. Ashutosh Mukherjee	...	A I R 1939 Cal. 627; 70 O L J 158; 43 O W N 1116; 12 R O 401.
649	Rani Dhandei Kuer v. Fatma Zuhra	...	A I R 1939 All. 698; (1939) A L J 807; 12 R A 342; I L R (1939) All. 921.
650	Ramji Lal v. Mandai	...	A I R 1940 Oudh 226; 1940 O W N 15; 1940 O L R 25; 12 R O 252.
652	Gobind Ram v. Kaju Ram	...	A I R 1939 Lah. 504; 42 P L R 232; 12 R L 310.
655	Bai Hakimbu v. Dayabhai Rugnath	...	A I R 1939 Bom. 508; 41 Bom. L R 1104; 12 R B 258.

660	Bhudeo Prasad v. Sri Nath	...	A I R 1939 All. 657; 12 R A 343.
663	K. K. N. K. A. R. Chettyar Firm v. Aga M. Shreerazee	...	A I R 1939 Rang. 436; 1939 Rang. 606; 12 R Rang. 217.
668	Man Singh v. Baij Nath Sahai	...	A I R 1939 All. 694; (1939) A L J 830; 1939 R D 513; 12 R A 341; I L R (1939) All. 888.
669	Keshav Ramkrishna Bhatt Phadke v. Subba Manga Naik	...	A I R 1939 Bom. 490; 41 Bom. L R 994; 12 R B 263.
671	Mohammad Murtaza v. Cyril Indernath Dey	..	A I R 1940 Pat. 432; 6 B R 232; 19 Pat. 111; 12 R P 407.
675	Hussainbi v. Khairuddin Kutubuddin	..	A I R 1939 Bom. 487; 41 Bom. L R 875; 12 R B 265.
677	C. S. Nataraja Pillai v. C. S. Subbaroya Chettyar	...	A I R 1939 Mad. 693; (1939) M W N 180; 49 L W 287; (1939) 1 M L J 499; I L R (1939) Mad. 507; 12 R M 569.
682	Bansidhar v. Emperor	...	A I R 1940 All. 18; (1939) A L J 671; 41 Cr. L J 220; 12 R A 366; I L R (1939) All. 865.
683	Commissioner of Income-tax, Bombay Presidency, Sind and Aden v. Central Popular Assurance Co. Ltd.	...	A I R 1939 Sind 364; (1940) Kar 130; 12 R S 172.
685	Frahlad Chandra Singh v. Bhim Mahato	...	A I R 1940 Pat. 341; 6 B R 336; 19 Pat. 172; 12 R P 411.
690	Rai Sri Krishna Mohan Ji v. Purshotam Das	...	A I R 1939 All. 695; (1939) A L J 751; 12 R A 346.
691	Pattu Kumari Bibi v. Nirmal Kumar Singh Nawlakha	...	A I R 1939 Cal. 569; 70 O L J 5; 43 O W N 907; 12 R O 332.
700	Akbar Husain Khan v. Emperor	...	A I R 1940 All. 7; (1939) A L J 962; 41 Cr. L J 227; 12 R A 371; I L R (1939) All. 975.
701	Jarnail Singh v. Bahadur Singh	...	A I R 1939 Lah. 561; 41 P L R 593; 12 R L 315.
702	Tikamdas Hotumal v. Kishnomal Jessomal	...	A I R 1939 Sind 367; (1940) Kar 36; 12 R S 174.
704	Debendra Chandra De v. Jamini Kumar Dey	..	A I R 1939 Cal. 744; 43 O W N 1209; 12 R O 402; I L R (1940) 1 Cal. 153.
705	Akoojee Jadwet and Co. v. A. V. and Son	...	A I R 1939 Rang. 423; 12 R Rang. 219.
709	Hans Hotz v. Emperor	..	A I R 1940 All. 5; (1939) A L J 1032; 41 Cr. L J 230; 12 R A 370; I L R (1940) All. 67.
711	Hans Raj Gupta v. Ram Lal Baldeo Parshad	...	A I R 1939 Lah. 498; 12 R L 317.
712	Synemodelux, Ltd., Tinnevely v. K. Vannamuthu Pillai	...	A I R 1939 Mad. 498; (1939) 1 M L J 534; (1939) M W N 324; 49 L W 537; 12 R M 574.
713	Ram Rattan v. Municipal Committee, Amritsar	...	A I R 1939 Lah. 511; 12 R L 316; I L R (1940) Lah. 362.
714	Abdul Latif v. Habibulla	...	A I R 1939 Cal. 351; 69 O L J 28; 12 R O 401.
726	Ambika Prasad v. Maqbulunnissa	..	A I R 1940 Oudh 207; 1940 O W N 129; 1940 R D 66; 1940 O L R 39; 12 R O 255.
727	Mishrilal v. Barik	...	A I R 1939 Nag. 305; 1939 N L J 487; 12 R N 169; I L R (1939) Nag. 665.
731	Deputy Commissioner, Kheri, Manager, Court of Wards, Mahewa Estate v. Kr. Khushwaqt Rai	..	A I R 1940 Oudh 180; 1940 O W N 22; 1940 O L R 31; 12 R O 253; 1940 R D 28; 15 Luck 298.
733	Mo Maung U v. Ma Bla On	...	A I R 1939 Rang. 399; 1939 Rang. 543; 12 R Rang. 222.
736	Jai Mangal Tewari v. Bindeshuri Singh	...	A I R 1940 Oudh 134; 1939 O W N 1005; 1940 O L R 36; 12 R O 257; 15 Luck 157.
738	Angelo v. Kandan Manjhi	...	A I R 1940 Pat. 316; 6 B R 241; 41 Cr. L J 221; 12 R P 440.
744	Sahibzadi v. Abdul Ghafoor	...	A I R 1939 Lah. 454; 41 P L R 867; 12 R L 318.
745	Babu v. Emperor	..	A I R 1940 Oudh 241; 1940 O L R 43; 41 Cr. L J 228; 1940 O W N 118; 12 R O 278.
748	Ram Chandra Singh v. Baldeo Singh	...	A I R 1940 Pat. 184; 6 B R 247; 41 Cr. L J 232; 12 R P 446.
749	Karangiseti Onkarappa v. Karingiseti Chenappa	...	A I R 1940 Mad. 33; 50 L W 896; (1939) 2 M L J 884; 12 R M 575; (1940) M W N 9; I L R (1940) Mad. 358 F B.

753	Maddankuri Subba Rao, <i>In re</i> ...	A I R 1940 Mad. 55; 50 L W 511 (1); (1939) M W N 1012; (1939) 2 M L J 750; 41 Cr. L J 225; 12 R M 593.
754	District Magistrate, Sultanpur v. Mr. Ramjas Yadava ...	A I R 1940 Oudh 178; 1940 O L R 40; 41 Cr L J 233; 12 R O 280.
755	Mammili Kunhi Raman Kitavu, Karnavan and Manager of Thavashi v. Vengilleri Thananoheri Kunhi Karanavan Kitavu ...	A I R 1940 Mad. 80; 50 L W 676; (1939) M W N 1136; (1939) 2 M L J 757; 12 R M 579.
756	Lachhmi Narain v. Musaheb Ali ...	A I R 1940 Oudh 214; 1940 O L R 42; 1940 O W N 80; 1940 R D 60; 12 R O 259.
757	Maung Aye Maung v. A Scott & Co. ...	A I R 1940 Rang. 1; 1939 Rang. 619; 12 R Rang. 225 F B.
765	Ramchand Virmal v. Lilaram ...	A I R 1939 Sind 291; 12 R S 175.
766	Shantranji Ji v. Deputy Commissioner, Manager, Court of Wards, Mahewa Estate, Kheri ...	A I R 1940 Oudh 183; 1940 O W N 26; 1940 O L R 46; 1940 R D 26; 12 R O 261.
767	Bhairo Kumar v. Markande Gir ...	A I R 1939 All. 679; (1939) A L J 620; 1939 R D 444; 12 R A 347; I L R (1939) All. 822.
768	Perumal Mooppan v. Subramania Mudaliar ...	A I R 1939 Mad. 299; (1939) 1 M L J 74; (1939) M W N 1115 (2); 12 R M 588.
769	Harballav Prasad Chowdhury v. Jagballav Prasad Chowdhury ...	A I R 1940 Pat. 7; 18 Pat. 777; 20 P L T 859; 6 B R 248; 12 R P 416.
771	Hardwari Lal v. Ohhotey Lal ...	A I R 1940 Oudh 205; 1940 O L R 18; 1940 O W N 146; 12 R O 262.
772	Noor Bibi v. Municipal Committee, Ambala City ...	A I R 1939 Lah. 453; 12 R L 319; 42 P L R 109.
773	Ramsagar Yadav v. M. Yunus ...	A I R 1940 Pat. 32; 20 P L T 712; 6 B R 250; 41 Cr. L J 234; 12 R P 451.
774	Har Govind Prasad v. Mahraj Kunwar ...	A I R 1940 Oudh 231; 1940 O W N 123; 1940 O L R 50; 1940 R D 62; 12 R O 263.
778	Official Assignee, Karachi v. Dhanoomal Mohanlal ...	A I R 1939 Sind 361; (1940) Kar. 235; 12 R S 177.
760	Zalliram v. Mangalsingh ...	A I R 1939 Nag. 302; 1939 N L J 477; 12 R N 173.
783	Ram Sarup Singh v. Mohan Singh ...	A I R 1939 All. 672; I L R (1939) All. 713; (1939) A L J 678; 1939 R D 485; 12 R A 348.
788	Ram Kumar Ram Saraff v. Mohan Lal Maharaj ...	A I R 1940 Pat. 270; 6 B R 256; 21 P L T 363; 12 R P 421.
791	Govind Ram v. A. U. John ...	A I R 1939 All. 668; (1939) A L J 675; 1939 R D 372; 12 R A 353.
793	Asian Assurance Co., Ltd. v. Asa Ram ...	A I R 1940 Oudh 212; 1940 O W N 149; 1940 O L R 62; 12 R O 266.
795	Paragji Bhulabhai v. Bhagwanji Bawabhai ...	A I R 1940 Bom. 14; 41 Bom. L R 1231; 41 Cr. L J 245; 12 R B 311.
796	Firm Harechandrai Anandram v. Firm Kedarnath Nirmal Ohandra Guha ...	A I R 1940 Pat. 353; 6 B R 259; 12 R P 418.
799	Murari Lal v. Emperor ...	A I R 1940 All. 3; (1939) A L J 1037; 41 Cr. L J 236; 12 R A 372.
801	Kishori Lal v. Governor-in-Council, Punjab ...	A I R 1940 F O 4; (1939) Kar. F O 191; 6 B R 336; 1940 O L R 100; (1940) M W N 180; 71 O L J 108; 12 R F O 17 F C.
802	Ah Li v. U San Baw ...	A I R 1939 Rang. 446; 1939 Rang. 581; 12 R Rang. 232.
804	Brij Raj Kumari v. Subh Karan Das ...	A I R 1940 F O 5; 6 B R 333; (1939) Kar. (F O) 190; 1940 O L R 97; 71 O L J 86; 12 R F O 21 F C.
805	Firm Ruldu Ram-Daulat Ram v. Basant Ram ...	A I R 1939 Lah. 356; 41 P L R 809; 12 R L 321.
807	Krishna Vitnak Mahar v. Shankar Krishna Gandhi ...	A I R 1939 Bom. 419; 41 Bom. L R 863; 12 R B 269.
808	Jannatun-Nissa Begam v. Parshadi ...	A I R 1940 All. 28; (1939) A L J 1014; 12 R A 355.
809	Hassan Bi v. Nek Alam ...	A I R 1940 Lah. 9; 41 P L R 678; 12 R L 320.
811	Rai Kissenji v. Sri Kissen Mackar ...	A I R 1940 Cal. 26; I L R (1939) 2 Cal. 370; 12 R C 415.
813	Ajam Ibram Modan v. Bai Hava Bibi ...	A I R 1939 Bom. 485; I L R (1939) Bom. 472; 41 Bom. L R 892; 12 R B 266.
816	Raja Singh v. Ohaichoo Singh ...	A I R 1940 Pat. 201; 6 B R 262; 20 P L T 957; 12 R P 423.

819	Ismail Piperdi v. Momin Bi Bi	...	A I R 1940 Rang. 12; 1939 Rang. 668; 12 R Rang. 234 F B.
821	Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan v. Ahmedabad Advance Mills Ltd.	...	A I R 1940 P O 36; 51 L W 61; (1940) A L J 63; 6 B R 334; 12 R P O 174; 1940 O L R 98; (1940) 1 M L J 137; (1940) M W N 115; 44 O W N 379; 21 P L T 177; 42 Bom. L R 318; 71 O L J 156; (1940) Kar (P O) 97 Sup; 67 I A 115, I L R (1940) Bom. 332; 42 P L R 464 P C.
824	Muthuswami Chettiar, <i>In re</i>	...	A I R 1940 Mad. 23; 50 L W 802; (1939) M W N 1209; 41 Cr. L J 233; (1940) 1 M L J 11; 12 R M 584; I L R (1940) Mad. 335 F B.
828	Dharmon v. Ran Singh	...	A I R 1939 Lah. 563; 41 P L R 620; 12 R L 323.
829	Emperor v. Taduturu Poligadu	...	A I R 1940 Mad. 12; (1939) M W N 873; 50 L W 437; 41 Cr. L J 242; 12 R M 612.
832	Nebhandas Hollaram v. Emperor	...	A I R 1939 Sind 337; (1940) Kar. 91; 41 Cr. L J 246; 12 R S 192.
834	T. H. Chandler v. Mrs. A. Chandler	...	A I R 1939 All. 696; (1939) A L J 572; 12 R A 358; I L R (1939) All. 819.
835	Dolaram Aratmal v. Mulomal Radhakishindas	...	A I R 1939 Sind 272; 12 R S 181.
837	Ahmad Hussain v. Amir Bano	...	A I R 1940 All. 63; 12 R A 356.
839	Dattatraya Vishnu Dabholkar v. Sadashiv Shivram Nisal	...	A I R 1939 Bom. 513; 41 Bom. L R 882; 12 R B 271.
843	Ladli Parshad v. Ohaman Lal	...	A I R 1939 Lah. 473; 41 P L R 632; 12 R L 324; I L R (1940) Lah. 231.
845	Khemchand Ramdas Wadhwa v. Mathradas Girdharidas	...	A I R 1939 Sind 289; (1940) Kar. 41; 12 R S 179.
847	Lee Shi v. Consolidated Tin Mines of Burma Ltd.	...	A I R 1939 Rang. 428; 12 R Rang. 237.
850	V. V. Vythilingam Pillai v. Seshan	...	A I R 1939 Mad. 477; 49 L W 103; (1939) 1 M L J 416; (1939) M W N 295; 12 R M 580.
852	Prabhavati Devi v. Mrs. Lila Singh	...	A I R 1940 Pat. 75; 20 P L T 796; 6 B R 267; 12 R P 428.
854	Babu Govind Das v. Indrawati	...	A I R 1940 All. 38; (1939) A L J 919; 12 R A 359; I L R (1940) All. 11.
857	Ramdeyal Babu Lal Firm v. Lakhu Sao	...	A I R 1940 Pat. 58; 20 P L T 768; 6 B R 270; 12 R P 427.
858	Banwari Lal v. Hussaini	...	A I R 1939 Lah. 455; 41 P L R 457; 12 R L 336.
861	Chiranji Lal v. Ohheda Lal	...	A I R 1940 All. 8; (1939) A L J 1040; 12 R A 362.
865	Indu Prova Debi v. Durga Oharan Mitra	...	A I R 1940 Pat. 40; 20 P L T 757; 18 Pat. 828; 6 B R 274; 12 R P 436.
870	Ahmed Ibrahim Singapori v. Collector of Surat	...	A I R 1939 Bom. 447; I L R (1939) Bom. 611; 41 Bom. L R 934; 12 R B 278.
871	Dhirendra Nath Das v. Indra Chandra Kisriwala	...	A I R 1939 Cal. 578; 12 R O 418.
874	Tarabai Shriniwas Naick Guttal v. Murtagharya Anantacharya	...	A I R 1939 Bom. 414; I L R (1939) Bom. 576; 41 Bom. L R 924; 12 R B 275.
877	Salig Ram v. Oharan Daas	...	A I R 1939 Lah. 492; 41 P L R 610; 12 R L 329.
880	Sripat Singh Dugar v. Mohini Sundari	...	A I R 1939 Cal. 626; I L R (1939) 2 Cal. 440; 12 R O 420.
881	Nandlal Rampratap v. Deorao	...	A I R 1940 Nag. 94; 12 R N 178.
883	Singaram v. S. P. R. Somasundaram	...	A I R 1939 Rang. 444; 12 R Rang. 241.
884	Mrs. N. A. Alexander v. M. S. Jalil	...	A I R 1940 Oudh. 279; 12 R O 274; 1940 O L R 71; 1940 O W N 139.
888	Janba v. Manno	...	A I R 1939 Nag. 312; 1939 N L J 486; 12 R N 177.
889	Lyallpur Bank, Ltd. v. Ramji Das	...	A I R 1940 Oudh. 237; 1940 O W N 132; 1940 O L R 75; 12 R O 270.
893	Secretary, Municipal Committee, Nagpur v. Ramchandra	...	A I R 1940 Nag. 174; 12 R N 179.
894	Sardar Khan v. Mohammad Akram Khan	...	A I R 1939 Lah. 560; 12 R L 336.
895	Bhawani Shankar v. Mohammad Hasan	...	A I R 1940 Oudh. 182; 1940 O W N 167; 1940 O L R 79; 12 R O 269.

TABLE

OF

Cases Overruled and Reversed In Volume 185 of Indian Cases, 1940.

Abdul Wahad v. Emperor, 78 Ind. Cas. 97; 23 Cr. L J 97 (Overruled)	...	208
Anant Potdar v. Mangal Potdar, 4 Pat. 704; 91 Ind. Cas. 483; A I R 1926 Pat. 27; 7 P L T 291 (Overruled)	...	480 F B
J. N. Surty v. T. S. Chettyar Firm, 4 R 265 at p. 288; 98 Ind. Cas. 417; A I R 1927 Rang. 20; 5 Bur. L J 187 (Overruled)	...	819 F B
Khaji Dodda Khaji Sahib v. Ohigamalla Nanjappa, 169 Ind. Cas. 359 (Reversed)	...	554
Kola Surayya v. Kola Subbamma, 53 M L J 677; 108 Ind. Cas. 863; A I R 1928 Mad. 42; (1927) M W N 911 (Overruled)	...	749 F B
Māgan Behari I al v. Ram Pratap Singh, (1939) A L J 405; 184 Ind. Cas. 160; A I R 1939 All. 535; I L R (1939) All. 568; 12 R A 183 (Overruled)	...	113 S B

GENERAL INDEX

INDIAN CASES 1940, Volume 185 JOURNAL SECTION

ARTICLES.

	Page.		Page.
Absence of Covenants for Title, &c.	2	Enemy Aliens	6
Aliens and Enemy Aliens	5	Forfeiture of Bankruptcy	1
Appeal after Plea of Guilty	17	Punch and the Police	29
Cattle on the Highway	33	Recitals in Deeds	7
Character Training Centres	21	Sandbags	37
Consent to Assault	18	The Effect of Discharge	2
Duties of Hotel-keepers	6		

EXTRACTS FROM CONTEMPORARIES

A Gleam of Humour	8	Making Amends	36
A Judicial Compliment to Scott	36	Notice under s. 107, Criminal Procedure Code	39
— and Crime	23	Old Scots Judges	35
Cruelty to Animals	39	Passports	32
Dangerous Ambiguities	38	Prize Courts	22
Deodands	8	— Punishment	39
Discipline and Character	23	Railways and Deodands	8
Dogs and Oats	4	Road Accidents and the Blackout	24
Don't and Do	22	Scots Judges' Other Titles	35
Evacuation and Desertion	3	Scraps of Paper	23
Fun Fairs	20	The Poor Woman's Dog	24
International Law	4	Unconscious Libel	32
Is an "Armed Merchant Ship" Legal?	40	Unusual Probation Condition	19
Legal Practitioner and Money-lending	38	— Warning	39
Limited Neutrality	4	What was a Deodand?	8

IMPERIAL ACTS

The Defence of India Act No. XXXV of 1939	9	The Insurance (Second Amendment) Act No. XLI of 1939	28
The Indian Air Force Volunteer Reserve (Discipline) Act No. XXXVI of 1939	25	The Motor Vehicles (Amendment) Act No. XL of 1939	27
The Indian Aircraft (Amendment) Act No. XXXVII of 1939	25	The Panth Piploda Courts (Amendment) Act No. XXXVIII of 1939	26
The Indian Oaths (Amendment) Act No. XXXIX, of 1939	28	The Workmen's Compensation (Second Amendment) Act No. XLII of 1939	28

REVIEWS

Broom's Legal Maxims, Tenth Edition	20	Laws of India or Civil Practice, Volume 1	20
-------------------------------------	----	---	----

INDIAN CASES

1940

VOLUME—185

FEDERAL COURT

Appeal from the High Court at Patna
October 9, 1939

GWYBE, O. J., SULAIMAN AND
VARADACHARIAR, JJ.

RAMNANDAN PRASAD NARAIN
SINGH AND ANOTHER—APPELLANTS

versus

Kulpati Shri Mahanth

GOSHWAMI MADHWANAND RAMJI—
RESPONDENT

*Bihar Money-lenders Act (III of 1938), ss. 16, 11—
Appeal relating to claim under s. 16 is maintainable
and order of High Court relating to s. 11 can also be
dealt with in such appeal.*

An appeal to the Federal Court is maintainable so far as it relates to the appellants' claim under s. 16 of the Bihar Money-lenders Act of 1938 (now s. 13 of the Act of 1939) and the order of the High Court so far as it relates to s. 11 of the Act of 1938 (now s. 7 of the Act of 1939) can also be dealt with in such an appeal, as in estimating the value of the attached properties, the amount due on the mortgage has to be ascertained. *Shyamakant Lal v. Rambhajan Singh* (2), followed. [p. 3, col. 1.]

Sulaiman, J.—This is an appeal by the judgment-debtors arising out of proceedings in execution of a simple money decree, dated March 11, 1935 (confirmed on appeal by the High Court on January 6, 1938) for about Rs. 15,000 passed on the basis of two promissory notes dated October 6, 1931, on which date a mortgage deed for Rs. 42,000 was also executed in favour of the creditor.

On September 12, 1938, the judgment-debtors filed an application under ss. 11 and 16 of the Bihar Money-lenders Act (Act III of 1938); also purporting to be an objection under s. 47, Civil Procedure Code. Their complaint was that in the execution case the properties were attached and sought to be sold "subject to the said mortgage lien". They urged that in view of the provisions of s. 11 of the Bihar Act the amount claimed to be due under the

mortgage deed was not in fact due, and so the properties could not be sold subject to that lien, and should therefore be valued free from that lien. The reply, dated November 5, 1938, filed by the decree-holder was to the effect that inasmuch as s. 16 of the Bihar Act had been declared null and void, no inquiry into the valuation of the properties could be made and the objection should, therefore, be dismissed.

The learned Subordinate Judge understood the objection to mean that the value of the properties should be assessed and that it be declared that the mortgage deed subject to which the decree-holder wanted to sell the same, should be held to have been satisfied on account of the provisions of s. 11 of the Provincial Act. As regards the validity of s. 16, after pointing out that under O. XXI, r. 17 of the Code in the case of a decree for payment of money the value of the property shall, as nearly as may be, correspond to the amount due under the decree, he held the section to be void because of the ruling in *Vishwanath Narain Singh v. Mahant Harihar Gir* (1). As regards the applicability of s. 11, he held that :

"This plea of the judgment-debtors cannot be entertained in these proceedings as the validity or satisfaction of the mortgage bond to which the properties are admittedly subject cannot be a matter for consideration in this execution case. The mortgage encumbrance will be notified as usual, without deciding as to the correctness of the amount said to be due under it".

He further pointed out that the judgment-debtors would later be entitled to sue for the redemption of the mortgage and show whether the mortgage money was satisfied or not.

Unfortunately the objection and the reply thereto do not make it quite clear

(1) 19 P.L.T. 760; 178 Ind. Cas. 279; A.I.R. 1939 Pat. 90; 11 B.P. 231; 5 B.R. 73; 17 Pat. 714.

whether the sale had been ordered "subject to the mortgage" as contemplated by O. XXI, r. 62, Civil Procedure Code, or whether the previous mortgage had been merely notified as contemplated by r. 66 of that order. The learned Counsel for the appellants has, however, conceded that there had been no adjudication under r. 62. The order of the Subordinate Judge also made it clear that the mortgage was to be merely notified.

The judgment-debtors appealed to the High Court and again raised the question of the applicability of ss. 11 and 16 of the Bihar Act. Section 11 had presumably been invoked for the purpose of getting the true value of the property estimated under s. 16. The High Court felt bound by its two previous decisions holding that these sections were void, and summarily dismissed the appeal.

As regards the applicability of s. 16, I expressed the view in *Shyamkant Lal v. Rambhajan Singh* (2) which had turned solely on that section, that the order of the High Court relating to it was not a final order within the meaning of s. 205 (1) of the Government of India Act. As in that case the new Act, of which the appellants wanted to take advantage in the appeal instead of relying upon it later in the first Court, had come into force after the appeal had been filed, I preferred to base my conclusions both on the ground that the repugnancy had been removed by the assent of the Governor-General to the new Act and that s. 16 had not in fact been repugnant to O. XXI, r. 66, Civil Procedure Code, as amended by the Patna High Court. I am now bound by the opinion of the majority that an appeal lies even from the order of the High Court under s. 16 of the Provincial Act.

As regards an order under s. 11 of the Act, there can be no doubt that when passed, it would involve a determination of the right of the decree-holder and the liability of the judgment-debtor, and such a determination being embodied in the decree passed in the suit would be a judgment within the meaning of s. 205 of the Government of India Act and of course also a decree. The difficulty which I feel in this case is that the stage for a decree in conformity with s. 11 has not yet arrived as no suit for the enforcement of the mortgage has yet been filed.

(2) (1939) F O R 193; 182 Ind. Cas. 161; A I R 1939 F O 74; 1939 O L R 399; 12 R. F O 1; 5 B R 756; 20 P L T 473; (1939) M W N 674 (F O)

If all that has happened in the execution proceedings is that the decree-holder has asked that his previous mortgage should be notified, and accordingly the proclamation of sale merely announces the existence of that encumbrance and there has been no determination by the execution Court under O. XXI, r. 62, Civil Procedure Code, that the property is really subject to such mortgage, then the order would not be any final order in the case, much less a judgment or a decree. I would then be inclined to hold that such an order in itself could not be the subject-matter of an appeal either to the High Court, or to the Federal Court. On the other hand, had the execution Court held that the attached properties were subject to the mortgage, and should be sold subject to the subsisting charge, and the judgment-debtors' objection has been thrown out on the ground that they cannot avail themselves of the provisions of s. 11 because they are void, then there might be a determination of a question between the decree-holder and the judgment-debtors within the meaning of s. 47, Civil Procedure Code, in which case the order would be a decree within the meaning of s. 2, Civil Procedure Code or at any rate a final order within the meaning of s. 205 of the Government of India Act. The order declaring the validity of the mortgage might then be final and binding on the judgment-debtors in a suit for redemption that they may bring or any suit that may be brought by the mortgagees hereafter. If, however, the appeal lies because of the order under s. 16, then the validity of s. 11 can be equally considered under s. 205 (2) of the Government of India Act, specially as in estimating the value of the mortgaged properties the amount due on the mortgage has to be ascertained.

I am inclined to think that the provisions of s. 11 affected "the jurisdiction and powers", of the Courts both with respect to "Contracts" or "Transfer of property" (List III Nos. 10 or 8 and 15) and "Money-lending" (List II Nos. 27 and 2). But the repugnancy to the existing Indian Laws has been cured by the Governor-General's assent to the new Act, which re-enacted the same provisions in s. 7.

Gwyer, C. J.—The material facts have been set out in the judgment which has just been delivered.

The case is clearly governed by the decision of this Court in *Shyamkant Lal v. Rambhajan Singh* (2) both as regard

the maintainability of the appeal and as to the order to be passed. According to that judgment, the relief which the appellants claimed in the Courts below under ss. 16 and 17 of the Bihar Money-lenders Act, 1938 (No. III of 1938), is now available to them under ss. 13 and 14 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (No. VII of 1939), the validity of which there is no ground for questioning.

The decree-holder sought to have the appellants' properties sold subject to a mortgage which he held over them; and in the Courts below the appellants claimed that in calculating the amount due to the decree holder under the mortgage they should have the benefit of s. 11 of the Act 1938. As s. 11 has now been re-enacted as s. 7 of the Act of 1939, the appellants are entitled to claim the benefit of this provision in the new Act when the executing Court proceeds under s. 13 to determine the value of the properties to be sold. In these circumstances, it appears to my brother Varadachariar and myself unnecessary to consider whether or not s. 11 of the Act of 1938 was void and we express no opinion upon it.

It is, in our opinion, equally unnecessary to decide whether this appeal would have been competent if it had not raised the question under s. 16 of the Act of 1938. We agree that, according to the previous decision of this Court, the appeal is maintainable so far as it relates to the appellants' claim under s. 16 of the Act of 1938 (now s. 13 of the Act of 1939) and we also agree that if the appeal is to this extent competent, the order of the High Court so far as it relates to s. 11 of the Act of 1938 (now s. 7 of the Act of 1939) can also be dealt with in this appeal, as in estimating the value of the attached properties the amount due on the mortgage has to be ascertained.

The case will be remitted to the High Court with a direction to discharge their order dated February 9, 1939, and the lower Court's order dated November 18, 1938, and to give liberty to the appellants to file an application under s. 13 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939.

There will be no order as to costs.

s. *Order accordingly.*

MADRAS HIGH COURT

Criminal Revision Case No. 673

of 1938

(Criminal Revision Petition No. 641 of 1938)

January 6, 1939

PANDRANG, Row, J.

In re KRISHNA IYER—PETITIONER

Madras Prevention of Adulteration Act (III of 1918), ss. 5 (1), 20—Rules under s. 20—Rr. 16, 18, 22—Charge under s. 5 (1) not specifying whether milk in question was cow's or buffalo's—Certificate of analysis based on assumption that it was buffalo's—Sample found to contain 3½ per cent. of milk fat—Offence held not established.

The accused had been convicted of an offence punishable under s. 5, cl. 1 (d) of the Madras Prevention of Adulteration Act. The charge was that he sold milk below the standard of purity prescribed by Government. The charge did not state whether it was buffalo's milk or cow's milk that was said to have been sold by him contrary to law. The certificate of analysis by the Government Analyst was to the effect that the sample contained 60.5 parts of genuine milk, 35.0 parts of added water and 4.5 parts of cane sugar in a total of 100 parts. This opinion was based on the assumption that the milk that was sent as sample that is the milk that was sold by the petitioner, was sold as buffalo's milk. There was no basis for this assumption that it was buffalo's milk that was sold. The sample was found to contain 3½ per cent of milk fat. There was nothing to show that the quantity of solid found was below the prescribed minimum;

Held, that the sample in this respect of which the offence was said to have been committed must be dealt with as if it were cow's milk that was offered for sale or sold. The minimum percentage of milk fat was only 3 per cent. under r. 16. The sample contained 3½ per cent milk fat. It could not therefore be said that the sample was below the minimum prescribed so far as milk fat was concerned. R. 18 did not apply and the offence had not been established.

Or. R. P. under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Vellore, in Or. App. No. 13 of 1938.

Mr. V. Rajagopala Mudaliar, for the Petitioner.

Mr. K. Venkatraghavachari, for the Crown.

Order.—The petitioner has been convicted of an offence punishable under s. 5, cl. 1 (d) of the Madras Prevention of Adulteration Act (III of 1918). The charge is that he sold milk below the standard of purity prescribed by Government. The charge that was framed against the accused did not state whether it was buffalo's milk or cow's milk that was said to have been sold by him contrary to law. The certificate of analysis in this case by the

Government Analyst is to the effect that the sample contained 60.5 parts of genuine milk, 35.0 parts of added water and 4.5 parts of cane sugar in a total of 100 parts. But this opinion as to the composition of the sample was based according to the certificate on the fact that the sample contained only 3.4 per cent. milk fat and only 0.321 per cent. nitrogen and 4.5 per cent. cane sugar where as it is laid down in G.O. No. 1867 P. H. dated September 1, 1932, that genuine milk contains at least 4.5 per cent. milk fat and at least 0.53 per cent. nitrogen. It is obvious, therefore, that this opinion was based on the assumption that the milk that was sent as sample that is the milk that was sold by the petitioner, was sold as buffalo's milk. There is no basis for this assumption that it was buffalo's milk, that was sold. The evidence of the Sanitary Inspector is also to the effect that he merely asked for a cup of milk and it was given to him. He does not say that he asked for any particular kind of milk, cow's or buffalo's. Rule 22 of the rules framed under s. 20 of the Act by the Government provides that "where milk is sold or offered for sale without any indication as to whether it is derived from the cow or the buffalo, the provision of rr. 16, 17 and 18 shall apply thereto in all respects as if it were cow's milk sold or offered for sale. It is, therefore, clear in this case that the sample in this respect of which the offence is said to have been committed must be dealt with as if it were cow's milk that was offered for sale or sold. The minimum percentage of milk fat is only 3 per cent. under r. 16. The sample contained 3.4 per cent. milk fat. It cannot therefore be said that the sample was below the minimum prescribed so far as milk fat is concerned. It is contended, but there is no evidence to show, that the quantity of solid found in the sample was below the prescribed minimum. Rule 18 does not seem to apply to this case in view of the note that is found below r. 21. In these circumstances it must be held that the offence has not been established in view of the analysis which is relied upon by the prosecution. The conviction and the sentence imposed upon the petitioner are therefore set aside and he is acquitted and the fine, if paid, must be refunded to him.

N.D.

Conviction set aside.

FEDERAL COURT

Appeal from the High Court at Patna

October 12, 1939

GWYER, C. J. SULAIMAN AND

VABADACHARIAR, J.J.

RAM PRATAPJI—APPELLANT

versus

HARI KISHAN DASS AND OTHERS

—RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 13—S. 13 which re-enacts s. 16 of Bihar Money-lenders Act (III of 1938), is valid.

The Bihar Money-lenders (Regulation of Transactions) Act VII of 1939, re-enacting in s. 13, s. 16 of the Bihar Money-lenders Act, 1938, is perfectly valid. *Shyamkant Lal v. Rambhajan Singh* (2), followed.

Judgment.—In this case, a mortgage decree was obtained against the appellant on July 1, 1935, for a sum of Rs. 14,599-6-11. The respondents in this Court having applied for execution of the decree in the Court of the Subordinate Judge, Gaya, the appellant filed an application under ss. 16 and 17 of the Bihar Money-lenders Act, 1938 (No. III of 1938), for fixing the value of the mortgaged property and for deciding which portion of the property should be sold in order to satisfy the decree. But a Division Bench of the Patna High Court had already held these sections to be void under s. 107 of the Constitution Act, as being repugnant to an existing Indian Law; *Vishwanath Narayan Singh v. Mahanth Harihar Gir* (1). The Subordinate Judge accordingly, on November 17, 1938, dismissed the application, and an appeal to the High Court was dismissed on the same grounds, on February 6, 1939, since that date, the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (No. VII of 1939), has been passed re-enacting in s. 13, s. 16 of the Act of the previous year. This Court in *Shyamkant Lal v. Rambhajan Singh* (2), held in similar circumstances that it was unnecessary to go into the question whether any of the sections in the earlier Act were void, since the Act of 1939 having been reserved for consideration of the Governor-General and having received His Excellency's assent, could not now be questioned in any Court. We therefore allow the present appeal. The case will be remitted to the Patna High Court with a direction to discharge the order of February 6, 1939, and the order of the Subordinate Judge dated November 17, 1938, and to give

(1) A.I.R. 1939, Pat. 90; 178 Ind. Cas. 279; 19 P. L. T. 760; 11 R. P. 231; 5 B. R. 73; 17 Pat. 714.

(2) (1939) F. O. R. 193; 182 Ind. Cas. 161; A.I.R. 1939 F. O. 74; 1939 O. L. R. 399; 12 R. F. O. 1; 5 B. R. 756; 20 P. L. T. 473; (1939) M. W. N. 674 (F. C.).

the appellant liberty to make such applications as he may be advised under the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (No. VII of 1939). There will be no order as to costs.

B. *Order accordingly.*

ODDH CHIEF COURT

Miscellaneous Appeal No. 50 of 1937

October 24, 1939

ZIA-UL HASAN AND HAMILTON, JJ.

*SHAMBHOO DAYAL AND OTHERS

—DEBTORS—APPELLANTS

versus

KUNDAN LAL—CREDITOR—

RESPONDENT

U. P. Encumbered Estates Act (XXV of 1934), ss. 4, 9 (5) (a)—Joint debtors who have not joined in making application under s. 4 must be made parties—Subsequent transferees of mortgaged property made parties to mortgage suit and decree passed—Transferees, whether joint debtors with mortgagors.

Section 9 (5) (a) of the U. P. Encumbered Estates Act makes it compulsory that joint debtors, who have not joined in making the application under s. 4, should be made parties to proceedings before the Special Judge. The definition of debt in s. 2 (a) covers a decretal debt also so that where in a mortgage suit the subsequent transferees from the mortgagors are made parties and a decree is passed against them, the transferees must be deemed to be joint debtors with the mortgagors and in an application under s. 4 by the mortgagors, the transferees must be made parties to the proceeding.

Misc. A. against the order of the Special Judge, First Grade, Lucknow, dated April 27, 1937.

Mr. D. P. Khare, for the Appellant.

Mr. P. L. Verma, for the Respondent.

Judgment.—This is an appeal under s. 45 of the Encumbered Estates Act. The appellants, who are father and sons, filed an application under s. 4 of the Act impleading Lala Kundan Lal, respondent, as the creditor-opposite party. Lala Kundan Lal filed a written statement in which he stated that he had obtained a decree on his mortgage and also contended that all those persons who were parties to the decree in his favour as judgment-debtors were also necessary parties to the present application under s. 4 of the Encumbered Estates Act. On this objection the learned Special Judge ordered that all the persons named by the respondent-opposite party in para 9 of his written statement should be made parties to the case before him, and directed the

applicants (the appellants) to take necessary steps for the purpose. It is against this order of the learned Special Judge that the present appeal has been brought.

It is conceded before us that the persons ordered by the Court below to be impleaded in the case are subsequent transferees of the property mortgaged to the respondent. It is argued that s. 9 (5) of the Encumbered Estates Act does not contemplate the inclusion of subsequent transferees of a mortgaged property in the expression "joint debtors" but that it refers to those persons only who have borrowed money jointly and are consequently personally responsible to re-pay the debt. We are unable to accept this argument. Under s. 2 (a) "debt" includes any pecuniary liability except liability for unliquidated damages. The definition, therefore, covers a decretal debt also so that the persons mentioned in para. 9 of the respondent's written statement must be deemed to be joint debtors with the present appellants, and as such, the Special Judge shall have to apportion the debt among them. In fact it appears to us that s. 9 (5) (a) of the Act makes it compulsory that joint debtors, who have not joined in making the application under s. 4, should be made parties to proceedings before the Special Judge and so it was incumbent on the learned Judge to make the order that he did when it was brought to his notice that persons other than the applicants were parties to the respondent's decree as judgment-debtors.

It was argued that under s. 18 of the Act the effect of the decree to be passed by the Special Judge would be to extinguish the mortgage previously held by the opposite party respondent, so that the decree which will be given to him by the Special Judge will be a simple money decree and as the other judgment-debtors of the respondent's decree were not parties to the original loan, they would not be affected by the decree to be passed by the Special Judge. No doubt the decree of the Special Judge is to be deemed a simple money decree but it will have to be executed in relation to the same mortgaged property and this being so, it is necessary that those persons who are interested in the property as subsequent transferees should be made parties to the proceedings under the Act and it is, we think, on this principle that s. 9 (5) (a) has been enacted.

It was also sought to show that while the respondent will not be prejudiced by

the persons mentioned in the Court's order not being impleaded, the applicants-appellants will suffer loss by their being made parties. We think, however, that it is not necessary to consider what would be the effect of the said persons being made parties on the applicants' interests when it is perfectly clear that under s. 9 (5) (a) of the Act, it is imperative that they should be made parties.

The appeal is without force and is dismissed with costs.

E.

Appeal dismissed.

CALCUTTA HIGH COURT
Appeals Nos. 266 to 268 of 1937
November 21, 1938

SEN, J.

MON MOHAN BHATTACHARJEE
AND OTHERS—DEFENDANTS—APPELLANTS
versus

BIDHU BHUSAN DUTTA

AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Schools of law—Mitakshara—How far to be considered authority in Bengal—Debts—Legal necessity—Debts incurred for marriage of male member, whether for necessity—Marriage—Sanskara includes marriage—Alienation—Sale of minor's property without legal necessity—Whether void or voidable—Sale not set aside by minor—Transferee from him, if acquires right to sue—Transfer of Property Act (IV of 1882), s. 6 (e)—Sale of minor's property—Purchaser in possession—Minor has merely right to sue—Limitation Act (IX of 1908), Sch. I, Art. 44—Right to question sale is personal one of minor and cannot be exercised by his transferee.

Although the Dayabhaga School of Law prevails in Bengal nevertheless the Mitakshara is to be considered as very high authority in Bengal on all questions in respect of which there is no conflict between it and the Dayabhaga. [p. 9, col. 1.]

Under the Hindu Law the entire joint family property is liable for the debts reasonably incurred for the marriage of a male member thereof. *Gopala Krishnamaraju v. Venkatanarasa Raju* (1) and *Sundar Bai v. Shiv Narayana* (3), relied on. *Ramjas Agarwalla v. Chand Mondal* (3), referred to.

The term *sanskara* includes the sacrament of marriage.

The sale by the natural guardian of a Hindu minor of the minor's property when there is no legal necessity for such sale is not void but voidable and is valid until set aside. The minor on attaining majority has the right to have the sale set aside and he must do so within the period fixed by Art. 44, Limitation Act. Until the sale is set aside, the minor's interest in the property amounts merely to a right to sue and therefore a transferee from him does not get anything. [p. 9, col. 2.]

Where a minor's property is sold and the purchaser goes into possession and is still in possession,

all the interest which the minor has in the property is a mere right to sue to get the sale set aside and the transfer of such a right is prohibited by s. 6 (e), Transfer of Property Act. [*ibid*]

The right to question the validity of the sale is a personal right of the minor which can be exercised by him on attaining majority. The purchasers from minor do not acquire this right by their purchase of property from him. *Jhaverbhai Hathibhai v. Babhai Becher* (4), referred to.

Dr. Radha Benode Pal and Mr. Shyama Pada Majumdar, for the Appellants.

Mr. Bijali Bhushan Sanjal (in Nos. 266 and 268) and Mr. Jyotirindra Nath Das, (in No. 267) for the Respondents.

Judgment.—These are three appeals by some of the defendants in three suits for the declaration of the plaintiffs' title to certain plots of land and for ancillary reliefs. The suits were numbered 949, 950 and 951 of 1934 and were tried together by the Munsif, Second Court, Krishnagar, who decreed them in favour of the plaintiffs. On appeal the learned Subordinate Judge upheld the decision of the trial Court making certain modifications in the decree passed with respect to Suit No. 949 of 1934. The defendants have now appealed to this Court. The appeals were taken up for hearing together and this judgment shall govern the three appeals. At the outset the learned Advocate for the appellants stated that he could not press the appeals arising out of suits numbered 949 and 950. They are Second Appeals Nos. 266 and 268, respectively. These appeals are accordingly dismissed with costs in favour of the appearing respondents.

In Suit No. 951 of 1934 out of which Second Appeal No. 267 arises the plaintiff's case briefly is as follows: There were two cousins Hari Mohan and Hari Nath who had an eight annas share each in certain property which they had inherited from their ancestors. These two cousins separated in mess and property. Hari Mohan died leaving three sons Nut Behari, Pralhad and Dhruba. Nut Behari married Malatimala who is defendant No. 3. He died leaving two sons Ramani Mohan and Abani Mohan who are defendants Nos. 1 and 2, respectively. Pralhad married Satya Kumari, defendant No. 10, and had two sons Murari and Mani Mohan who are defendants Nos. 8 and 9, respectively. Dhruba married Charusila, Dhruba predeceased his brothers leaving Charusila a childless widow. Hari Nath died leaving

as his heirs two grandsons Mohini Mohan and Debendra by his daughter as his heirs. They are defendants Nos. 6 and 7, respectively. The plaintiff's suit is concerned with the eight annas share of the property which belonged to Hari Mohan. Dhruba inherited a one-third share in this property. On his death his widow Charusila sold this one-third share to defendant No. 10 Satya Kumari, the wife of Pralhad, for legal necessity. Nut Behari and Pralhad then separated and Nut Behari held his one-third share in the property separately. After Pralhad's death, Satya Kumari and her two sons Murari and Mani Mohan together had a two-third share in the property of Hari Mohan. The plaintiff, by three *kobalas* Exs. 6, 6-a and 6-b purchased certain plots of land appertaining to this two-third share. This was in *Falgun* and *Chaitra* 1335 B. S. corresponding to February and March 1929 and in *Baisakh* 1336 B. S. corresponding to April and May, 1929. The *kobalas* were executed by Murari on his own behalf and by Satya Kumari for self and as guardian of her minor son Mani Mohan (defendant No. 9). In the *kobala* Ex. 6 (a) it was recited that the sale was effected to raise funds to meet the current family expenses and to pay off certain debts. In the *kobalas* Exs. 6 and 6 (b) it is stated that the property was sold to raise money to meet the marriage expenses of Murari, the adult male son of Satya Kumari. After the sale the plaintiff possessed the land peacefully till 1340 B. S. corresponding to 1933 and 1934, when some of the paddy on the land was forcibly reaped by some of the defendants. Defendant No. 6 then brought a collusive and fraudulent partition suit being Title Suit No. 1 of 1931 and had a compromise decree passed therein declaring that Hari Mohan had a seven annas share in the ancestral property and Hari Nath a nine annas share therein. The plaintiff contended that this was a fraudulent decree and that in any case it was not binding on him. He accordingly sued for a declaration of his title to the property in suit, for confirmation of his possession and for ancillary reliefs.

Various defences were taken in the trial Court, but for the purposes of this appeal, the following only need be mentioned. It was contended that Hari Mohan's share was 7 annas and not 8 annas and that this was declared in a decree passed in a partition suit; the sale by Charusila to

Satya Kumari was alleged to be invalid as there was no legal necessity for the sale; as regards the sales by defendants Nos. 8, 9 and 10 to the plaintiff, the defence was that the sale was void inasmuch as the vendors when they executed the sale deeds were fraudulently induced by the plaintiff into believing that they were executing powers-of-attorney in favour of the plaintiff. Defendants Nos. 4 and 5 claimed to have purchased some of the properties in suit from defendants Nos. 8 and 9 in the year 1933 by a *kobala* Ex. L and defendant No. 6 claimed to have purchased some of the properties in suit in execution of his decree for costs in the Partition Suit No. 1 of 1931. The trial Court held against the defendants on all points. In the lower Appellate Court an additional point was taken. It was contended that the share of defendant No. 9, Mani Mohan, was not affected by the transfers effected by the *kobalas* Exs. 6 and 6 (b). On the dates of these *kobalas* defendant No. 9 was a minor and his share was transferred by his mother, defendant No. 10, acting as his guardian in order to meet the marriage expenses of her elder son Murari (defendant No. 8) who was then a major. The argument is that under the Hindu Law the minor's property could not be made liable for such an expenditure and that therefore Mani Mohan's share was unaffected by these transfers. The lower Appellate Court concurred in the finding of the trial Court as regards the defences taken there. With respect to the new point raised, the lower Appellate Court makes the following observations :

"It is true that the eldest son's marriage expenses could not be a legal necessity, but the thing is that the mother really required money for meeting the current expenses of the joint family she was in charge of and so there was legal necessity."

The learned Subordinate Judge then goes on to say that even if it be held that there was no 'legal necessity' for the sale, the plaintiff's title should be declared for the following reasons. He points out that the sale of Mani Mohan's share was not void but voidable and that after the sale all that remained in Mani Mohan was a mere right to sue to set aside the sale and nothing more. This right the learned Judge holds is not transferable by reason of the provisions of s. 6, Transfer of Property Act, and he decided consequently that defendants Nos. 4 and 5 got nothing by the transfer. As regards defendant No. 6 the learned Subordinate Judge holds that the partition decree in execution of which

defendant No. 6. purchased part of the property was a nullity and that defendant No. 6, obtained nothing by his purchase. On these findings the learned Subordinate Judge upheld the decree of the trial Court.

It this Court the learned Advocate for the appellants stated that he would urge only one point against the decision of the lower Appellate Court and that he accepted all the other findings. The argument briefly is as follows: The share of Mani Mohan in the property left by Pralhad was not liable to meet the marriage expenses of Murari and therefore the transfers executed by Exs. 6 and 6 (b) could not affect Mani Mohan's share. The learned Subordinate Judge was wrong in holding that the money was required to meet the current expenses of the family. He was also wrong in his view that after the sales Mani Mohan had no interest left in the property except a mere right to sue to set the sales aside. It was contended that by the subsequent sale to defendants Nos. 4 and 5 by Ex. L Mani Mohan expressed his intention to avoid the sales effected during this minority and that by this subsequent sale the previous sales, so far as they affected Mani Mohan's share, were made void. On these grounds it was urged that the plaintiff's title with respect to the share of Mani Mohan in the property in suit transferred by the *kobala* 6 and 6 (b) had not been established. This in substance is the argument urged before me. Learned Advocate for the appellants had no objection to the suit being decreed with respect to the rest of the property.

In my opinion the learned Subordinate Judge was wrong in holding that the sales effected by the *kobalas* Exs. 6 and 6 (b) were for the purpose of raising money for meeting what he describes as the 'Current expenses' of the joint family. The documents recite that the money was required for meeting the expenses of the marriage of Murari and there are no materials placed before me in support of the view of the learned Subordinate Judge which is mere surmise. The question therefore which first arises for determination is whether the share of Mani Mohan in the property is liable to meet the expenses of Murari's marriage. Learned Advocate for the respondent contends that under the Hindu Law the entire joint family property is liable for the debts reasonably incurred for the marriage of a male member thereof and he referred

me to the Full Bench decision in *Gopala Krishnamaraju v. Venkatanarasa Raju* (1) and to the case in *Sundar Bai v. Siv Narayana* (2). Both these cases undoubtedly lay down the principle contended for by the learned Advocate for the respondent.

The Madras case is exactly in point. There three brothers mortgaged their joint property to raise funds to meet the marriage expenses of one of them who was an adult. One of the three brothers was a minor at the time. In a suit on the mortgage it was contended that the share of the minor brother was not bound by the mortgage. The Full Bench held that marriage is obligatory on a Hindu who does not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi and that being so, the debts reasonably incurred for the marriage of a twice born Hindu male are binding on the joint family properties.

The Bombay decision deals with the matter exhaustively. The learned Judge referred to a text of Yajnavalkya cited and expounded in the *Mitakshara* where it is laid down that in a joint Hindu family consisting of several brothers of whom some have and others have not had their sacramental ceremonies (*Sanskaras*) performed by their father during his lifetime, the former are bound to get these ceremonies performed in respect of the latter out of their joint property. The learned Judge then went on to discuss whether the term "*Sanskara*" would include the marriage ceremony of a male and after an elaborate examination of the different texts on the point concludes that it does. I respectfully agree with the view that the term "*Sanskara*" includes the sacrament of marriage. Golap Chandra Sarkar Sastri in his treatise on Hindu Law states that marriage is the last of the "*Sanskaras*" or sacramental rites that are ordained to have the effect of purifying the body specially from inherited taint, if any. (Hindu Law by Golap Chandra Sarkar Sastri Edition 7, p. 161). If joint property is liable for the debts incurred for performing the "*Sanskaras*" of a co-parcener then certainly the marriage expenses of a male co-parcener would be a liability on the joint property. Learned Advocate for the appellant in meeting this argument says that this may be the law according to the *Mitakshara* School of Hindu Law but

(1) 37 M 2/3; 17 Ind. Cas. 308; A I R 1914 Mad. 432; 23 M L J 288 (F B).

(2) 32 B 81; 9 Bom. L R 1368.

that it is not so according to the Dayabhaga School. He points out that the decisions relied on deal with persons governed by the Mitakshara. He was not able, however, to point out any text in or ruling under the Dayabhaga Law which is contrary to the view expressed in the cases mentioned above, nor have I been able to find any decision or text which would establish that the Dayabhaga lays down a different rule. There is a case decided by this Court which has, I think, some bearing on the question. I refer to the case in *Ramjas Agarwalla v. Chand Mondal* (3). In this case two brothers, one a major and one a minor, owned some property. This property was mortgaged by the major brother and his mother acting as guardian of the minor brother. The bond recited that the money was raised to meet the marriage expenses of the minor brother. The question arose whether the marriage expense of the minor constituted a legal necessity which would justify the guardian in mortgaging the property. The case in *Sundar Bai v. Shiv Narayana* (2) was referred to and Mukherjea, J. in dealing with that case said:

"It is true that marriage is a sacrament or Sanskar in Hindu Law and the only Sanskar for those who are not twice born."

He goes on to say that the Hindu Law, however, did not sanction early marriages of males and he quotes the text of Manu which says:

"Let a man of 30 years marry an agreeable girl of 12 years or a man of thrice eight years a girl of eight years, one marrying earlier deviates from duty."

Mukherjea, J. then went on to point out that the marriage of this minor was in contravention of the provisions of the Child Marriage Restraint Act of 1929 and held that such a marriage did not furnish a legal necessity. I refer to this case merely for the purpose of showing that this Court considered the Bombay decision and did not dissent from the view laid down there that the marriage expenses of a male co-parcener are to be met out of the entire joint estate. From the texts and the authorities I am of opinion that the expenses of the marriage of a Hindu male co-parcener are to be met out of the joint estate in this province as well. Although the Dayabhaga School of law prevails here nevertheless the Mitakshara is to be considered as very high authority in Bengal on all questions in respect of which there is no conflict bet-

ween it and the Dayabhaga. In this view of the law, I hold that the sales in favour of the plaintiff by Exs 6 and 6 (b) are valid and binding on the share of Mani Mohan as well on that of Murari and Satya Kumari.

This is sufficient to dispose of the appeal. I propose, however, to give my opinion on the other contention raised by the respondent, namely that even if it be held that Mani Mohan's share in the property was not liable for the debts incurred for meeting the marriage expenses of Murari nevertheless the validity of the sales could not be questioned inasmuch as Mani Mohan had not got the sales set aside and inasmuch as defendants Nos. 4 and 5 got nothing by the purchase in 1933 of Mani Mohan's share as Mani Mohan at that time had merely a right to sue which was not transferable at law. It is now well-established that the sale by the natural guardian of a Hindu minor of the minor's property when there is no legal necessity for such sale is not void but voidable and that the sale is valid until set aside. The minor on attaining majority has the right to have the sale set aside and he must do so within the period fixed by Art. 44, Limitation Act. No question of limitation arises in this case but Mani Mohan though he has attained majority has not yet had the sales set aside. The sales, therefore stand and are valid. It certainly cannot be said that the sales have been set aside merely because Mani Mohan has chosen to ignore the sales by his guardian and to sell the same property to defendants Nos. 4 and 5. It has been found by both Courts that the plaintiff went into possession after his purchase and is still in possession. In these circumstances all the interest which Mani Mohan possessed in the property was a mere right to sue to have the sale set aside. The transfer of such a right is clearly prohibited by s. 6 (e), Transfer of Property Act. The purchaser from Mani Mohan by the *kobala* Ex. L therefore, got nothing. There is an additional reason why the appellants cannot succeed. Murari, Mani Mohan and Satya Kumari who were defendants Nos. 8, 9 and 10 and who were the vendors in the sales sought to be impugned did not appeal against the decision of the trial Court. The only person who had the right to question the sale is Mani Mohan and as he has accepted the decision of the trial Court it must be taken that he has acquiesced in the sale and elected not to dispute it. The right to question the validity of the sale is

a personal right of the minor, Mani Mohan which he could have exercised on attaining majority. Defendants Nos. 4 and 5 have not acquired this right by their purchase of the property from him. In this connection I would refer to the case in *Jhaverbhai Hathibhai v. Babhai Becher* (4). In view of the findings arrived at, this appeal also must be dismissed with costs.

S. Appeals dismissed.

(4) A I R 1933 Bom. 42; 141 Ind. Cas. 808; 34 Bom. L R 1512; Ind. Rul. (1933) Bom. 165.

ODUH CHIEF COURT

Second Civil Appeal No. 312 of 1937

October 9, 1939

ZIA-UL HASAN, J.

Pandit SITLA SAHAI—PLAINTIFF—

APPELLANT

versus

Raja SRI RAM AND ANOTHER—

DEFENDANTS—RESPONDENTS

Oudh Laws Act (XVIII of 1876), ss 6, 10, 11, 13
—Pre-emption—Suit for pre-emption of part of property sold—Maintainability of—Second appeal—Question of law, if can be entertained for first time.

A suit cannot be instituted under the Oudh Laws Act for pre-emption of part of the property sold, on payment of a proportionate share of the price. *Baij Nath v Mahabir Prasad* (3), relied on.

When a question of law is raised for the first time in second appeal upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. *Abdul Hafiz v. Manohar Lal* (3), relied on.

S. O. A. against the order of the Civil Judge, Rae Bareilly, dated April 30, 1937.

Messrs. Ram Bharosey Lal and Anant Prasad Nigam, for the Appellant.

Mr. M. Wasim, for Respondent No. 1.

Judgment.—This is a plaintiff-pre-emptor's second appeal against a decree of the learned Civil Judge of Rae Bareilly upholding a decree of the learned Munsif by which he dismissed the appellant's suit for pre-emption.

The learned Counsel for the respondent vendee has contended that the appellant's suit must fail as it was for pre-emption of only part of the property purchased by his client. The certified copy of the sale-deed filed by the plaintiff-appellant shows that by that deed three items were sold. Two of these were shares in certain groves and the third was a one-sixth share in bazar Kundanganj of village Karanpur. It is the

last property that the plaintiff wanted to pre-empt by the present suit.

As the law stands in this province, it appears that the suit is clearly not maintainable. In *Raj Birendra Bikram Singh v. Brij Mohan Pande* (L. R. 61 I. A. 235) (1) their Lordships of the Judicial Committee while interpreting the Oudh Laws Act remarked :

"In the cases now under consideration, the property sold by the vendor was the whole *taluqdari mahal* containing 163 villages.

The plaintiffs in each suit claimed to pre-empt one of the said villages only. It would be absurd to suggest that they would be bound to tender the whole of the price, namely, Rs. 5,50,000 which was the price at which the vendor was willing to sell and yet there is no provision in the Act which would enable the plaintiffs to tender the amounts at which the plaintiffs valued the two villages respectively as was stated in their plaint or any amount other than the said Rs. 5,50,000. These considerations, in their Lordships' opinion, are conclusive as showing that the claims of the plaintiffs as stated in their plaint are not within the above-mentioned Act and are, therefore, not maintainable."

In *Baij Nath v. Mahabir Prasad* (1937 O. W. N. 1202) (2) a Bench of this Court held that it is not permissible under the Oudh Laws Act to pass a decree for pre-emption of part of the property sold, on payment of a proportionate share of the price.

It was contended on behalf of the appellant that the plea now raised was not taken in the Courts below and should not, therefore, be allowed to be raised in second appeal. On behalf of the respondent-vendee, I have been referred to para. 14 of the written statement. That paragraph is not very clearly worded but there can be no doubt that both the Courts below considered that by that paragraph the contesting defendants meant to raise the plea that the plaintiff was not entitled to pre-empt part of the property sold. Both the Courts while mentioning the defence of the vendees have referred to the plea that pre-emption of a portion of the property cannot be allowed. The issue framed on para. 14 of the written statement was not decided by the trial Court as it considered that the suit failed on other issues, but there can be no doubt that both the Courts took para. 14 of the written statement as pleading the bar of partial pre-emption. But even if it be supposed that the plea

(1) 61 I A 235; 151 Ind. Cas. 74; 11 O W N 843; A I R 1934 P O 153; 7 R P O 26; 67 M L J 149; 38 O W N 989; 60 O L J 143; (1934) A L J 732; 40 L W 784; 9 Luck. 407 (P O).

(2) (1937) O W N 1202; 171 Ind. Cas. 987; 10 R O 151; 1937 O L R 584; A I R 1938 Oudh 37.

was not raised by the defendants in the Court below, it seems to me that there is no bar to its being entertained in second appeal by this Court. In *Abdul Hafiz v. Manohar Lal* (1939 O. W. N. 736) (3) a Bench of this Court following the dictum of Lord Watson in *Connecticut Fire Insurance Co v. Kavanagh* (1892 A. O. 473) (4) held that when a question of law is raised for the first time in the Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The plea raised on behalf of the respondent does not require any fresh evidence to be put in but is based on the written statement and on what is not disputed and what is apparent from the copy of the sale deed filed by the plaintiff-appellant himself.

The suit of the plaintiff-appellant being for pre-emption of a portion only of the property purchased by the answering respondents, must fail. The appeal is, therefore, dismissed with costs.

s

Appeal dismissed.

(3) (1939) O W N 736; 183 Ind. Cas. 604; 1939 O L R 537; 12 R O 44; 1939 R D 455; A I R 1939 Oudh 233.

(4) (1892) A O 473; 61 L J P C 50; 67 L T 508; 57 J P 21.

SIND JUDICIAL COMMISSIONER'S COURT

Second Civil Appeal No. 20 of 1936

December 23, 1938

DAVIS, J. C. AND LOBO, J.

MANGALMAL AGANMAL AND ANOTHER—
DEFENDANTS NOS. 18 AND 19—APPELLANTS
versus

Haji MUHAMMAD USIF BHORO AND
OTHERS—RESPONDENTS

Co-sharers—Co-ownership of Muhammadans and joint ownership of Hindu family—Distinction—Adverse possession—Co-sharers—Essentials—Partition—Allotment—Alienees of co-owners, shares of—Estate not large enough for alienees to get from their vendors' share all they purported to sell—Same piece of land not sold twice over—Principle of priority of first purchaser over subsequent, if applies.

There is a difference between the co-ownership of Muhammadans and the joint ownership of a joint Hindu family, for, while in a joint Hindu family all the co-parceners have a share in the whole property, among Muhammadans who inherit as heirs, each one has a specific share. [p. 12, col. 1.]

To constitute a title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the

one of other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent, to show that it is possession adverse to the competitor. *Bhagbhari v. Khatun* (2), relied on. [*ibid*]

In a suit for partition if what the co-owners sold or purported to have sold can be allotted to their alienees on partition, it should be so allotted so that the alienees can get from their vendors what they sold or purported to sell to them. *Gemalsingji Khumansingji v. Bai Fati* (5), relied on.

The principle that the alienees under the first sale have priority with respect to the lands sold or purported to be sold to them over subsequent purchasers will have no application if the estate is not large enough for the alienees to get from their vendor's share all they purported to sell to them and if the vendors have not sold the same piece of land twice over. *Din Dayal v. Gur Saran Lal* (7), relied on [p. 13, col. 1.]

Mr. Srikrishindas H. Lulla, for the Appellants.

Mr. Hukumatrai M. Eidnani, for the Respondents.

Davis, J. C.—This is an appeal from the judgment of the District Judge of Larkana in which he modified the decree of the Subordinate Judge of Mehar. The Subordinate Judge in a suit for partition between Muhammadans, the heirs of one Khuda Baksh, who died some thirty years ago, dismissed the plaintiffs' suit against defendant Nos. 18 and 19, alienees of two of the joint owners Hamid and Musa, sons of Khuda Baksh, finding that the claim against them was time-barred, they having been for more than twelve years in adverse possession of the land not only against their vendors but against their sisters, the daughters of Khuda Baksh, through one of whom Amnat, as son and husband, the plaintiffs claimed. But the District Judge was of a different opinion holding that as against the female heirs and against the plaintiffs who claimed through them adverse possession was not proved and this question of adverse possession and the equities to be considered in the partition of the property are the only questions argued before us in appeal.

Now, so far as the question of adverse possession is concerned, it appears that in 1917 the two brothers Musa and Hamid sold not only their own share in the common property to defendants Nos. 18 and 19, but they sold the shares of their sisters also. They sold twelve-annas in the rupee of Survey Nos. 274, 275, 255 and 276, and four-annas in the rupee of 273 and 277. The alienees, defendants No. 18 and 19, can only have perfected their title against the shares of the sisters or the sisters' heirs

if they can show a possession on their part having all the necessary attributes of adverse possession. The learned Subordinate Judge appears to be of the opinion that mere possession by strangers who become co-owners by a sale from some of the co-owners was necessarily adverse possession against the rest; but there is a difference between the co-ownership of Muhammadans and the joint ownership of a joint Hindu family for while in a joint Hindu family all the co-parceners have a share in the whole property, among Muhammadans who inherit as these sons and daughters did, as heirs, each one has a specific share. Therefore the ruling to which Mr. Lulla with his usual diligence has referred us relating to Hindus or Sikhs or Buddhists affords us no true guidance. Mr. Lulla, however, relies on *Dhumoomal Chandiram v. Kaim Khatu* (1) at p. 134 and particularly the passage:

"Now, the Court will not presume and will refuse to believe, without very clear proof, that, when the sons of a Muhammadan *pardanashin* lady lease or mortgage family lands, they do so adversely to her, that is, in fraud of her rights, or with the intention to defeat them. The natural presumption is that they deal with the lands as managers or agents for her as well as for themselves. We must, therefore, date the commencement of the defendants' adverse possession from the date of the sale to their father."

We do not think that the learned Judge there laid down any general principle of law. It is, in our opinion, merely an expression of his opinion that in certain circumstances the sons of *pardanashin* lady who leased or mortgaged family lands did so as her agents. That case, however, dealt not, as here, with sale, but with ordinary acts of management. Even so, we think it well that this ruling be kept to its own particular facts for we ourselves think that the Court should be alert to protect the interests of *pardanashin* women, cut off from the world, and should rely more upon facts than upon presumptions. To constitute a title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by one of the other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent, to show that it is possession adverse to the competitor: *Bhagbhari v. Khatun* (2) Mr. Lulla argued that the District Judge is wrong when he said that there must be

adverse possession to the knowledge of the true owner, but in the case he referred, *Secretary of State v. Debendra Lal* (3) at p. 137, their Lordships of the Privy Council said:

"As to what constitutes adverse possession, a subject which formed the topic of some discussion, in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi v. Collector of Khulna* (4) where his Lordship said that, 'the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.' The classical requirement is that the possession should be *nec vi nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment or that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped, it cannot be heard to plead that the fact was not brought to its notice."

But there is a great difference between the opportunities of knowledge of the Crown with its officers in every district and in every village and of *pardanashin* women behind the *pardah*. Their Lordships say, it is not necessary to show that adverse possession was brought to the knowledge of the Crown. It is sufficient that the possession be adverse and without any attempt at concealment so that the person against whom time is running ought, if he exercised due vigilance, to be aware of what is happening. In this case, the *pardanashin* ladies did, so far as they could, exercise due diligence but they did not know what was happening. The learned District Judge held that Amnat, the sister through whom the plaintiffs claimed, lived jointly with her brothers and shared the produce of the lands. He finds the Banias, defendants Nos. 18 and 19, did not prove they were exclusively enjoying produce. On the contrary, the evidence showed that *Musammam* Amnat lived with Hamid and Muso and enjoyed the produce even after her marriage with Usif and that after her death he enjoyed her share. It is not suggested that the Judge was not on the evidence able to find these facts and in second appeal we will not disturb the findings on facts; therefore, from the facts no legal inference of adverse

(3) 66 M L J 134 at p 137; 147 Ind. Cas. 545; A I R 1934 P C 23; 61 I A 78; 61 C 262; 6 R P O 49; 11 O W N 96; (1934) M W N 165; 39 L W 257; 36 Bom. L R 249; 38 O W N 285; (1934) A L J 153; 59 C L J 56 (P O).

(4) 27 I A 138 at p. 140; 27 C 943; 7 Ser. 714; 4 O W N 597 (P O).

(1) 18 L R 133 at p. 134.

(2) 16 S L R 25; 80 Ind. Cas. 118; A I R 1921 Sind 177.

possession can be drawn in favour of the Banias, Mangalmal, defendant No. 18, and Hundomal, defendant No. 19, and the District Judge's judgment on this question must be upheld.

On the question of equities in the partition of the property, Mr. Lulla argues that if what Muso and Hamid sold or purported to have sold can be allotted to their alienees on partition, it should be so allotted so that the alienees can get from Muso and Hamid what Muso and Hamid sold or purported to sell to them. He relies on *Gemalsingji Khumansingji v. Bai Fati* (5). To this equitable application of s. 41, Transfer of Property Act, we can see no objection. But Mr. Lulla goes further. He says that there were several sales and that his clients the alienees under the first sale of 1917, have priority with respect to the land sold or purported to be sold to them over subsequent purchasers. He relies on *Narayan Babaji v. Nathaji Durgaji* (6). In this case, however, it is clear that all the purchasers in the subsequent sales which the Court could have recognized, and these are seven in all, the alleged oral sale being excluded will have to make some contribution, will have to give up some proportion of their supposed purchases because the estate is not large enough for the alienees of Hamid and Muso to get from Hamid and Muso's share all Hamid and Muso purported to sell them. Nor does it appear that Hamid and Muso sold the same piece of land twice over, there will be no conflicting claims and no question of priority to the same piece of land: see *Din Dayal v. Gur Saran Lal* (7) at p. 341. We think the equitable position will be made sufficiently clear to the revenue authorities who are carrying out the actual partition if we modify lines 364 to 374 in the judgment of the District Judge as follows:

"The shares of Hamid, Muso, Karimat and Rahmat would go to the purchasers and the purchasers will contribute equally if they have taken anything in excess of the shares of the vendors. The purchasers will, as far as possible, be kept in possession of the property sold or purported to have been sold to them to the extent of the shares of the vendors in the whole estate if this can be done, and without prejudice to any of the co-owners. The partition

should be made according to these directions by the revenue authorities."

We must therefore confirm the judgment of the District Judge with this variation and dismiss the appeal with costs. There are cross-objections by the plaintiff-respondents on the order of costs in the lower Appellate Court, the order being that each party should bear his own costs, and as this order was passed in a partition suit, we think it is a proper order, and the cross-objections are dismissed with costs accordingly.

D.

Appeal dismissed.

BOMBAY HIGH COURT

Second Appeal No. 253 of 1937

February 24, 1939

LOKUR, J.

LAXMAN MANJUNATHAYA BALWALLI

AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VENKATRAO MANGESHRAO

AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 47, O VIII, r. 6—Partition decree keeping certain property undivided pending litigation about it and providing that, that property should be partitioned by metes and bounds after termination of that litigation—Property subsequently lost to family and money acquired in its stead—Separate suit for partition of that money basing right on decree, if barred by s. 47—A suing B for share in certain amount realized by B—B claiming set-off in respect of certain amount awarded to him against A by previous decree—Set-off, if can be allowed—Omission of B to pay court-fee, whether affects his claim to set-off.

Where a partition decree has kept certain immovable property undivided until the termination of a pending litigation concerning such property and has further provided that after the determination of the said litigation, the property should be divided by metes and bounds between the parties according to their shares but after the decree that property is lost to the family and some movable property in the form of money is acquired in its stead, that movable property cannot be partitioned in execution of the decree which made no reference to it, and a separate suit mentioning the circumstances and basing right to the partition of the money on the decree is not barred by s. 47, Civil Procedure Code. *Krishna Roy v. Jawahar Singh* (1) and *Ahmed v. Shaik Essa* (2), relied on. [p. 15, col. 1.]

Where A sues B for a share in certain amount realized by B and B in his written statement claims set-off in respect of certain amount awarded to him against A by a previous decree, the set-off can be granted as both the claims are definite pecuniary demands. It does not matter that B had already secured by a judgment against A the amount which he claimed by way of a set-off. The omission of B to pay court-fees on the amount claimed does not affect his claim to set-off.

S. A. from the decision of the District Judge, Kanara, in Appeal No. 121 of 1935.

(5) 40 Bom. L. R. 1205; 179 Ind. Cas. 721; A. I. R. 1939 Bom. 40; 11 R. B. 261.

(6) 28 B. 201; 5 Bom. L. R. 945.

(7) 42 A. 386 at p. 341; 59 Ind. Cas. 67; A. I. R. 1920 All. 253; 18 A. L. J. 287.

Messrs. G. P. Murdeshwar and U. S. Hattayangadi, for the Appellants.

Messrs. D. R. Manerikar and R. A. Mundkur, for Respondents Nos. 1, 2 and 3, respectively.

Judgment.—This second appeal arises out of a suit filed by the plaintiffs to recover their share in the moneys realized by the defendants on behalf of all of them. The plaintiffs and the minor defendants were members of a joint Hindu family, and by a compromise decree in the year 1925, they partitioned the joint family property among themselves. Plaintiffs Nos. 1 to 4 were allotted one-fourth share, plaintiffs Nos. 5 and 6 three-eighths share, and defendants Nos. 1 and 2 three-eighths share. One other property, situated in the village of Hosakuli, had been purchased by the family, and as the vendor had filed a suit under the Dekkhan Agriculturists' Relief Act alleging that the sale was a mortgage, the decree provided that that property should be left undivided until the termination of the said litigation. The part of the decree which dealt with that property ran as follows:

"As there is litigation going on in respect of the property of the village Hosakuli, it is retained in common and undivided. The assessment of the said property should be paid by all the different three branches of the family, according to their respective shares determined in this compromise. Its income also is to be enjoyed similarly. After the determination of the said litigation, the property is to be divided specifically, according to their shares. All costs of the said litigation including the future, are to be borne by all the three different branches according to their shares."

In the litigation it was ultimately held that the transaction was a mortgage, and the vendor was allowed to redeem the mortgage on payment of the amount found due. Defendants Nos. 1 and 2 being minors, the Deputy Nazir of the District Court was appointed their guardian and he recovered Rs. 981-4-9 from the mortgagor on February 10, 1933. The plaintiffs, who were entitled to five-eighths share, in this amount, which represented the property of the village Hosakuli mentioned in the compromise decree, made a demand from the Deputy Nazir for their share; but under the orders of the District Judge, plaintiff No. 1 was informed by a letter (Ex. 18) that he and the other plaintiffs should take steps to recover their share by executing the decree. In the meantime the Deputy Nazir himself had presented a *darkhast* against the plaintiffs to recover Rs. 250 and Rs. 375 which had been awarded to the defendants by the compromise decree

in order to equalize the shares. In the suit the defendants put in a written statement asking for a set-off in respect of these amounts. The trial Court held that the suit was barred by s. 47, Civil Procedure Code, that the set-off was permissible, and that on deducting the amount sought to be set-off from the amount due to the plaintiffs as their share, nothing remained due to them. The suit was, therefore, dismissed, and under the circumstances the parties were ordered to bear their own costs. Those findings were upheld in appeal, and the decree of the trial Court was confirmed. In this appeal the plaintiffs have deducted from their claim the amount of the expenses of the litigation and limited their claim to Rs. 493 only. It is urged that their suit is not barred by s. 47, Civil Procedure Code, and that the defendants should not have been allowed to claim a set-off in this suit. It is also contended that, as the plaintiffs were driven to the suit by the reply given by the Deputy Nazir, they should have been awarded their costs.

The suit would obviously be barred under s. 47, Civil Procedure Code, if the claim made in the suit could be made in execution of the compromise decree. The extract from that decree, which I have given above, clearly shows that the property of the village Hosakuli was kept undivided as a litigation was pending about it and it was further provided that after the termination of that litigation that property should be specifically divided according to the shares, that is to say, that the property should be divided by metes and bounds between the plaintiffs and the defendants. It did not provide for a contingency of the property itself being lost to the family and the mortgage amount being realized. It was not then known that the property was only in mortgage with the family and that the family was only entitled to recover the amount due under the mortgage. The decree did provide for the cost of the litigation, and the executable part of the decree provided for the partition of the land by metes and bounds. The facts of this case are analogous to those in *Krishna Roy v. Jawahir Singh* (1). There the plaintiff had purchased a one *guntha* share in a certain estate and obtained a decree for possession against the defendants. While the plaintiff's suit was pending, and before he took out execution under the said decree, there were certain partition proceedings, whereby the defendants' interest in that estate was converted into a

smaller estate in view of their share in the whole estate. It was then held that a separate suit could be brought by the plaintiff to have it declared that the defendants' interest in the former estate had passed into the latter and that it was not barred by s. 244, corresponding to the present s. 47, Civil Procedure Code. The same view was taken in *Ahmed v. Shaik Essa* (2). In that case an award decree for partition directed a certain sum of money to be paid to the plaintiffs by defendant No. 1 on the plaintiff's handing over certain movable and immovable property and executing certain deeds of conveyance. But subsequently a vessel, which was part of the movable property to be handed over to the plaintiffs, was lost at sea and the plaintiffs were therefore unable to fulfil the condition on which alone they could claim the payment of the amount awarded to them. The plaintiffs issued a notice calling upon defendant No. 1 to show cause why in execution of the decree the Court should not ascertain and fix some sum as the value of, or compensation for, the loss of the vessel to be deducted out of the amount awarded to him, as their vessel could not be delivered. Subsequently, the plaintiffs applied to have the decree amended by stating the sum to be paid in lieu of the vessel, but that application was also refused; and ultimately it was held that the proper remedy was a suit. Starling, J. observed (p. 504*) :

"In my opinion, the only way in which the plaintiffs can obtain what they seek is by filing a fresh suit setting out the decree herein, and the circumstances which have transpired since the passing of that decree, and asking for a declaration of their rights under all the circumstances of the case."

In the present case also certain circumstances have transpired after the compromise decree for partition was passed. That decree contemplated the division by metes and bounds of specific immovable property, but after the decree that property was lost to the family and some movable property was acquired in its stead. Hence that movable property cannot be partitioned in execution of the decree which made no reference to it, and the plaintiffs were right in filing a separate suit mentioning the circumstances and basing their right to the partition of the money on the compromise decree. I therefore hold that the suit is not barred by s. 47, Civil Procedure Code. This litigation was really unnecessary as the trial Court has found

that the amount due from the plaintiffs to the defendants is almost equal to the amount claimed by the plaintiffs in this suit, and taking accounts, it found that nothing was really due to the plaintiffs. The plaintiffs, however, contend that as the amount due to the defendants is ordered to be paid to them by the compromise decree, and as the defendants have already filed a *darkhast* to recover that amount, it cannot be claimed as a set-off in this suit. In support of this contention it is pointed out that a written statement asking for a set-off has the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off, and that as the claim of the set-off has already been adjudicated upon and embodied in the decree, there cannot be a fresh suit asking for that very amount. This contention, however, cannot be upheld in view of illustration (d) to O. VIII, r. 6, Civil Procedure Code, which says:

"A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off."

It does not matter that B had already secured by a judgment against A the amount which he claimed by way of a set-off. The only other objection to the set-off is that the defendants should have been called upon to pay the necessary court-fees on the amount claimed. It is true that the defendants should have paid the requisite court-fees, but their omission to pay the court-fees does not affect their claim to the set-off since they can be called upon to pay the necessary court-fees at any stage of the proceedings under s. 149, Civil Procedure Code. Thus, the result is that if the defendants pay the requisite court-fees on their claim for the set-off, nothing will be found due to the plaintiffs, but the plaintiffs had to file the present suit on account of the attitude taken by the Deputy Nazir on behalf of the defendants. (His Lordship then dealt with the question of costs and proceeded further). The result is that the decree of the lower Courts dismissing the suit is confirmed. The defendants shall pay the court-fees on their claim for the set-off in the trial Court. They will pay the plaintiffs their costs in the trial Court to the extent of their claim for Rs. 449-12-7 only, and will bear their own costs in the trial Court. The plaintiff should pay the costs of the defendants in the lower Appellate Court and bear their own. The costs

In this Court will be borne by the parties themselves.

s.

Decree confirmed.

MADRAS HIGH COURT

Second Appeal No. 5 of 1935

December 9, 1938

WADSWORTH, J.

CHOKKA DHANAMMA AND ANOTHER

—APPELLANTS

versus

THE COROMANDEL COMPANY,
LIMITED, OOCANADA AND ANOTHER

—RESPONDENTS

Tort—Common carriers—Liability for loss of goods—Carriage of Goods by Sea Act (XXVI of 1925), s. 2—Lighter carrying goods from port not to another port but to ship which carries those goods to another port—Lighter, if comes under s. 2.

Common carriers, are liable for the loss of goods entrusted to them for carriage unless the loss be due to an act of God or of the King's enemies.

Where a lighter carries goods from the port but it does not carry those goods to any other port, the fact that the goods transported are placed in another ship, which itself carries them to another port, would not bring such lighter within the purview of s. 2 of Act XXVI of 1925. Moreover, even if such lighter was a "ship" to which that Act applies, cl. (g) of r. 2 of Art. IV of the Schedule to that Act would make the owners of the lighter liable for the loss of goods which is due to the fault of the agent of the carriers.

S. A. against the decree of the District Court of East Godavari at Rajahmundry in A. S. No. 117 of 1933, preferred against the decree of the Court of the Subordinate Judge of Oocanada, in O. S. No. 56 of 1931.

Mr. V. Govindarajachari and K. V. Rangacharyulu, for the Appellants.

Mr. T. Satyanarayanan, for the Respondents.

Judgment.—This appeal arises out of a contract for the carriage of goods from the wharf at Oocanada to a steamer lying at anchor in the roads. The facts are no longer in dispute. The first plaintiff the Coromandel Company was shipping agent for Messrs. Ralli Brothers and in that capacity through its agent the second plaintiff, arranged for the transport of 875 bags of castor seeds in a lighter of which the 4th defendant was the tindal, whereas the owner has now been found to be the second defendant, defendants Nos. 1 to 3 being members of a joint family. The goods were loaded into the lighter which left for the anchorage some 6 or 7 miles away from the wharf one night and returned on the following evening, whereupon the 4th defendant reported that his boat had sprung a leak and he had been

obliged to jettison 330 bags of seeds and further 144 bags had been damaged by sea water. The circumstances were suspicious and an inquiry demonstrated that the 4th defendant's story was false and that the missing bags had been stolen by him or with his connivance. The plaintiffs claimed to recover the value of the lost and damaged goods from the defendants. Defendants Nos. 1 to 3 denied the liability but the suit has been decreed against defendants Nos. 1, 2 and 4 and the family properties of the 3rd defendant. The appeal has been preferred by defendants Nos. 1 and 3.

There can be no doubt that the damage was caused owing to the criminal act of the fourth defendant. If the defendants are common carriers, they are liable for the loss of goods entrusted to them for carriage unless the loss be due to an act of God or of the King's enemies. It is urged they are protected by rules made under the Carriage of Goods by Sea Act (XXVI of 1925). The reply to this contention is that by s. 2 of that Act the rules apply only to the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. There seems to be some doubt whether the anchorage of Oocanada is or is not included within the limits of the port. The plaintiff asserts that the ships are anchored in the port and there is no denial. But the actual notification prescribing the limits of the port is not in evidence. The matter is to my mind, however, not material. The defendants' lighter would come within the definition of a "ship" in Act XXVI of 1925. It carries goods from the port of Oocanada, but it does not, so far as the evidence goes, carry those goods to any other port and the fact that the goods transported are placed in another ship, which itself carries them to another port, would not, to my mind, bring this lighter within the purview of s. 2 of Act XXVI of 1925. Moreover, even if this lighter was a "ship" to which that Act applies, I am of opinion that cl. (g) of r. 2 of Art. IV of the Schedule to that Act would make the defendants liable for this loss which is certainly due to the fault of the agent of the carriers. The decision of the Court below is correct and the appeal is dismissed with costs.

N.D.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeals Nos. 57 and 58 of 1938

January 10, 1939

S. K. GHOSE AND B. K. MUKHERJEA, JJ.
KEDAR NATH TUSHNIAL AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

RAJ KUMAR DAS AND OTHERS—

RESPONDENTS

Will—Execution—Burden of proof—Propounder stranger to family and attesting witnesses men of opposite camp, if lessens the burden—Probate—Part of will lost—Probate, when can be granted—Testamentary capacity—Presumption.

The burden of proving due execution of the will is always on the propounder, and the burden is not lessened by the fact that the propounder is a stranger to the family and the attesting witnesses are men of the opposite camp. The Court is of course competent to disregard the testimony of some of the attesting witnesses and pronounce in favour of the will, if it is satisfied from the evidence collectively or from the circumstances of the case, that the requirements of law have been complied with and that the witnesses who had spoken against the will had not spoken the truth. *Brahma Dutt v. Chaudan Bibi* (4), relied on. [p. 23, col. 2.]

Under s. 23F, Succession Act, probate may be granted if the whole will is lost but the contents are proved. But if only a part of the will is lost, probate may also be granted if the contents are proved. Where all but the first page which is lost are found to be genuine, and as to the first page the evidence is sufficient to show the contents, Probate of the will can be granted. *Kedar Nath v. Sarojini Dasi* (1), referred to. [p. 20, col. 1.]

If, the will is a natural one, and due execution is proved, testamentary capacity is ordinarily presumed.

As. from the original decrees of the District Judge, Sylhet, dated December 23, 1937.

Dr. S. C. Basak, Dr. N. C. Sen-Gupta and Mr. Priya Nath Dutta, for the Appellants.

Messrs. Atul Chandra Gupta, Hiralal Chakravarti, Nikunja Behari Roy and Bhabesh Chandra Barua, for the Respondents.

S. K. Ghose, J.—The appellants before us were the petitioners in the lower Court and they are the heirs of one Damodar Das Tushnial who was a creditor to the estate of Joyram Das, deceased. In these proceedings, they seek to establish that Joyram validly executed a will bearing date *Bhadra* 31, 1334 corresponding to September 17, 1927. It is not disputed that prior to that date, that is to say, on *Falgun* 9, 1318, corresponding to February 21, 1912, Joyram had validly executed another will which was registered. At that time, Joyram had two wives, two daughters and four sons. At the time of the disputed second will, one of the wives

and one of the daughters had died and three of the sons had attained majority. The main difference between the two wills may be stated as follows: By the first will Joyram dedicated all his immovable properties to an idol and bequeathed his movable properties to his sons. He appointed his sons as *shebait*s and named two executors who were to administer the estate until the sons had attained majority. By the second will, only a portion of the immovables was made *debutter* and the remaining immovable properties were given to the four sons. Certain other provisions were made in favour of his wife and one daughter who were then living. Joyram died on October 5, 1927. It is further alleged that five days before his death, on September 30, 1927, Joyram executed a deed of gift in favour of his second son, Jitendra in respect of a piece of immovable property. This deed of gift was registered after Joyram's death, but the second will remained unregistered.

For some time after Joyram's death, no application for probate was made in respect of either of the two wills. It appears that on January 22, 1929, Joyram's sons took a loan of Rs. 6,000 by mortgaging some of the immovable properties which would pass to them by the terms of the second will. This loan was given by a land mortgage Bank and the evidence is not now disputed that at time the second will was shown to some of the directors of the Bank by way of proving the title of the mortgagors. About two months later, on March 28, 1929, the four sons of the testator again raised a loan of Rs. 2,000 by mortgaging some of the properties which would pass to them by the second will. This document was also shown to the mortgagees and was in fact made over to them for keeping as title deed. One of the mortgagees has deposed and the evidence on that point is not questioned. On August 13, 1930, Mohendra Chandra Das who was one of the four executors named in the second will filed an application for probate of that will. The proceedings continued for four months until December 12, 1930, when the case was dismissed for default. It may be noted here that to that application for probate one Manindra Kumar Dey as an attesting witness to the second will signed his name in verification for the application. Then followed another transaction. On December 7, 1931, the four sons applied to Damodar Das Tushnial for a loan of Rs. 9,000 upon a mortgage of properties

bequeathed to them by the second will. At that time, this document was in the custody of the Court having been there since the filing of the application for probate on August 13, 1930. The loan was given by Damodar Das Tushnial and a part of the money went to pay off the debt due to the land mortgage Bank. Then a step was taken which may be described as curious. On January 4, 1932, two affidavits were sworn, one by Mohendra Chandra Das and the other by Dayadra Nath Das who were two of the four executors named in the second will. In these two affidavits, these two persons stated that they would not take probate or letters of administration of the will in question. These affidavits were filed in Will Case No. 65 of 1930. The other two executors named in that will were Jitendra and Jamini, two of the four sons of the testator.

It may be stated here that there is further evidence that the testator's sons were dealing with the properties as if these properties had passed to them as secular properties in accordance with the terms of the second will. This evidence will be referred to later. Up to this time, the first will had not been mentioned in Court. It appears that the firm of Abdul Majid obtained a money decree against the four sons and started execution case on July 16, 1932, and proceeded to attach the movable properties. On August 15, 1932, the sons filed a petition alleging that the decree had been adjusted. The point to note is that two days before this, on August 13, 1932, an application for probate of the first will was made for the first time. This application was filed by Raj Kumar Das, one of the executors named in the will. The evidence is that the first will was all along in the custody of Raj Kumar. As a result of this application, probate was granted on September 3, 1932. Then Raj Kumar filed a claim case in the execution case. This claim case appears to have been dismissed on May 27, 1932. Meanwhile, on September 27, 1932, the present appellants filed two applications, one for the revocation of the grant of probate in respect of the first will and the other for letters of administration with the second will annexed. Petitions of objection were filed by Raj Kumar, by Hemangini, the widow of the testator, and by the sons. Hemangini and one of the witnesses Radhika Mohan Dutt were examined on commission. The other witnesses were examined in Court before Mr.

Masih, the District Judge. He gave judgment holding in favour of the applicants, namely that the second will was proved and that the first will stood revoked. Against that judgment, Raj Kumar Das filed an appeal to this Court. By the judgment, dated February 4, 1937, D. N. Mitter and M. C. Ghose, JJ. set aside Mr. Masih's decision and remanded the case for re-hearing with a direction that the idol should be represented by a proper guardian before the Court. This was done and some of the witnesses were recalled and cross-examined before the then District Judge, Mr. Younie. He gave judgment taking a view contrary to that of Mr. Masih and held that the alleged second will had not been validly executed by Joyram. He accordingly dismissed the application. Against that judgment these appeals have been filed.

It is quite clear that if the second will be held to be validly executed, the first will will necessarily stand cancelled and the probate already granted of that will will stand revoked. The question in these proceedings is whether the second will has been proved to have been validly executed. It is not disputed in this Court that the second will was in fact signed by the testator and that a ceremony, if it may be so-called, of execution and attestation was gone through. Mr. Gupta appearing for the respondents in this Court does not dispute this fact and indeed, as mentioned already, probate of the second will had once been applied for. The question raised in this Court upon the evidence is with regard to testamentary capacity and proof of attestation. The document does not contain the signature of the testator. It purports to bear a mark and his name was signed for him by the scribe, Raman Bihari De. The names of eight attesting witnesses appear in the document, out of which one Banka Behari Sen has died since the date of the document; another witness Manindra Kumar De and also the scribe Raman Behari De are absent. The other witnesses have been examined. (After discussing evidence his Lordship concluded as follows). So far therefore the evidence leads to the inference that the second will was validly executed by Joyram. It is a document of five pages.

Dr. Basak for the appellants in this Court has stated that it is not his case that the first page is genuine. He concedes that there is evidence to show that the original first page is lost and that another page has been substituted. His further case is that

the remaining four pages are genuine. When the case went back on remand the appellants applied to the Court that Raj Kumar who had been contesting the proceedings at the first trial and had taken out probate of the first will should be appointed guardian of the idol for the purpose of these proceedings. This was on March 30, 1937. On the same day, Raj Kumar filed a petition stating that his interests and those of the idol were not identical and suggesting the names of three persons who might be appointed guardian of the idol. The first name was that of Pradyumna Kumar Sen who was related to him and living with him in the same house. Accordingly Pradyumna was appointed guardian to represent the idol. On May 1, 1937, Pradyumna filed a petition of objection in respect of the idol and in para. 21 of that petition he stated that he had reason to believe that the sons of Joyram in collusion with their *karmachari* Raman Behari had manufactured the will and that he further suspected that specially the first page and the signatures of Baikuntha and Radhika were forged. On May 3 following, he filed a petition in the course of which he stated that he suspected that the first cartridge paper used in the will had been issued by Government long after the alleged date of execution. Thereupon, the sons of the opposite party were called upon to produce the original sheet but this they were unable to do. Evidence was taken of an officer in the office of the Controller of Printing, Stationery and Stamps, Calcutta, and it was to the effect that the first sheet was not in existence on September 17, 1937, that is to say, the date on which the will purports to have been executed, but the other four sheets were in existence at the time. Mr. Younie has found that this spurious first page was substituted for the original one and as to the motive for the substitution, there is the evidence of Surendra to the effect that in the original first page reference was made to Joyram's previous will, but the first page as it now stands contains no such reference. I see no reason why this evidence should not be accepted. The question, was raised after remand and it certainly shows special knowledge on the part of the objector Pradyumna who was representing the idol. Further, the evidence goes to show that the altered page as it now stands is the same as the original first page except the reference to the previous will is omitted. Mr. Younie has been impressed by this evidence which is

described as a dramatic development having taken place since the idol was made a party and from this he draws the inference that the entire will has been fabricated.

On the other hand, Dr. Sen Gupta for the appellants in this Court contended that if the change in the first page was necessary, it only goes to show that the original first page was something different and therefore the will could not have been forged. I think this argument is reasonable and should be accepted. As to the time and the motive for the alteration one can only speculate, but so far as the evidence goes, it would be sufficient to infer that the alteration of the first page took place at the time when the application for the probate of the second will was made by Mohendra and the document itself was filed in Court. Possibly, at that time the interested parties had decided that the first will should be suppressed. The present appellants had nothing to do with it. But whatever that may be, it is possible for us to come to the finding, that the original first page of the will in question is lost and that this is not due to any action on the part of the testator himself, that the first page as it stands is in the same terms as the original first page of the will which was executed by the testator except that the reference to the previous will is omitted, and that the remaining four pages are genuine. Now, the first page contains the signature of Radhika Mohan which appears to have been identified by him as being his genuine signature on the false copy, but the signatures of the other attesting witnesses including that of Basanta appear on the remaining four pages of the will and this evidence leads to the inference that Radhika did validly sign the will as an attesting witness on the original first page.

In these circumstances, the question arises whether the petitioners will be entitled to the grant of the probate of the second will. Leaving out the first page, the remaining four pages contain all the secular dispositions made by the testator. There are two schedules mentioned at the end of the document. Of this, Sch. II explains itself because the heading is, "rules for the *sheba* and *puja*, etc." Schedule I does not explain itself but para. 3 provides that the sons shall be the owners of all immovable properties after excluding those described in Sch. I. The portion above para. 3 which occurs on the second page, leaving the first page aside, contains some directions as to *debutter* properties. It is not necessary for

the purpose of this case to construe the will by excluding the first page in respect of the properties comprised in Sch. I. But even leaving out the first page, there is no difficulty in understanding the disposition with regard to properties mentioned on the four pages. In this state of affairs, there is no difficulty in granting probate by taking the second to the fifth page of the will as genuine and by taking the first page as proving the contents of the original first page except that reference to the previous will is omitted. Under s. 238, Succession Act, probate may be granted if the whole will is lost but the contents are proved. But if only a part of the will is lost, probate may also be granted if the contents are proved. In *Kedar Nath v. Sarojini Dasi* (1) only a portion of the will was produced and there was no evidence as to the contents of the remainder of the will. The question arose as to whether probate could be granted of the portion of the will which was produced. McLean, C. J. observed :

"It must, I consider, be taken as settled law in England (see *Sugden v. Lord St. Leonards* (2)) that probate can be granted of a portion of a will, though, if the extant portion be only the residuary clause, some question may arise, as was pointed out by Lord Herschell in *Woodward v. Goulstone* (3). We are not, however, dealing with any such clause in the present case. It must be taken to be established by the English decisions that, where the contents of a lost will are not completely proved, probate can be granted to the extent to which they are proved. The present will is proved to the extent of the first sheet."

The present case, however, is stronger. All but the first page are found to be genuine, and as to the first page, the evidence is sufficient to show the contents. In these circumstances there is no difficulty, in my judgment, to grant probate of the will. The appellants are, therefore, entitled to succeed. The result is that the application for letters of administration with a copy of the will annexed will be granted on this understanding, that in the document as it stands, the first page will be taken to be not the genuine first page, but its contents will be taken to be the same as the contents of the original first page, except that in the latter there was reference to the previous will, and the remaining four pages of the document will be taken to be genuine. As the result of this, the probate granted in respect of the first will will stand revoked. The appeals are accordingly

allowed. The appellants will be entitled to their costs throughout which will come out of the estate of the testator. A consolidated hearing-fee of five gold *mohurs* is allowed in both the appeals.

B. K. Mukherjea, J.—I agree with my learned brother in holding that these appeals should be allowed. The appellants before us are the heirs of one Damodar Tushnial who was a mortgagee of certain properties belonging to one Joyram Das, a resident of Sylhet, the mortgage being effected by the sons of Joyram after the death of the latter. The two connected appeals arise out of two applications made by Damodar, while he was alive, for letters of administration in respect of the last will of Joyram which purported to have been executed on September 17, 1929, and for revocation of probate granted to one Raj Kumar Das in respect of an earlier will of the same testator. Damodar died pending these proceedings and the present appellants were substituted in his place. Both the applications have been dismissed by the District Judge of Sylhet and it is against these orders of dismissal that the present appeals have been taken. To appreciate the point in controversy in both these appeals, it is necessary to give here a succinct narrative of the material facts. Joyram Das, who was a prosperous businessman in the town of Sylhet died on October 5, 1937, leaving a widow Hemangini, and four sons, to wit, Jogendra, Jitendra, Jamini and Janaki. He also left surviving him a daughter named Sukeshini who was married to one Basanta Kumar Das.

It is admitted that Joyram executed a will on February 21, 1912, which was duly registered. By this will, all his immovable properties were made *debutter* and were dedicated to the family deity Sri Sri Giridhari Jew. Certain legacies were given to the testator's first wife Radharani and to his daughter Sukeshini, and the rest of the movable properties including the *karbar* were given to the four sons in equal shares. The sons were directed to pay Rs. 6 a month, out of the income of the movable properties, for defraying the expenses of worship of an idol called Shamsundar Jew which was installed by the testator at Navadvipa and Rs. 3 a month, as maintenance allowance to the testator's mother-in-law. The executors named in the will were Raj Kumar Das and Dayadra Nath Das. The dispute is as I have said above with regard to a later will, which Joyram was

(1) 26 O. 634; 3 O W N 617.

(2) (1876) L R 1 P D 154; 45 L J P 49; 34 L T 372; 24 W R 860.

(3) (1886) 11 'A O 469; 56 L J P 1; 55 L T 790; 35 W R 337; 51 J P 307.

alleged to have executed on September 17, 1927, just eighteen days before his death. By this will some of the immovable properties of the testator which were made *debutter* by the first will were given to the four sons in absolute right, and the rest were dedicated to the deities Giridhari Jew and Shamsunder Jew, the latter idol having been brought down from Navadwipa and installed in the family dwelling house at Sylhet. The will gave a legacy of Rs. 2,000 to Hemangini, the second wife of the testator, and another legacy of Rs. 200 to his daughter Sukeshini. The movable properties that would remain after paying off the debts of the testator were also given to the sons in equal shares. There were four persons named as executors in this will, namely (1) Mohendra Chandra Das, (2) Dayadra Nath Das, (3) Jitendra and (4) Janaki, the last two being the second and third sons of the testator.

From the evidence it appears that very soon after the testator's death even though no application for probate of the second will was made, the sons began to deal with the properties left by the testator in accordance with the provisions of the second will. These immovable properties which were dedicated to the deities were treated as *debutter* property while the rest were enjoyed and disposed of as secular properties belonging to the sons in absolute ownership. On January 22, 1929, the three major sons borrowed from the Sylhet Co-Operative Land Mortgage Bank, a sum of Rs. 6,000 on a hypothecation of some immovable properties which were made *debutter* by the first will of Joyram, but were given to the sons by the second will. Ramani Mohan Das, a retired District Magistrate who was the Chairman of the Bank at that time, swears that a will was shown to him by Jamini, one of the sons of the testator, and he was satisfied on a perusal of the same that the properties which the sons were going to mortgage were not made *debutter* by the testator. On March 28, 1929, the sons again borrowed a sum of Rs. 2,000 from Mohini Mohan Das and others on mortgage of some properties and Jogendra Mohan Das, one of the mortgagees, has stated in his evidence that a will purporting to be executed by Joyram Das was not only shown to him, but was actually kept in his custody for more than a year.

On August 13, 1930, it appears that an application for probate of the second will was actually made by Mohendra who was

one of the executors named in the will, but strangely the application was not proceeded with and it was allowed to be dismissed for default on December 12, 1930. On December 7, 1931, the sons executed a mortgage bond in favour of Damodar Das Tushnial to secure a loan of Rs. 9,000. Out of this sum of Rs. 9,000, only Rs. 1,908 annas odd was taken in cash, and the rest was retained by the mortgagee to pay off the Sylhet Land Mortgage Bank, and take back the mortgage deed. There was also a deed of exchange executed by the sons on June 27, 1932, and by this deed they transferred to one Newali Chand Das certain properties to which they could claim title only under the second will. It appears that one Abdul Majid, a creditor of the sons, attached some property of theirs in execution of a money decree some time in July 1932. After the attachment was made Raj Kumar Das, one of the executors under the first will, who was staying elsewhere, now came forward and presented an application for probate of the first will on August 13, 1932. The probate was granted *ex parte* on September 3, 1932. On September 27, 1932, Damodar Das, who, as said above, had advanced money to the sons on mortgage of some of the properties, presented two applications before the District Judge of Sylhet: one for revocation of the probate granted to Raj Kumar Das in respect of the first will on the ground that there was suppression of the fact of the existence of the second will when the grant was made and the other for grant of letters of administration with a copy annexed of the second and last will of Joyram.

The applications were contested by Raj Kumar as well as by Hemangini and her sons and daughter. The learned District Judge, by his judgment dated March 29, 1934, held in favour of Damodar Das and allowed both the applications. There were appeals taken against this decision to this Court by Raj Kumar Das and these appeals (*viz.*, F. A. Nos. 83 and 84 of 1934) were heard and disposed of by D. N. Mitter and M. C. Ghose, JJ. on February 4, 1937. The learned Judges set aside the judgment of the District Judge and sent both the cases back for re-hearing on the ground that the deity who was the principal legatee under the first will was not properly represented in the proceedings. It was directed that the Court should appoint a proper guardian for the deity and allow him to contest the probate proceeding.

After the cases went back, Mr Prodyumna Kumar Sen was appointed guardian of the idol, and fresh objection was filed on its behalf. Most of the witnesses who had been examined before, were produced and cross-examined on behalf of the idol. The idol also led additional evidence in the shape of examining Mr. Sanat Kumar Chatterjee, an officer in the Stationery Department of the Government, to show that the first page of the will was a subsequent fabrication; the water-mark on the sheet showing that the paper did not exist at the date when the will purported to be executed. The District Judge by his judgment dated December 23, 1937, dismissed both the applications whereupon the petitioners have preferred these appeals.

The only point in controversy in both the appeals is, as to whether or not the alleged second will of Joyram was a valid testamentary document duly executed by a free and capable testator. If this question is answered in the affirmative, the appellants are not only entitled to letters of administration in respect of the second will, but the grant of probate in respect of the first will must be revoked. On the other hand, if a negative answer is given to this question both the applications of the appellants must be dismissed. Now, it is not disputed by the respondents before us, that the alleged second will of Joyram was in existence at the date of the death of Joyram or rather at the date when it purported to be executed. It is not a document which was fabricated subsequently. Their case is that a ceremony of execution was gone through and the document was brought into existence actually on September 17, 1927. It was not, however, according to them a will of Joyram. It was the will of the sons prepared at their instance and for their benefit and with the assistance of some of their friends and dependants, they managed to stage a show of execution and attestation though the testator had no testamentary capacity and neither could nor did comprehend what the document was. It is true that the sons acted upon the second will and made use of it for the purpose of borrowing money from others for some years after the testator's death. But that, it is said, was quite in accordance with their plan and the circumstances that the sons acted upon the will is not at all material to prove that it was genuine. The last contention is undoubtedly sound,

but I think that though the conduct of the sons is not much relevant in this connection yet some weight might be attached to the conduct of the executor under the first will.

Raj Chandra Das, the executor under the first will, did not apply for probate till five years after the testator's death. He says that he was at Brindaban and the reason why he did not apply for probate earlier was that the sons did not pay him the expenses. But he says at the same time that he was paying the costs of probate out of his own pocket. The application for probate was necessary to file a claim in the execution case started by Abdul Majid. The fact that the sons had been mortgaging several immovable properties left by Joyram was too well-known, and it is somewhat strange that Raj Kumar, whose intention, as he says, was to prevent waste by the sons, did not care to come in and apply for probate earlier. A suspicion is also raised by the fact that on January 7, 1931, two of the executors under the second will, viz. Mohendra and Dayadra filed two sworn declarations in Court, declaring that they would never apply for probate of that will. If the sons were really behind this move, it is apparent that having taken as much advantage as they could of the second will, they wanted to give it a decent burial and a way was being prepared to bring in the first will which alone could save the properties mortgaged or attached from the clutches of creditors. As neither of these persons have come forward to depose in the case in spite of strenuous efforts by the petitioners, it is difficult to say what exactly was behind the declarations which they made. It cannot be denied that Mohendra at any rate admitted the execution of the second will in his application for probate of the same.

Before I turn to the evidence relating to execution of the will and the presence or absence of testamentary capacity in the testator, it would be convenient to look at the provisions of the second will as compared with those of the first. To me, it seems that the provisions of the second will are quite natural and the changes are necessary in view of the altered state of circumstance since the first will was executed. The first wife of Joyram had died already and hence a legacy was given to Hemangini by the second will and not to the first wife. The idol Shamsundar Jew had been brought down from Navadwipa and the second will makes the dedication

in favour of both the deities and not to Giridhari Jew alone. Rupees 2,000 were set apart for education expenses of the minor son. The material change was that some of the properties which were made *debutter* by the first will were given to the sons by the second. Raj Chandra says that the business of Joyram which was the only valuable movable property had dwindled down very much during the last five years of his life. It seems to me to be very natural that having regard to the declining state of his business, the testator thought it proper to bequeath some of the immovable properties to his sons. If the business failed they had nothing else to fall back upon and it might be necessary to raise money for carrying on the *karbar* itself. I am not impressed by the argument advanced on behalf of the respondents that Joyram, a religious man as he was, could not think of taking back some of the properties which were already given to the deity.

In the first place, a gift by a will is not effective till the death. Even assuming that there was a mental dedication, it appears that the testator himself found it necessary to sell some of the properties that were made *debutter* by the first will, before his death. Two deeds of sale of the year 1924 in respect of some of the immovable properties have been made exhibits in this case: *vide* Exs. 23 and 32, and they strengthen the view that after the execution of the first will conditions had changed which induced the testator to alter his plan of making all his immovable properties *debutter*. The other argument which found favour with the District Judge, is that the testator was not in good terms with his sons and as one of his sons was mentally defective, he could not have any reason for altering the *debutter*. I don't think that this contention has much weight. As the *karbar* was not expected to bring much income, some of the immovable properties were given to the sons. The fact that the eldest son was mentally defective and the youngest was a minor could not possibly affect the situation. The second son indeed was once implicated in a criminal case, but it does not appear that the father had lost his natural affection for this son. The story of Heamangini, that this son was turned out of the house, does not appear to be a credible one. After all, the sons were all treated alike, and no distinction was made between one son and another in the first will of Joyram. As the *debutter* created

by the first will was an absolute *debutter*, I fail to see, how the sons who were made *shebaita* could derive any substantial secular benefit from the *debutter* properties.

Coming now to the evidence relating to execution of the will, it is undoubtedly true as was contended by Dr. Basak, that the appellant had to encounter a great difficulty in the way of producing the attesting witnesses before the Court. Many of them, including the scribe, did not appear even after issue of warrants. Those who came and deposed were unwilling witnesses and some turned positively hostile. The burden of proving due execution of the will is always on the propounder, and the burden is not lessened by the fact that the propounder is a stranger to the family and the attesting witnesses are men of the opposite camp. The Court is of course competent to disregard the testimony of some of the attesting witnesses and pronounce in favour of the will, if it is satisfied from the evidence collectively or from the circumstances of the case, that the requirements of law have been complied with and that the witnesses who had spoken against the will had not spoken the truth: *vide Brahma Dutt Chaudan Bibi* (4). (After examining some evidence his Lordships proceeded further). If the story of the draft is accepted, and there is no reason why it should not be accepted, there remains no doubt that the will was really the will of Joyram. Radhika Mohan Dutt is the last witness whose evidence is material on the point. He was present when the will was being written by Raman Behari and he saw the testator putting his mark. He himself as well as Dr. Baikuntha and Hem Chandra, also signed the will as attesting witnesses. On being asked about the mental condition of the testator the witness says nothing definite. He could not say whether he had intelligence or not though he was not unconscious, and adds that had he not intelligence, he would never have executed a will. I think this witness corroborates the story of execution and attestation as given by Basanta, and his evidence does not show that the testator had no testamentary capacity.

If, as I have said above, the will is a natural one, and due execution is proved, testamentary capacity is ordinarily presumed. None of the attesting witnesses, including the family doctor, says anything from which it can be inferred that the testator

(4) A I R 1916 Cal. 374; 31 Ind. Cas. 686; 20 C W N 192.

had no clear idea of the extent of his property or the claims of those who were entitled to his bounty. The beneficiaries with certain minor exceptions were the same as in the earlier will, and, if the testator had the first will in his mind, the few changes that were introduced by the second will did not at all make it a complicated instrument which a man of his age even though suffering from illness could not comprehend. Besides, the objector's specific case was that the testator was unconscious, and this I think has not been established by any reliable evidence. The evidence of Hemangini on this point is not worth acceptance. That the testator had testamentary capacity is also proved by a deed of gift which was executed after this will. I cannot agree with the learned Advocate for the respondent that the deed of the gift was manufactured after the death of Joyram and it was the result of Kala's blackmailing. The document was admitted in evidence under s. 89, Evidence Act, and unless there is something to the contrary proved by proper evidence, we must presume that it was properly executed and attested. There is nothing unnatural in this deed. The small plot of land at Navadwipa was lying vacant and it was given to one of the sons of the donor. The result is that I do not agree with the view taken by the learned Judge, and in my opinion, the evidence and circumstances of the case do establish that the second will was duly executed and attested and was the work of a free and capable testator. Ordinarily I would have been reluctant to disagree with the trial Court on questions of fact which depend mainly on oral evidence, but here the major portion of the evidence was recorded not by Mr. Younie against whose judgment the present appeals have been laid, but by Mr. Masib, who actually pronounced his decision in favour of the propounder. Mr. Younie had before him, the witnesses only when they were cross-examined on behalf of the idol.

Then there remains another question, as to whether, having regard to the finding of the trial Court which has not been challenged in appeal, that the first page of the will, as it is before the Court, is not genuine, we can grant letters of administration in respect of the will either in whole or in part. It can now be taken to be proved, that the first page of the original will has been tampered with and a new page was substituted in its place. Dr. Basak on behalf of the appellants argues that even

if the first page of the will is left out, he is entitled to probate in respect of the remaining sheets of the will about which there is no dispute, and relies upon the decision in *Sugden v. Lord St. Leonards* (2). It was held by Cockburn, C. J. in that case, and this was agreed to by Sir George Jessel, M. R., that if all the contents of a lost will are not before the Court, probate should be allowed of that which it has, so long as it is satisfied that it has the substantial part of the will made out. This case was discussed and considered in *Woodward v. Goulstone* (3). There the only part of the will with regard to which convincing evidence was available was the residuary clause and nothing was known about the legacies. In such a case, it was held, the principle in *Sugden v. Lord St. Leonards* (2), cannot be made applicable. Though there is no statutory provision covering such cases in the Succession Act, the principle in *Sugden v. Lord St. Leonards* (2), together with the qualification as indicated in *Woodward v. Goulstone* (3), has been held to be applicable in India: *Vide Kedar Nath v. Sarojini Dasi* (1). In the case before us, the four sheets of the will, about the genuineness of which no question can arise, contain complete disposition of all the properties of the testator save and except those which are described in Sch. (I). We know for certain what the properties in Sch. (I) are and therefore there is no difficulty in saying that we have got here a substantial part of the will and the legacies mentioned there are not in any way dependant on the gift of Sch. (I) properties.

But I think, we can go further in this case, and say that the contents of the first page are sufficiently established by other evidence. The second page of the will begins with the latter portion of para. (2). Paragraph 1 and a part of para. 2 therefore are wanting. From the rest of the will the conclusion is irresistible that para. 1 contained a disposition of Sch. (I) properties. We think that the evidence of Surendra who carried the instructions of the testator to the Pleader Rajendra Das makes it clear that the first page of the will as it now stands is a reproduction of the first page of the original will, subject to this, that the present sheet does not contain any clause regarding the revocation of the previous will which the original sheet did. The internal evidence also shows that the first page contained a disposition of Sch. (I) properties in favour of the deities. We hold therefore that both the appeals should suc-

ceed. The petitioners are entitled to letters of administration with a copy annexed of the will of Joyram dated September 17, 1927, and the first page of the will must be taken to be the first page of Ex. (1) with an additional clause that the previous will of 1912 had been revoked by this will. The probate granted to Raj Kumar in respect of the first will must be revoked.

D.

*Appeals allowed.***OUDH CHIEF COURT**

Second Civil Appeal No. 187 of 1937

September 1, 1939

RADHA KRISHNA, J.

SAHEB DIN—DEFENDANT—APPELLANT

versus

GAURI SHANKAR—PLAINTIFF—

RESPONDENT

*Transfer of Property Act (IV of 1882), s. 111 (g)
—Forfeiture—Essentials—Lessor, if must give notice
to lessee—Second appeal—Question of law can be
raised.*

Under s. 111 (g), Transfer of Property Act, in order to work a complete forfeiture, it is not only that the lessee should have renounced his character as such but the lessor should have given notice in writing to the lessee of his intention to determine the lease.

A plea of law, which goes to the very root of the case, can be entertained in second appeal. *The Official Liquidator of M. B. Moola Sons, Ltd. v. Perin B. Burjorjee* (1), relied on.

S. J. A. against the decree of the Additional Civil Judge, Lucknow, dated December 10, 1936, upholding the decree of the Munsif, South, Lucknow, dated September 30, 1936.

Mr. D. N. Bhattacharji, for the Appellant.

Mr. B. P. Misra, for the Respondent.

Judgment.—This is the defendant's appeal arising out of a suit for ejectment brought against him by the plaintiff-respondent on the allegation that the defendant was holding the land in suit as his lessee and the lease was determined by forfeiture on the ground that the lessee had renounced his character as such by setting up a title in himself. The Courts below have decreed the suit.

In second appeal before me it has been argued that in order to work a complete forfeiture it is not only that the lessee should have renounced his character as such but the lessor should have given notice in writing to the lessee of his intention to determine the lease. No such notice

was given and, therefore, it is argued that the suit was not maintainable.

The other contention put forward on behalf of the appellant is that the plaintiff failed to prove his title.

It is admitted that if the relationship between the parties is that of lessor and lessee then the case would be governed by the provisions of s. 111, cl. (g) of the Transfer of Property Act as amended in 1929.

I have heard the learned Counsel for the parties. I am of opinion that the first contention raised by the learned Counsel for the appellant must prevail. Section 111 (g) runs as follows :

"A lease of immovable property determines—(g) by forfeiture, that is to say,—(1) in case the lessee breaks an express condition which provides that, on breach thereof the lessor may re-enter * * * or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;"

A perusal of the last sentence will show that the giving of notice in writing is an essential condition of forfeiture taking effect in law. In fact the act of lessee renouncing his character as such makes the lease only voidable, that is, gives the lessor a right to avoid the lease but the lessor is not entitled to take possession until he actually avoids the lease by issuing a notice in writing as set forth in the last sentence in cl. (g) of s. 111 of the Transfer of Property Act. My opinion which is based entirely upon the language of the enactment referred to above is that a lessor cannot file a suit for ejectment until after he has given notice because till then the relationship of lessor and lessee subsists.

On behalf of the respondent it is contended that the above plea is a new one and raises a question of fact and should not be permitted in second appeal. The plea, in my opinion, is a pure plea of law and I am of opinion that in order to entitle him to a decree for ejectment, it was necessary for the plaintiff to set up definitely in his plaint a case to the effect that he had complied with the provisions of law by issuing a notice. A plea of law, like the present one, which goes to the very root of the case, can be entertained in second appeal. The plea of law in the present case arises upon the allegations in the plaint itself and upon the record of the case and I consider that it is not only

competent but expedient in the interests of justice to entertain such a plea (*Vide The Official Liquidator of M. E. Moola Sons, Ltd. v. Perin R. Burjorjee*, A. I. R. 1932 P. C. 118) (1).

On the view expressed by me above it must be held that the suit as framed was not maintainable. It is not necessary to decide the other point raised by the learned Counsel for the appellant.

The result is that the appeal is allowed, the decree passed by the Courts below is reversed, the suit filed by the respondent is dismissed with costs throughout.

Appeal allowed.

(1) A. I. R. 1932 P. C. 118; 136 Ind. Cas. 737; 36 C. W. N. 877; 55 C. L. J. 362; 10 R. 242; 34 Bom. L. R. 1071; (1932) M. W. N. 680, 59 I. A. 161; (1932) A. L. J. 706; 36 L. W. 75; 63 M. L. J. 131; 9 C. W. N. 930; Ind. Rul. (1932) P. C. 151 (P. C.).

MADRAS HIGH COURT

Second Civil Appeal No. 968 of 1934

October 24, 1938

WADSWORTH, J.

CHERUTTY AND ANOTHER—APPELLANTS

versus

NAGAMPARAMBIL RAVU AND OTHERS

—RESPONDENTS

Hindu Law—Maintenance — Daughter—Maintenance denied to daughter during lifetime of her father—If can file suit directly against manager of joint family—Proper course for her to be followed, stated—Minor co-parcener—Maintenance, denied to him—In suit by him for maintenance he must make also alternative claim for partition—Minor co-parcener, whether can claim maintenance without making alternative claim for partition.

A daughter, during the lifetime of her father is not entitled to bring a suit directly against the manager of the joint family property, ignoring the fact that the primary responsibility for her maintenance is upon the father and his properties, both joint and separate. The proper course for a daughter to adopt, if during the lifetime of her father, she has been denied maintenance, is not to bring a suit for maintenance against the manager of the joint family, but to bring a suit against her father claiming maintenance out of his properties, joint and separate. After she has got her decree, she may, if necessary, enforce it by the sale of her father's share in the joint family properties. This would presumably lead to a proper partition in which the rights of each branch of the family could be equitably worked out.

A co-parcener cannot claim maintenance if he is entitled to claim partition. But although it cannot be said that in no circumstances can a Court give a decree for maintenance against the family properties in favour of the minor co-parcener, yet in the vast majority of cases, where the circumstances would justify a decree for maintenance, they would also justify a decree for partition and so it should be open to the Court to pass that decree which the Court thinks best in the interests of the minor whose rights have been denied. From this, it follows that a minor co-

parcener who has been denied maintenance and wishes to claim maintenance should bring his suit in the alternative claiming partition or maintenance as the Court thinks fit, unless his guardian decides to adopt the usual form of a suit claiming partition in the property. *Bhagwan Singh v. Kawal Kaur* (2) and *Ramdas v. Lachman Das* (3), distinguished. [p. 27, col. 2]

[*Quere.*—It is very much doubtful whether a minor co-parcener has a right to claim maintenance without at least putting it within the power of the Court to give the ordinary relief of partition should the Court think fit].

S. C. A. against the decree of the Sub-Judge, South Malabar at Calicut in A. S. No. 176 of 1931.

Mr. K. P. Ramkrishna Ayyar, for the Appellants.

Mr. K. Subramanian, for the Respondents.

Judgment.—This appeal arises out of a suit brought by plaintiff No. 1, his wife (plaintiff No. 2), his son (plaintiff No. 3) and his daughter (plaintiff No. 4), against the defendants who represent a collateral branch of the same family, claiming arrears of maintenance, on the basis that the family is undivided. The lower Appellate Court, though it expressed a very strong opinion that the family was not undivided, unfortunately gave no finding on the subject and the whole suit was dismissed on the ground that a co-parcener cannot claim maintenance, but should sue for partition. This decision overlooks the fact that neither plaintiff No. 2 nor plaintiff No. 4 are co-parceners, one being the wife and the other the daughter of a co-parcener. There is no appeal by plaintiffs Nos. 1 and 2. The appeal is preferred only by plaintiff No. 3 (the son) and plaintiff No. 4 (the daughter). The contention in appeal based on the observations of the Privy Council in *Rama Rao v. Rajah of Pittapur* (1) at p. 784 is that the son is entitled to be maintained out of the joint family property because he is a co-parcener and that the daughter is entitled to be maintained out of the joint family property, because she is a female member of the family whom the family is obliged to maintain until her marriage. The grounds on which the claim is made are therefore different in the case of the son from those in the case of the daughter. As to the claim of the son, it is, I think, undoubtedly the ordinary rule that a co-parcener cannot

(1) 41 M. 778 at p. 784; 47 Ind. Cas. 354; A. I. R. 1918 P. O. 81; 45 I. A. 148; 35 M. L. J. 392; 34 M. L. T. 276; 16 A. L. J. 833; 28 C. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 C. W. N. 173; (1918; M. W. N. 922 (P. C.).

claim maintenance if he is entitled to claim partition. Objection has been taken on the ground that the authorities quoted in the text-books in support of this proposition are all Bombay authorities. But the proposition is stated both by Mr. Mayne and Sir Dinshaw Mulla in general terms and no Madras authority to the contrary has been quoted before me.

Mr. Ramkrishna Iyyar has quoted two Lahore cases, one which is that in *Bhagwan Singh v. Kawal Kaur* (2) where a widow claiming maintenance for herself and her minor son and daughter was given a decree against assets of the joint family, comprising a certain allowance for the widow and an additional sum for each of the minor children. In this case, the learned Judges did not consider the question whether the minor boy should or should not have brought a suit for partition and the fact that he had rights as a co-parcener as distinct from his rights as a minor entitled to maintenance is not referred to. The other case quoted is that in *Ramdas v. Lachman Das* (3) which was a case in which two grandsons sued their grandfather for maintenance during the lifetime of their father. It was observed that the grandfather's liability for maintenance arose only owing to the possession of joint family properties in his hands. This was of importance as affecting the question of jurisdiction which was the question actually decided in that case and no decision was given on the merits of the suit which was remanded for disposal in the light of the decision on the jurisdiction question. I do not think this can be treated as an authority for the proposition that the sons can get a decree for maintenance against the manager of the family during the lifetime of their father without claiming a partition. The argument which has the greatest force with reference to the claim of the son rests on the fact that the minor son's right to claim partition is not an absolute right, whereas he has an absolute right to be maintained out of the family property—at any rate, to the extent of his share; and it is argued that if he can claim partition only in circumstances which make it necessary to divide the family property in his interests, there would be no remedy for the refusal of maintenance in circumstances which do not make the

partition desirable in his interests. I do not think it necessary for me for the purpose of the present case to lay down that in no circumstances could a Court give a decree for maintenance against the family properties in favour of the minor co-parcener. But it does appear to me that in the vast majority of cases where the circumstances would justify a decree for maintenance, they would also justify a decree for partition and it should, in my opinion be open to the Court to pass that decree which the Court thinks best in the interests of the minor whose rights have been denied. From this it seems to me to follow that a minor co-parcener who has been denied maintenance and wishes to claim maintenance should bring his suit in the alternative claiming partition or maintenance as the Court thinks fit, unless his guardian decides to adopt the usual form of a suit claiming partition in the property. I doubt very much whether a minor co-parcener has a right to claim maintenance without at least putting it within the power of the Court to give the ordinary relief of partition should the Court think fit. It seems to me obvious that a claim for separate maintenance by a co-parcener without any partition is likely to lead to great complications in any subsequent working out of his right to partition.

With reference to the claim of the daughter, I doubt very much whether the daughter during the lifetime of her father is entitled to bring a suit directly against the manager of the joint family property, ignoring the fact that the primary responsibility for her maintenance is upon the father and his properties, both joint and separate. In the present case, we have the curious position of the father and the daughter joining together to sue the manager for the daughter's maintenance. A daughter whose father is a member of a joint Hindu family has a right to be maintained by her father and out of his share in the joint family property. To allow her to get a decree directly against the manager of the joint family property would, in my opinion, be to create a situation which would almost certainly lead to complications and probably to injustice. Her maintenance would have to be charged on a particular item. That item might well be sold in execution of her decree. If that were done, would the father be allowed at a subsequent partition to take his full share of the balance of the joint family properties, ignoring the fact, that

(2) A I R 1927 Lah. 280; 101 Ind. Cas. 201; 8 L 360; 28 P L R 201; 9 L L J 117.

(3) A I R 1936 Lah. 853; 169 Ind. Cas. 321; 9 R L 733.

one item had been taken away to satisfy a liability which is primarily his own. It is suggested that a decree could be given and the charge could be made subject to a proviso that if it were realized, the item of property sold should be treated as part of the share of the father. It does not seem to me practicable to make any such provision which would have the effect of attempting a partial partition. It seems to me that the proper course for a daughter to adopt if, during the lifetime of her father, she has been denied maintenance, is not to bring a suit for maintenance against the manager of the joint family, but to bring a suit against her father claiming maintenance out of his properties, joint and separate. After she has got her decree, she may, if necessary, enforce it by the sale of her father's share in the joint family properties. This would presumably lead to a proper partition in which the rights of each branch of the family could be equitably worked out. Seeing that the daughter's right is primarily against her father's share and that is a right which is derived from him, I do not consider that she should be allowed to bring a suit directly against the person in charge of the family properties, instead of proceeding against the person who is primarily responsible for her maintenance and whose share in the family properties is ultimately liable. In the result, therefore, I dismiss the appeal with costs. Leave to appeal granted.

N.B.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

First Appeal No. 53 of 1935

August 22, 1938

LOBO AND WESTON, J.J.

VIRBHANDAS SHAMSING AND OTHERS—

APPELLANTS

versus

DASUMAL KESHOWDAS AND OTHERS—

RESPONDENT

Transfer of Property Act (IV of 1882), ss. 3, 5, 130—Dissolution of partnership—Certain partners paid off and in return assigning their interest in assets of partnership to remaining partners—Whether amounts to transfer of property—Assignment to those remaining partners of debts due to firm can only be made by writing signed by other partners.

The definition of "transfer of property" is sufficiently wide to cover cases in which on dissolution of a partnership, certain partners are paid off and in return, give up or assign their interests in the assets of the partnership. Where those partners arrange

that the remaining partners are to be entitled to the debts due to the firm, such an arrangement amounts to a transfer of an actionable claim, and under s. 130, Transfer of Property Act, such a transfer could be made only by a writing signed by the other partners. *Brijmohan v. Mahabeer* (1) and *Mulibai v. Shewaram Menghraj* (2), distinguished.

Mr. Dipchand Chandumal for the Appellants.

Mr. Srikishindas H. Lulla, for the Respondents.

Weston, J.—The facts leading to this litigation are as follows: Suit No. 62 of 1931 in the Court of the First Class Sub-Judge, Sukkur, was filed in the name of the firm of Virbhandas Shamsing of Sukkur, said to have been already dissolved, by two partners Changomal and Seommal against another firm Dasumal Keshowdas of Pir Jo Goth through nine persons. The defendant partners are said to be the descendants of one Takhandas and to have formed a joint family business among themselves. Although in the plaint it is suggested that defendants were the only partners of the firm of Dasumal Keshowdas it was pleaded by defendants that there were also certain other partners in this firm. The nine defendants were also concerned in the plaintiff firm of Virbhandas Shamsing and it appears that this firm of Virbhandas Shamsing was made up of the two plaintiffs, the nine defendants and three other persons, who were not made parties to the suit, as partners. This is not stated in the plaint but was disclosed by plaintiffs following an application by defendants under O. XXX, r. 2, Civil Procedure Code, 1908. The case of plaintiffs was that the firm of Virbhandas Shamsing was dissolved on October 30, 1930, and that a balance sheet or *po'amel* was drawn up at that time. The two plaintiffs then took on the business with its assets and liabilities and the other partners then ceased to have any connection with the firm. The firm of Dasumal Keshowdas, as such, had had dealings with the firm of Virbhandas Shamsing and on the date of the dissolution of the latter firm, owed it an amount of about Rs. 15,000. The present suit therefore filed originally, as has been stated, in the name of the firm of Virbhandas Shamsing was for the recovery of this amount of Rs. 15,000 from the firm of Dasumal Keshowdas.

Defendants among other defences pleaded that the suit was not maintainable and that as plaintiff's firm had been dissolved, all the partners of that firm were necessary parties to the suit. After written statements were

filed plaintiffs Changomal and Secomal applied to amend the plaint by striking out the firm of Virbhandas Shamsing and continuing the suit themselves in their personal capacity. The application was allowed and an amendment made. The learned Subordinate Judge held that on the evidence it was proved that there had been dissolution of the partnership of Virbhandas Shamsing and that plaintiffs had taken up the assets and liabilities of the partnership. He held, however, that as the suit was by plaintiffs in their individual capacity as assignees of the outstandings of the firm of Virbhandas Shamsing, this assignment of the debt due to the firm could only be made under s. 130, Transfer of Property Act, by means of an instrument in writing signed by the transferors or their duly authorized agents. As there was no such instrument, he has dismissed the suit with costs.

Plaintiffs appeal and it is contended by Mr. Dipchand on their behalf, firstly, that no document in writing was necessary in order to give plaintiffs a right to sue for a debt due to the firm, and secondly, in the alternative that even if a document in writing is necessary, yet such a document exists by reason of the *potamal* drawn up at the time of dissolution of the partnership. In view of the amendment of the plaint, it is no longer necessary to consider whether, although the firm of Virbhandas Shamsing had ceased to exist, the suit by Changomal and Secomal in the name of the firm was not maintainable in view of the fact that the firm existed and these persons were partners when the cause of action accrued. Plaintiffs probably in view of the provisions of O. XXX, r. 9, have chosen to base their case upon the arrangements said to have been made at the dissolution of partnership.

We would remark that the evidence that the arrangement pleaded was accepted by all partners appears to us very unsatisfactory. It is admitted that there were partners other than plaintiffs and defendants, but we have not been able to find evidence that these other partners who are not parties to the suit were consulted about or accepted the arrangements said to have been made. On this ground alone we think that plaintiffs must fail. Assuming, however, that the arrangement was proved that all the partners agreed that Changomal and Secomal were to be entitled to the suit debt, in our view such an arrangement amounts to a transfer of an actionable claim, and under s. 130, Transfer of

Property Act, such a transfer could be made only by a writing signed by the other partners. That the suit debt is an actionable claim appears from the definition in s. 3, Transfer of Property Act, Section 5 of the same Act, defines transfer of property as an act by which a person conveys property to one or more persons or to himself. Mr. Dipchand has relied upon certain cases of joint Hindu family businesses such as *Brijmohan v. Mahabeer* (1), in which it was held that in a Mitakshara joint family business no assignment is necessary when a co-parcener retires from membership of the family business. But we do not think that these cases can be applied to other partnerships. In our view the definition of transfer of property is sufficiently wide to cover cases in which on dissolution of a partnership, certain partners are paid off, and in return, give up or assign their interests in the assets of the partnership. In England when a change in a firm has occurred assignment of the debts of the old firm in the new firm is necessary if the new firm wishes to sue to recover these debts: *vide* Lindley on Partnership, 10th Edn., p 359. In the present case, we understand that partners other than plaintiffs were given cash credits in consideration of their giving all rights in the assets of the firm. This being so, we hold that s. 130, Transfer of Property Act, requires that the acquisition by plaintiffs or the assignment to plaintiffs of the actionable claim now in suit could not be effected except by a document in writing signed by the other partners.

Mr. Dipchand has relied upon the ruling of this Court reported in *Mulibai v. Shewaram Menghraj* (2), which is said to lay down that s. 130, Transfer of Property Act, is not exhaustive of all methods of devolution of interest. This was a case where there had been a devolution by a decree of the Court, but such a devolution is expressly saved from the operation of s. 130 by s. 2 (d), Transfer of Property Act, and this ruling cannot be taken to mean that devolutions other than those exempted from the operation of s. 130 are valid. It only remains to see whether in the present case the writing required by s. 130 exists. No such writing appears on the record of the case, and for evidence of the existence of any such writing we do not think we need go further than the statement of the plaintiff Chango-

(1) 63 O 194; 166 Ind. Cas. 781; 40 O W N 808; 9 R O 614.

(2) A I R 1926 Sind 78; 90 Ind. Cas. 111.

mal when (at p. 16 of the paper-book) he says : "There were no signatures on the potamel." The conclusion must be that no writing signed by other partners was made to effect the assignment of the suit debt to the present plaintiffs. The suit as brought therefore was not maintainable. The appeal must fail and is dismissed with costs.
D. *Appeal dismissed.*

MADRAS HIGH COURT

Appeals Nos. 151 and 249 of 1936

December 13, 1938

VARADACHARIAR AND ABDUR RAHMAN, JJ.

SURATHU SITHARATHNAMMA—

APPELLANT

versus

PILLARISSETTI SESHAMMA AND ANOTHER

—RESPONDENTS

Court Fees Act (VII of 1870), s. 17—Suit by widow against persons claiming as legatees under her husband's will, for recovery of possession of his property on ground that he died intestate—Alternative prayer for maintenance—Separate court-fee for alternative claim, if must be paid—Hindu Law—Maintenance—Widow—Provision by husband in his will as regards maintenance to be granted to his widow, if deprives Court of power to fix reasonable maintenance—Mere fact that widow was living away from her husband during his lifetime without any justifiable cause, whether causes forfeiture of her right to maintenance.

Where a widow brings a suit for recovery of her husband's property alleging that he died intestate, against persons who claim to be legatees under the will executed by her deceased husband with a prayer in the alternative for maintenance, the payment of court-fees for the higher claim for possession is sufficient to cover the alternative claim for maintenance as well, and no separate court-fee is payable for such alternative claim. [p. 31, col. 1.]

Any provision made by the husband in his will as regards the wife's maintenance cannot be regarded as taking the matter out of the Court's power to fix a reasonable maintenance but can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance when the provision made by the husband in his will for the maintenance of his wife and minor daughters appears to be inadequate, the Court has power to substitute a more reasonable provision. *Promotha Nath Roy v. Nagendrabala* (1), relied on. [*ibid.*]

Obiter.—A widow does not forfeit her right to maintenance from her deceased husband's estate merely because she was living separate from her husband during his lifetime without any justifying cause but not for any improper purpose, nor is she debarred from enforcing the right against the legatees from her husband, more especially so when the husband's conduct during his lifetime clearly shows that he never regarded his wife as having forfeited her claim to maintenance. *Surampalli Bangaramma v. Surampalli Brambaze* (4), relied on, *Naganna Naidu v. Lakshmi Debi* (2), explained, *Sankaramurthy v. Subbamma* (3), distinguished.

As. against the decree of the Sub-Judge (Additional), Masulipatam, dated December 9, 1935.

Messrs. G. Lakshmanna and P. S. Ramachandra Ayyar, for the Appellant in No. 249 and for the Respondents in No. 151.

Messrs. P. V. Rajamannar and K. Subba Rao, for the Respondents in No. 249 and for the Appellants in No. 151.

Varadachariar, J.—These appeals arise out of the same suit which related to the estate of one Pillarisetti Butchi Venkatarao Naidu who died at Masulipatam on November 17, 1932. Plaintiff No. 1 is the junior wife of the deceased and plaintiff No. 2 is her minor daughter. The defendant is the daughter of the deceased by his predeceased senior wife. The main prayer in the plaint was for recovery of possession by the plaintiffs on the footing that the deceased died intestate. As the defendant was setting up a will alleged to have been executed by the deceased on May 10, 1932, there were alternative prayers for maintenance, for the marriage expenses of plaintiff No. 2, etc. The defendant set up Ex. 1 as the will left by the deceased. The plaintiff denied its genuineness and contended that even if it had been executed by the deceased, it must have been got from him at a time when he was not of a sound disposing state of mind and as a result of undue and overpowering influence exercised by the defendant and those interested in her. The defendant denied these allegations. The will Ex. 1 contains certain provisions as regards the maintenance to be paid to the plaintiffs and the money to be paid for the marriage expenses of plaintiff No. 2. The plaintiffs contended that even if the will was true and otherwise valid, these provisions as regards the maintenance, marriage expenses, etc., could not affect their right to a reasonable provision for the same under Hindu Law. The learned Subordinate Judge held that Ex. 1 was duly executed by the deceased in a sound disposing state of mind and was not brought about by any undue influence. He accordingly dismissed the suit so far as it claimed possession of the estate. He was however of opinion that the provisions in Ex. 1 as regards maintenance and marriage expenses to be paid to the plaintiffs were inadequate and unsubstantial and were not binding upon the plaintiffs. He was also of opinion that the security for the same provided by the will was of very little value. He accordingly enhanced the amounts pay-

able to the plaintiffs under these heads and made better provisions for securing their payment. The plaintiffs have preferred A. S. No. 249 of 1336 against this decree and the defendant has preferred A. S. No. 151 of 1936.

So far as the claim for recovery of possessions of the estate on the footing of intestacy is concerned, we see no reason to differ from the conclusion of the learned Subordinate Judge (His Lordship then discussed the evidence and proceeded). It only remains to deal with the alternative claim to maintenance and other payments. The defendant in her appeal has contended that the lower Court has fixed the maintenance too high. A question has also been raised in support of her appeal that, in the circumstances, the Court has no power to interfere with the provision made by the deceased in the will. The plaintiffs on the other hand have, in their appeal, claimed that a more liberal provision should be made for their maintenance and for the expenses of plaintiff No. 2's marriage. Having given to the contentions of both sides our best consideration, we see no reason to interfere with the rates fixed by the lower Court.

On the question of law raised by Mr. Subba Rao on behalf of the defendant, he drew our attention to the conflicting observations of the two learned Judges of the Calcutta High Court who took part in *Promotha Nath Roy v. Nagendrabala* (1). It happened in that case that both the learned Judges agreed as to the propriety of the provision that had actually been made in the will. The observations on the general question were therefore *obiter*. It has not been disputed before us that if the husband had bequeathed his property ignoring the wife's claim to maintenance, such giving away will not affect the widow's claim to maintenance. If this is the true legal position, it appears to us that there is more to be said in favour of the view taken by Cox, J. in *Promotha Nath Roy v. Nagendrabala* (1), that any provision made by the husband in his will as regards the wife's maintenance cannot be regarded as taking the matter out of the Court's power to fix a reasonable maintenance but can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance. Mr. Subba Rao conceded that if the provision in the will was so unsubstantial as practically to make it illusory, the

Court might regard it as a fraudulent exercise of the husband's power, if any, in the matter. Without using such strong language, the learned Subordinate Judge, has in this case, held that the security provided in the will for the payment of maintenance to the plaintiffs is of very little value.

It is no doubt true that for many years before the testator's death, the husband and the wife had been living apart; but there are conflicting versions as to the reason for the same. Fortunately, no improper motives have been suggested for the plaintiffs living apart and it must be said to the credit of both the husband and the wife that in spite of all the strain involved on their good-will by such living apart, the husband never thought that the wife was no longer entitled to claim maintenance or by her conduct had forfeited it. Even during the time that he was ill, he took particular care to see money sent to her every month for her maintenance and a provision has been made in the will on the same lines. While giving credit for this to the husband, we cannot help feeling that when it came to his making these provisions in the will, the estrangement caused by such living apart has weighed his feelings far too much against the plaintiffs. The mere fact that during his lifetime he has been giving her Rs. 20 per mensem will not of itself establish that that was an adequate provision for all time. The first plaintiff was day by day growing older and her father on whom she might at one time have relied was growing older too. On the other hand, plaintiff No. 2, as she was growing in age, would require greater expenditure to bring her up in a decent way befitting their position in society. There is again the fact that during his illness which was chronic and protracted, the husband had to spend large amounts on his own treatment and that might well have made it difficult for him to make a more liberal provision for the plaintiffs. But that necessity ceased with his death. In these circumstances, we have come to the conclusion that the provision made by the deceased in his will in favour of the plaintiffs is inadequate and it is within the power of the Court to substitute a more reasonable provision.

The learned Counsel for the defendant next contended that by reason of plaintiff No. 1 living apart from her husband for so many years, she must be deemed to have forfeited her right to maintenance and that a right to the same in these circumstances cannot be enforced

against the legatee from the husband. In support of this proposition, he relied on the decisions in *Naganna Naidu v. Lakshmi Debi* (2) and *Sankaramurthy v. Subbamma* (3). The point decided in *Sankaramurthy v. Subbamma* (3), does not now arise for decision. The learned Judges recognized the existence of a conflict of judicial opinion on the point then before them, namely the right of a daughter-in-law to claim maintenance from a legatee who has taken the father-in-law's self-acquired property under a bequest. The decision proceeds on the footing that the daughter-in-law had no legal right to claim maintenance from the father-in-law during his lifetime. That is not the position here; because, subject to the defendant's argument as to forfeiture by reason of separate living, the plaintiffs undoubtedly had a legal right to claim maintenance from the defendant's father. The decision of the Privy Council in *Naganna Naidu v. Lakshmi Debi* (2), does not support the argument that a wife for ever forfeits her claim to maintenance by living away from the husband. Their Lordships were only dealing with a claim for arrears of maintenance claimed in respect of a period during which the wife had been living away from the husband without justifiable cause. No question arose in that case with reference to a claim for future maintenance. We have examined the record of that case and the judgment of the Subordinate Judge explains why no claim for future maintenance had to be considered in that case. The wife did not there sue for future maintenance and as a matter of fact, her husband died two months after the institution of the suit. By the affirmation of the trial Court's judgment, their Lordships of the Judicial Committee could not be taken to have negatived the wife's right to future maintenance, because the learned Subordinate Judge stated in that case at the conclusion of his judgment that since the date of her husband's death, the plaintiff would certainly have been entitled to maintenance. It seems to us therefore safe to proceed on the footing that in *Naganna Naidu v. Lakshmi Debi* (2), their Lordships did not pronounce an opinion on the question whether a wife who, during her husband's lifetime had lived apart from him without justifiable cause but for no improper

(2) A I R 1928 PC 187; 110 Ind. Cas. 30; 55 M L J 242; 28 L W 105; 48 C L J 171 (P.C.)
 (3) A I R 1938 Mad 914; 179 Ind. Cas. 121; 48 L W 411; (1938) M W N 922; 11 R M 514; (1939) 1 M L J 301; 1 L R (1939) Mad. 242.

purpose forfeits her right to maintenance for all time or is merely prevented from claiming separate maintenance during the time that she is living apart. In *Surampalli Bangaramma v. Surampalli Brambaze* (4), one of the learned Judges was clearly of opinion that it would merely be a case of suspension of the right and not a forfeiture. Even on this question, it is unnecessary in the present case to express a definite opinion, because the husband's conduct itself clearly showed that he never regarded the wife as having forfeited her claim to maintenance. As we have observed already, he was, throughout his lifetime, remitting moneys to plaintiff No. 1 for the maintenance of herself and plaintiff No. 2 and made what he considered a suitable provision for the same in the will. The only question for decision therefore is as to the reasonableness of the provision that has been made by him.

It was next contended by the learned Counsel for the defendant that the lower Court had overestimated the income from the Salt Factory and that the provision made by the lower Court in favour of the plaintiffs was much too onerous to the defendant. On the other hand, it has been contended by the learned Counsel for the plaintiffs that the lower Court's estimate of the income was unduly low and that the provision made by the lower Court is inadequate. We do not think there is any justification for the contention that the lower Court's estimate of the income is too high. It is true that the testator contemplated the possibility of the income sometimes going below Rs. 1,000; but the suit was actually tried three years after the testator's death and the defendant was in the best position to produce satisfactory materials to establish what the income was. Though we have held that the plaintiffs were not justified in suggesting any kind of conspiracy between D. W. No. 4 and the defendant during the testator's lifetime to bring into existence the will, Ex. 1, there can be little doubt that during the trial D. W. No. 4 has been doing his best to support the defendant's case. The reason given for the non-production of the factory accounts for the years 1932-33 and 1933-34 is wholly unconvincing. The accounts for 1934-35 have been produced. Mr. Lakshmanma has contended that even these accounts are not reliable because, according to him, the prices shown for the sale of salt are not true prices. The learned Subordinate Judge was also of the opinion

(4) 31 M 338; 18 M L J 254.

that D. W. No. 4 and the defendant were estimating the income much too low. We think that the figure fixed by him is perhaps the safest estimate in the circumstances. On that basis we see no reason to differ from the rates fixed by him for the maintenance of the plaintiffs and for the expenses of plaintiff No. 2's marriage.

The result is that both the appeals must be dismissed with costs and the lower Court's decree confirmed except in respect of two matters. As the plaintiffs instituted the suit *in forma pauperis*, the lower Court has made provision in its decree for payment of the court-fee payable to Government and the amount thus directed to be paid is Rs. 2,539-13-0. Mr. Lakshman has contended—and we think rightly—that the lower Court has arrived at this figure on a wrong view of the law. The plaint contained alternative prayers either for possession or for maintenance. When the matter was before the District Court, the District Court made an order on January 15, 1935, directing that court-fee should be calculated under s. 17, Court Fees Act, on three separate heads, namely the claim for possession, the claim for maintenance, etc., and the claim in respect of Sch. C. Totalling up the three heads the learned District Judge made up the sum of Rs. 2,539-13-0 as follows: Rupees 1,582-7-0 for recovery of possession, Rs. 837-7-0 for the maintenance claim and Rs. 119-15-0 for Sch. C claim. The inclusion of Rs. 837-7-0 as a separate item seems to us unwarranted. The payment of court-fee for the higher claim for possession was in the circumstances sufficient to cover the alternative claim as well. The sum of Rs. 2,539-13-0 mentioned as court-fee in the lower Court's decree will accordingly be reduced to Rs. 1,702-6-0.

It has also been brought to our notice that the decree of the lower Court does not incorporate the provision in the judgment for the expenses of plaintiff No. 2's marriage. This provision will be included in the decree as it is covered by the provision for charge made in the concluding portion of the lower Court's decree. The decree will, however, state that the amount awarded for the marriage expenses will be claimable only three months before the date fixed for the marriage.

N.S.

Order accordingly.

NAGPUR HIGH COURT

Second Appeal No. 332 of 1936

October 10, 1938

Bose, J.

Musammât RENUKABAI—APPELLANT

versus

BHEOSAN HAPSAJI JUNGHARE

AND OTHERS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 100, 91, 53, 3—Agreement creating charge offending against latter part of s. 100—Validity—Charge, how created—In default of payment of maintenance, the plaintiff given right to cultivate fields by taking possession—Whether creates charge—Mortgage of such fields with notice, effect of—Enforcement of charge against mortgagee—Form of decree—Burden of proving that transfer was for value and without notice—Conduct which can be regarded as wilful abstention from making inquiry—Notice to agent, is constructive notice to principal.

The first part of s. 100, Transfer of Property Act, deals with substantive rights and the second with the manner in which they are to be enforced, that is to say, with the adjective or procedure law. That being so, the latter portion of the section cannot be said to govern the former. An agreement which clearly falls within the definition cannot therefore be invalidated altogether simply because it contains provisions which offend against the procedural law, as laid down in the latter portion of the section. (p. 35, col. 1.)

The agreement which provides that in default of payment, of maintenance by one party to the plaintiff, the latter would be at liberty to cultivate the fields by taking possession of the same, the intention is that the plaintiff is to look to the profits from this land for her maintenance, for a particular period. That clearly creates a charge. It does not amount to a mortgage, for there is no transfer of any interest in the property charged and such a charge cannot be enforced by sale of the land. When the parties themselves expressly contract that the remedy for default in payment shall be delivery of possession for a particular period, namely during the lifetime of the charge holder and not sale, the Courts would not be justified in substituting a totally different contract for the one made. *Khajaj Sulekhan Qadir v. Salimullah Bahadur* (1) and *Nawab Umjad Ali Khan v. Mohamdee Begum* (2); relied on. [*ibid.*]

Where the property thus charged was mortgaged, the mortgagee having the constructive notice of the charge and there being default in payment of maintenance, the charge was sought to be enforced against the mortgagee:

Held, that the decree should approximate as near as may be to a decree for foreclosure; that is to say, the defendant must be given the chance of redemption if he desired to keep the property in his possession. The relief was an equitable one and so could be moulded to suit the requirements of the case.

The possession of a mortgagee who takes with constructive notice of the charge, is that of a trustee, or to be more accurate resembles that of a trustee, under s. 91 of the Trusts Act. Consequently, he is as much bound to fulfil the obligation which attaches to this property as the mortgagor himself. An equitable lien arises under the law. *Omrao Begam v. Secretary of State* (3) and *Varden Seth Sam v. Luckpathy Royjee Lallah* (4), followed.

Whether the matter falls squarely within s. 100, Transfer of Property Act, or whether it comes under

a more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. *Bhup Narain Singh v. Gokul Ohand* (5), relied on.

Where a mortgagee knows about the law of registration, and also that if he wants to make sure that the property mortgaged to him was free from encumbrances, it is necessary for him to search the registers and yet while actually instituting a search or rather causing one to be made, refrains from making the same, his conduct can only be regarded as wilful abstention. *Agra Band v. Barry* (6), referred to [p. 36, col. 1.]

Where the registers of the Registrar contain a reference to a particular agreement creating a charge on particular property on the date on which they were examined on behalf of the mortgagee, an omission to look at the entries against this property and to look into them carefully must be held to be due either to wilful abstention or to gross negligence and the mortgagee must be held to have constructive notice of the charge.

S. A. from the appellate decree of the Court of the Additional District Judge, Amraoti, dated March 30, 1936, in Civil Appeal No. 58-A of 1935, confirming the decree of the Court of the First Subordinate Judge, Second Class, Amraoti, dated November 1, 1935.

Diwan Bahadur K. V. *Brahma*, for the Appellant.

Mr. M. R. *Bobde*, for the Respondents.

Judgment.—The plaintiff sues for possession of a field to the extent of a 1-3rd share and for arrears of maintenance.

The field originally belonged to a joint Hindu family of which the plaintiff was a member. On a partition between the male members, this field was assigned to the share of the plaintiff's grandson Ramrao. He undertook to pay the plaintiff a maintenance allowance of Rs. 300 a year and agreed in default to hand over the field to the plaintiff for her cultivation and enjoyment during her lifetime. This agreement is embodied in a registered document, Ex. P-1, dated February 8, 1926.

On March 20, 1926, Ramrao mortgaged the field to one Lalji, the father of the defendants Nos. 2-4 for Rs. 8,000 (Ex. B-9).

After this, on November 29, 1926, he sold the field to one Ramchandra Suryabhan. The first defendant who was a co-sharer, thereupon brought a suit for pre-emption, obtained a decree on June 23, 1928, and obtained possession. He also agreed at the same time, since, according to the plaintiff, the responsibility for paying the plaintiff her maintenance allowance had now devolved on him, to pay the plaintiff her Rs. 300 a year. The plaintiff says he did so up to January 1, 1932, but as he

stopped payments after that date she sued him and obtained a decree on April 30, 1934, in Civil Suit No. 577 of 1933.

In the meanwhile the defendants Nos. 2-4 had sued on their mortgage (C. S. No. 32 of 1932). They obtained a final decree for foreclosure and took possession on November 4, 1933. The first defendant was thus dispossessed.

The plaintiff's case is that the defendants Nos. 2-4 are now liable for the maintenance allowance and since they have refused to pay it on demand, the plaintiff is entitled to possession. Hence this suit.

The principal defence to the action in the lower Courts was that the defendants Nos. 2-4 are *bona fide* transferees for value without notice and so are not bound by the charge. The lower Courts have upheld this plea and have dismissed the plaintiff's claim. She appeals here.

The main point taken here on behalf of the defendants Nos. 2-4 is that the document in question, Ex. P-1 does not create a charge at all and that, therefore, no question of notice arises.

The document is in the following terms:—

"You are my grandmother and you are entitled to maintenance from me. Hence I shall give you Rs. 300 on account of maintenance each year in the month of January and shall obtain your receipt. In default to pay the aforesaid maintenance allowance at the stipulated time, I shall pay interest thereon.....I shall pay you this amount each year as stipulated. In case of default in the payment of the maintenance amount, I agree in writing to let you cultivate the following fields and thereby let you maintain yourself."

The last sentence is taken from the transaction given me by the learned Counsel for the defendants-respondents. I agree it is a more correct rendering of the original than the official translation:

It will be seen that the agreement was that the plaintiff was to enter upon possession and cultivate herself in the event of default and not that the property should be brought to sale in the manner contemplated by s. 100 of the Transfer of Property Act. This, it is argued, differentiates the agreement in question from a charge and, therefore, it is argued, considerations which apply to charges cannot be applied here.

Section 100 of the Transfer of Property Act defines a charge in the following words:

"Where immovable property of one person is by act of parties made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

This part of the section has not been touched by the amendment.

Then, having defined a charge, the section continues to deal with the manner of its enforcement. Before the amendment, it ran thus :—

"and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of ss. 81 and 82, shall, so far as may be, apply to the person having such a charge"

After amendment it reads as follows :—

"and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such a charge."

It will be seen that the first part of the section deals with substantive rights and the second with the manner in which they are to be enforced, that is to say, with the adjective or procedural law. That being so, I do not think the latter portion of the section can be said to govern the former. It may be relevant in considering whether a charge was really intended to be created but I do not think that an agreement which clearly falls within the definition can be invalidated altogether simply because it contains provisions which offend against the procedural law. Therefore what we primarily have to see is whether the agreement here falls within the ambit of the definition. That resolves itself into two questions: (1) was the intention to make the property security for payment of the money, and (2) does it not amount to a mortgage?

I have no doubt about the first point. The agreement was that in default of payment, the plaintiff was to be at liberty to cultivate the fields. The intention therefore was that the plaintiff was to look to the profits from this land for her maintenance. That clearly creates a charge. See *Khajaj Sulehman Quadir v. Salimullah Bahadur* (1). It does not amount to a mortgage, for there is no transfer of any interest in the property charged. Therefore the conditions of the definitions are fulfilled.

But I also agree that the charge here cannot be enforced by sale. When the parties themselves expressly contract that the remedy for default in payment shall be delivery of possession for a particular period, namely during the lifetime of the charge-holder and not sale, I do not think the Courts would be justified in substituting a totally different contract for the one made. The difference is a material one,

for if sale is the remedy, then the owner stands a chance of losing his property for all time, whereas if possession is all that can be claimed, then his proprietary interest in the property is unaffected and his right to possession revives on the death of the charge-holder. It is to be observed that s. 100 contemplates other methods of enforcement, for the words relating to sale are *so far as may be* and their Lordships of the Privy Council observe in *Nawab Umjad Ali Khan v. Mohumdee Begum* (2) that

"unless some authority is cited to show that the transaction is invalid, effect should have been given to the manifest intention of the parties"

The trouble arises here because in India the one word "charge" is used to embrace not only charges properly so-called, which arise by act of parties, but also liens which arise by operation of law. In the one case, namely of charge proper, remedy by sale is of the essence, but not necessarily so in the case of a lien.

As between the immediate parties to the agreement, it does not much matter what the transaction is called, for it could clearly be specifically enforced. If Ramrao had failed to pay, the plaintiff could have compelled him to perform his bargain and place her in possession. In those circumstances the possession of the defendant, who, as I shall show later took with constructive notice of the charge, was that of a trustee, or to be more accurate, resembled that of a trustee, under s. 91 of the Indian Trusts Act. Consequently, he is as much bound to fulfil the obligation which attaches to this property as Ramrao was. An equitable lien arises under the law. Cases of analogous liens under the English Law are to be found in *Oote on Mortgages*, Vol. I, p. 80 and Vol. II, p. 337. The Privy Council also envisage the possibility of equitable charge in India in *Omrao Begum v. Secretary of State* (3) and *Varden Seth Sam v. Luckpathy Royjee Lallah* (4). See also Ghose's Law of Mortgages in India, 4th Edition, Vol. I, p. 130 *et seq.*

That brings me to the question of notice. There is not much difficulty there. Whether the matter falls squarely within s. 100 or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. This has been

(2) 11 M I A 517 at p 548; 10 W R 25; 2 Suth. 98; 2 Sar. 315 (P O).

(3) 19 O 584 at p 593; 19 I A 95; 6 Sar. 192 (P O).

(4) 9 M I A 307 at p 326; 1 Sar. 857, 1 Suther 460; 19 B R 756 (P O).

(1) 49 O 820 at p 836; 69 Ind. Cas. 138; A I R 1922 P O 107; 31 M L T 79; 4 U P L R (P O) 70; 43 M L J 385; 24 Bom. L R 1257; 27 C W N 101; 21 A L J 1; 27 O L J 56; 49 I A 153 (P O).

settled by their Lordships of the Privy Council in *Bhup Narain Singh v. Gokhul Chand* (5), where they quote a passage from an earlier ruling of the Board in *Varden Seth Sam v. Luckpathy Royjee Lallah* (4). Their Lordships stated there that it does not matter whether the charge is an equitable or a legal one for the principle is the same and continued :

"As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge."

That settles the question.

The lower Appellate Court has placed the burden on the plaintiff and so has the first Court, but that, according to their Lordships' decision, is wrong.

It may be conceded that registration does not operate as constructive notice here because the amendment to s 3 of the Transfer of Property Act, had not been made at the date of the mortgage but the definition of notice was the same.

"A person is said to have notice of a fact when... but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

This makes the matter as variable as the proverbial Chancellor's foot. What would be gross negligence in one case would not be so in another; what would amount to wilful abstention in one man would not necessarily be so in another. The type and kind of search expected of one person would not be the same as that required of another. It all depends upon the man's knowledge and the means of information which lay to his hand.

"It is merely the course which a man dealing *bona fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow with a view to his own title and his own security. *Agra Band v. Barry* (6)."

In the present case there can be no doubt that the defendant knew about the law of registration. He knew that if he wanted to make sure that the property mortgaged to him was free from encumbrances it would be necessary for him to search the registers. I say he knew this because he actually did institute a search, or rather caused one to be made. That being so, armed with that knowledge, if he had refrained from making a search, it could only have been regarded as wilful abstention in his case.

(5) 13 Pat. 242 at p 251; 147 Ind. Cas. 1134; A I R 1934 P C 68; 61 I A 115; 6 R P O 108; 11 O W N 330; 39 L W 363; 15 P L T 67; (1934) M W N 206, 66 M L J 255; 38 O W N 393; (1934) A L J 291; 38 Bom. L R 421; 59 O L J 139 (P O).
(6) (1874) 7 H L 135.

It is not a matter of law; it is not that the law requires a search in every case. It is a question of fact, pure and simple. Would a man possessed of the knowledge which the defendant possesses, or rather possessed at the relevant date, knowing all he did, acting honestly, anxious to take a mortgage free from encumbrances, have searched the registration registers? If yes, then an omission to do so would either be wilful abstention or gross negligence.

I stress this because the lower Courts, and especially the lower Appellate Court, seem to think that the matter is one of law and have decided the case accordingly. I refer in particular to the following sentence :

"No duty is cast by the law to take an inspection of the registry."

In the present case I can only come to one conclusion on the facts. The defendant did cause a search to be made. He must have done that for some reason. The only reason possible was to see whether the property was free from encumbrances and whether the title sought to be conveyed resided in the mortgagor. That being so, he was aware of the value and necessity of a search when taking a mortgage of property and if he was aware of that, then it was incumbent on him, possessed of that knowledge, to make the necessary search or cause it to be made on his behalf.

It is necessary to come to this finding before one passes on to the next step, because if it was not necessary for him to make a search, then the fact that he made, or caused to be made a very cursory one, would not tell against him. On the other hand, if it was necessary, then a cursory glance through the registers and an omission to look at the entries relating to this property could only have been due to wilful abstention or to gross negligence. No other conclusion is possible.

Now we know that the registers did contain a reference to this particular agreement on the date on which they were examined on behalf of the defendant. I have also held that it was incumbent on the defendant, armed with the knowledge he had, to inspect or cause these registers to be inspected. That being so, an omission to look at the entries against this property and to look into them carefully must, in the circumstances of this case, have been due either to wilful abstention or to gross negligence.

The next question is whether the defendant can be charged with the negligence or

bad faith of his agent. It is now settled that he can. The matter is dealt with in Mulla's Transfer of Property Act, 1933 Edition, p. 33. In spite of a Calcutta decision to the contrary, their Lordships of the Privy Council decided in *Mohori Bibee v. Dharmodas Ghose* (7) that the acts and knowledge of the agent were the acts and knowledge of his principal, and this as Sir Dinshaw Mulla points out accords with the principle that "he who acts through another is deemed to act in person." Were it otherwise "notice would be avoided in every case by employing agents."

This principle has now been embodied in Explanation III to s. 3 of the Transfer of Property Act, but the amendment introduces no new law. It merely gives effect to the Privy Council decision as against the earlier Calcutta ruling in *Greender Chunder Ghose v. Mackintosh* (8).

In these circumstances not only has the defendant not proved that he is a *bona fide* transferee without notice but he is in equity deemed to have had constructive notice of the charge. Consequently it can be enforced against him.

The next question then is to what extent can this be done? The claim includes a prayer for arrears of maintenance and also for possession. It is clear that no personal decree can be passed against the defendant because he was not a contracting party. He did not agree to pay the plaintiff anything.

It is equally clear under the terms of Ex. P-1 that if there is default in payment of the allowance, then the plaintiff is entitled to possession. There has been default and so under a strict interpretation of the bond possession would have to be handed over. But even a foreclosure mortgage is not enforced like that, and so a mere charge, which is a lesser right cannot be placed upon a higher footing. The decree will therefore have to approximate as near as may be to a decree for foreclosure; that is to say, the defendant must be given the chance of what I might term redemption if he desires to keep the property in his possession. That resort may be had to foreclosure in suitable cases is evident from 13 Halsbury 93. The relief is an equitable one and so can be moulded to suit the requirements of the case.

The decree will therefore be that if the

(7) 30 O 539 at p 545; 30 I A 114; 8 Sar. 374; 7 O W N 441 (P O).

(8) 4 O 897 at p 910; 4 O L R 193.

defendants pay into Court the sum of Rs. 317-4-0 and future interest thereon from July 6, 1936 (the date of the appeal in this Court) to March 6, 1939 (the date hereby fixed for payment) at the rate of 6 per cent. per annum simple together with the costs on or before March 6, 1939, then the plaint property will stand free from the charge created by reason of the said sum (but not free from a charge for future maintenance). But if they do not, then the defendants will place the plaintiff in possession of the plaint property for the period of her life in lieu of her right to maintenance.

I have not allowed future interest from the date of suit to the date of the appeal because it was not claimed and no court-fees were paid for such a relief.

The appeal is allowed and the decrees of the lower Courts are reversed. Costs in all three Courts will be paid by the defendants-respondents.

D.

Appeal allowed.

MADRAS HIGH COURT

Second Appeal No. 404 of 1934

April 17, 1939

LEACH, C. J. AND PATANJALI SASTRI, J.J.

SAMINATHA IYER AND ANOTHER—

APPELLANTS

versus

(MINOR) VAGEESAN BY GUARDIAN

SIVAKAMI AMMAL—RESPONDENT

Hindu Law—Adoption—Brahmin adopting daughter's son—Datta homam, if essential.

The performance of the *datta homam* ceremony is not essential for the validity of the adoption by a Brahmin of the son of his daughter. [p 37, col. 2.]

[Case-law referred to.]

S. A. against the decree of the Sub-Judge, Kumbakonam, dated November 29, 1933

Mr. K. S. Desikan, for the Appellants.

Messrs. K. Rajah Ayyar, R. Viswanathan and V. Ramaswamy Ayyar, for the Respondent.

Leach, C. J.—The question which falls for decision in this case is whether the performance of the *datta homam* ceremony is essential when a Brahmin adopts the son of his daughter. Natesa Ayyar, the brother of the first appellant, adopted the respondent, the son of his only daughter. Natesa Ayyar was joint with his brother and his brother's son, the second appellant. Natesa Ayyar died on September 23, 1929,

and the respondent filed the suit out of which this appeal arises on January 22, 1930, for partition of the family properties. The appellants denied the factum of adoption, and advanced the alternative plea that if the respondent had been adopted, the adoption was invalid as the *datta homam* ceremony had not been performed. They also averred that if the respondent's adoption was valid, the partition of the family estate was not for his benefit. The District Munsif of Kumbakonam, who tried the suit, held that the adoption had taken place, but the *datta homam* ceremony had not been performed. As the District Munsif considered that the ceremony was not necessary for a valid adoption and being of the opinion that the suit was for the benefit of the respondent he granted the decree prayed for. The appellants appealed to the Subordinate Judge, who concurred in all the findings of the District Munsif. The appeal to the Subordinate Judge having failed, the appellants have appealed to this Court. The findings of fact of the Subordinate Judge are conclusive and the only question which we have to decide is whether the performance of the *datta homam* ceremony was essential in this case the family being of the Brahmin caste.

By the decision of the Privy Council in *Bal Gangadhar Tilak v. Shrinivas Pandit* (1) it has now been finally settled that the *datta homam* ceremony is not necessary when the adoption is of a Brahmin boy of the same *gotra*. I shall return to the judgment in that case presently; but before doing so I desire to trace the course of decision in this Province. In *Singamma v. Venkata Charlu* (2) it was held that in order to establish a valid adoption in a Brahmin family, proof of the performance of *datta homam* was not essential; proof of the giving and taking was sufficient. In that case it was not known whether the adopted boy was or was not of the same *gotra* and the decision must therefore be taken to apply to the adoption of a boy of a different *gotra*. This decision was followed by Kindersley and Muttusamy Ayyar, JJ. in *Chanidramala v. Muktamala* (3) which related to an adoption by a Kshatriya. Muttusamy Ayyar, J., however, observed that if the question whether

(1) 39 B 441; 29 Ind. Cas. 639; A I R 1915 P C 7; 42 I A 135; 13 A L J 570; 19 O W N 729; 17 Bom. L R 527; 22 O L J 1; 29 M L J 34; 18 M L T 1; (1915) M W N 484; 2 L W 611 (P O).

(2) 4 M H C R 165.

(3) 6 M 20.

religious ceremonies were essential to adoption were *res integra*, he would have felt considerable difficulty in holding that the ceremony of *datta homam* was not of the essence of a valid adoption among the three higher classes. The same doubt was expressed in the judgment of Turney, O. J. and Muttusamy Ayyar, J. in *Venkata v. Subhadra* (4). In *Govind Ayyar v. Dorasami* (5) a Full Bench, consisting of Collins, O. J. and Kernan, Muttusamy Ayyar, Brandt and Parker, JJ. held that the ceremony of *datta homam* was not essential to a valid adoption among Brahmins in Southern India when the adoptive father and son belonged to the same *gotra*. To that extent the Court felt it might adhere safely to the decision in *Singamma v. Venkata Charlu* (2). It did not expressly say that that decision went too far and therefore it cannot be said that the decision was overruled, but the doubts apparently still existed. The case in *Bal Gangadhar Tilak v. Shrinivas Pandit* (1) related to an adoption from the same *gotra* and in delivering the judgment of the Judicial Committee Lord Shaw observed:

"The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvass or call in question any *dicta* upon that general point, nor does the question arise, whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govind Ayyar v. Dorasami* (5) or of the Madras High Court in *Singamma v. Venkata Charlu* (2) both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India, for, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same *gotra* as that of the adoptive father."

In view of this statement and bearing in mind that in *Govind Ayyar v. Dorasami* (5) there was no express limitation of the decision in *Singamma v. Venkata Charlu* (2) it is certainly arguable that the latter decision still stands. If it stands, it is binding on us and provides a short answer to the appellants' case. It is, however, not necessary to come to a definite decision on the question whether it binds us or to inquire into the question whether the judgment went too far, because the appeal may be disposed of on another ground. There is ancient authority for the proposition that the *datta homam* ceremony is not essential in the case of an adoption by a

(4) 7 M 548.

(5) 11 M 5 (F B).

father of his daughter's son and the authority is the Yama text. The text is set out in the judgment of Sir Asutosh Mookerjee in *Katki v. Lak Pati Pujari* (6) and reads as follows:

"The *homam* or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son; by the verbal gift and acceptance alone, that is accomplished; this is declared by the Lord Yama."

Little is known of Yama but his name appears in the list of law-givers set forth in the Smriti of Yajnavalkya. Sir Asutosh Mookerjee accepted the text as of unquestionable genuineness and authority and set forth his reasons in detail. The text was accepted by the Bombay High Court in *Valubai v. Govind Kashinath* (7) and was accepted as authority for the proposition that the *datta homam* ceremony was not required in the case of adoption of a daughter's son in the course of the arguments in *Bal Gangadhar Tilak v. Shrinivas Pandit* (1). In *Bhagwan Singh v. Bhagwan Singh* (8) Banerjee, J. did cast doubt on the authenticity of the text, but I do not consider that his criticism should outweigh its acceptance in *Katki v. Lak Pati Pujari* (6), *Valubai v. Govind Kashinath* (7) and *Bal Gangadhar Tilak v. Shrinivas Pandit* (1). Moreover, the case in *Bhagwan Singh v. Bhagwan Singh* (8) was carried to the Privy Council, *Bhagwan Singh v. Bhagwan Singh* (9) and there is no indication in the judgment of the Board of the acceptance of the criticism of Banerjee, J. On the other hand Lord Hobhouse in delivering the judgment referred to the fact that "one ancient sage, called the holy Yama, expressly asserts the right to adopt a sister's son." It is true that the Yama text is in conflict with the Dattaka Chandrika in that the latter does not recognize the validity of the adoption of a daughter's son. The prohibition has, however not been observed in Southern India, where a custom exists of adopting a sister's or a daughter's son; vide *Vayidianada v. Appu* (10). It does not, of course, follow from the fact that there is this custom that the *datta homam* ceremony is not essential in the case of the adoption of a daughter's son, and there is no evidence that it is customary to dispense with the *datta homam* ceremony in such a case, but if the Yama text is accepted, it must be

(6) 20 O W N 19; 27 Ind. Cas. 39; A I R 1915 Cal. 214; 20 O L J 319.

(7) 2 B 218; 1 Bom. L R 770.

(8) 17 A 294; A W N 1895, 167 (F B).

(9) 21 A 412; 26 I A 153; 7 Sar. 474 (P O).

(10) 9 M 44 (F B).

held that the ceremony is not essential to a valid adoption. I see no reason why it should not be accepted and consequently I hold that the adoption in this case was valid despite the fact that the *datta homam* ceremony was not performed.

Mr. Rajah Ayyar on behalf of the respondent advanced the argument that the reason why the *datta homam* ceremony is not essential in the case of the adoption of a daughter's son is because the Hindu Law regards a daughter's son as being in the same position as a son's son in the performance of the obsequies and other ceremonies following the death of the grandfather. He referred in this connection to the judgment of Venkataramana Rao, J. in *Panchapakesa Iyer v. Gopal* (11) where the learned Judge quoted these words of Vishnu: "In regard to the obsequies of ancestors, daughter's sons are considered son's sons" and the following words of Manu:

"Between a son's son and the son of a daughter there exists in this world no difference; for even the son of a daughter saves him (who has no sons) in the next world, like the son's son."

This may be the reason why Yama declared that the *datta homam* ceremony was not essential in the case of the adoption of a daughter's son, but the validity of the text does not depend on the discovery of the reason for the rule. For the appellants it has been argued that the Yama text refers to the son of a daughter born after the daughter's appointment by the father to continue his line. The wording of the text does not support this argument and the argument is obviously fallacious because adoption is not necessary when the appointed daughter bears a son. The son is regarded from the moment of his birth as the son of the daughter's father and not as the son of her husband. I consider that the case was rightly decided below and as my learned brother shares this opinion, the appeal will be dismissed with costs.

Patanjali Sastri, J.—This second appeal raises the question of Hindu Law whether *datta homam* is essential to the validity of the adoption of a daughter's son by a Brahmin. The general question whether that ceremony is an essential requisite for a valid adoption among Brahmins and other twice born classes was also raised, but it is not necessary in this case to decide it, as I am clearly of opinion that no *datta*

(11) 48 L W 887; 183 Ind. Cas. 877; A I R 1939 Mad. 216; (1938) M W N 1180; 12 R M 382.

homam is necessary even among Brahmins for the adoption of a daughter's son. As there is no decided case on this precise question, the discussion before us had to turn to some extent on the Hindu Law texts and text-books. The learned Advocate for the appellants urged that Dattaka Chandrika and Dattaka Mimamsa are works of great and unquestionable authority on Hindu Law in matters relating to adoption and that both of them clearly laid down that *datta homam* is essential among the twice born classes to the establishment of the filial relationship of the person adopted. This is no doubt the general rule according to these authorities, but an exception based on a text of Yama in the case of a brother's son's adoption has been recognized in decided cases. If the authority of this text is to be acted upon, it concludes the question in favour of the respondent as it excepts the adoption of a daughter's son also from the rule requiring *datta homam*. The appellants' learned Advocate therefore directed his attack against the genuineness and authority of this text and drew our attention to the observations of Banerjee, J. in *Bhaqwar Singh v. Bhagwan Singh* (b) at p. 325* where that learned Judge throws doubt on the authenticity thereof.

It is no doubt true that this text does not appear in Yama Smriti and Yama-dharma Sastra as they are now extant. But the authenticity and the authority of the text have been accepted in a long course of decisions in this country beginning with *Huebut Rao v. Govindarao* (12) of the year 1821 and Mr. Mandlik has also regarded its authenticity as beyond question. In *Katki v. Lak Pati Pujari* (6) Mukherjee, J. after an elaborate examination of the authorities bearing on the point, definitely accepted its authenticity and relied upon its authority in the case of the adoption of a brother's son which was there in question. It was also accepted as genuine and acted upon by the Allahabad High Court in *Atma Ram v. Madho Rao* (13) and by the Bombay High Court in *Valubai v. Govind Kashinath* (7), both cases relating to adoption of a brother's son. In view of these decisions, it seems to me that the authenticity as well as the authority of the text of Yama is no longer open to question. The learned Advocate for the appellants further contended that even if the

text is accepted as genuine, it must, on its true construction, be taken to apply only to the case of a *putrika putra* and a *Dwyamushyayana* adoption and not to Dattaka adoptions. The text runs thus :

"*Dauhitre Bhratru putre cha Homadiniyama nahi Vagdanadeva tatsiddih. (Ityaha Bhagvan Yama)*" which may be translated as follows :

"*Homam* or the like is not prescribed in the case of a daughter's son or a brother's son; by verbal gift alone that is accomplished. So declared *homam* Yama."

The argument is that the expression *Vagdanadeva* (by verbal gift alone) cannot apply to a Dattaka form of adoption, as corporeal delivery and acceptance of the child is universally treated as the essential part of an adoption in the Dattaka form. It seems to me that this argument proceeds on a misconception. The context makes it clear that the expression *Vagdanadeva* (by mere verbal gift) is used in contradistinction to *homadi niyama* (prescription of *homam* or the like), to convey the meaning that no gift accompanied by the burning of the sacrificial fire and *Vyahrutis*, etc., is necessary, but a mere gift with a verbal declaration of intention to give is sufficient. *Dana* or gift ordinarily imports corporeal delivery and *Vagdana* is used merely to make it clear that the delivery is to be made with appropriate words showing an intention to give. Moreover, in the case of *putrikaputra*, there was no adoption by the maternal grandfather at all. The daughter's son when born automatically became the son of the maternal grandfather if the latter had no male issue. He was recognized as one of the subsidiary sons in the Hindu Law not by virtue of any adoption but by mere intention on the part of the maternal grandfather, and without any consent asked for or obtained (see Mayne's Hindu Law, Edn. 10, p. 113). The reference in the text to *Vagdana* being sufficient would, therefore, be devoid of any meaning as applied to a *putrika putra*. Nor has the reference to a brother's son ever been understood to relate only to *Dwyamushyayana* adoption. This contention of the appellants' learned Advocate must therefore be rejected.

Apart from the text of Yama, referred to above, it has been contended by the learned Advocate for the respondent that the reason of the now well-established rule that no *datta homam* is necessary in cases where the adopted son and the adoptive father belong to the same *gotra* would apply equally to the adoption of a daughter's son. In the Full Bench decision in *Govind Ayyar v. Dorasami* (5) which laid down this rule

(12) (1821) 2 Borr 82.

(13) 6 A 276; A WN 1824, 82 (FB.)

*Page of 17 A.—[Ed.]

for this Province, it is said at p. 9*:

"Both Manu and Caunakha declare that one who is eligible for adoption should be the reflection or have the resemblance of a son and the commentators apparently thought that as adoption is made partly to secure spiritual benefit arising from the performance of obsequies, the prescribed ceremony was necessary to ensure to the adopted son competency to perform those obsequies with efficacy."

If thus the object of the *homam* is to bring about an effective transfer of the person from his own *gotra* prior to the adoption to the *gotra* of the adopter so as to clothe him with ceremonial competency, it would seem that such a ceremony is not necessary in the case of a daughter's son who though belonging to a different *gotra* has always been recognized as competent to perform obsequial rites for the maternal grandfather. See the texts cited in *Panchapakesa Iyer v. Gopal* (11) at p. 891† and *Narasinga Rao v. Maha Lakshmi Bai* (14) at p. 390, where their Lordships of the Privy Council point out that according to Hindu religious ideas, a daughter's son stands in the place of a son and like a son is a liberator from *put*. The respondent's learned Advocate suggested that the special position of a daughter's son in relation to his maternal grandfather might indeed be the reason for Yama's text excepting his adoption from the rule prescribing *datta homam* and other formalities. The suggestion certainly seems plausible but it can only be a speculation, as the text itself does not give the reasons on which it is based. But however that may be, as the Full Bench decision holding that no *datta homam* is necessary where the adopter and the person adopted belong to the same *gotra* seems to proceed upon the view that the *homam* would be necessary only to ensure the ceremonial competence of the person adopted, it would not be unreasonable to hold that such ceremony is not necessary in the case of the adoption of a daughter's son who according to the Hindu Dharmasastras is already endowed with such ceremonial competence. On this ground also, the respondent's adoption can be upheld.

It is a matter of satisfaction that our conclusion which is in consonance with modern ideas which tend more and more to favour the disentanglement of civil rights and obligations from the meshes of Hindu ceremonial law could be supported on the

(14) 50 A 375 at p 390; 109 Ind. Cas. 703; A I R 1928 PC 156; 55 I A 180; 55 M L J 42; 48 C L J 106; 28 L W 171; 32 O W N 1965; 26 A L J 897; 30 Bom. L R 1231; 5 O W N 951 (P O)

*Page of 11 M.—[Ed.]

†Page of 48 L. W.—[Ed.]

authority of an ancient text. I agree with my Lord that this appeal fails and should be dismissed with costs.

N.-S.

Appeal dismissed.

ALLAHABAD HIGH COURT

Execution First Appeal No. 137 of 1938

May 10, 1939

IQBAL AHMAD AND BAJPAT, JJ.

SHEO PRASAD AND OTHERS—JUDGMENT—
DEBTORS—APPELLANTS

versus

KALKA PRASAD DHAWAN—DEBTOR

HOLDER—RESPONDENT

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 2 (2) (g)—Property presenting appearance of bungalow and compound in residential area—Whether "land" under s. 2 (2) (g).

An area held by a person was a walled compound within which there was a bungalow and some out-houses. In the compound there were two old trees and a small vegetable garden. The property thus presented the appearance of a bungalow and compound in a residential area:

Held, that under the Tenancy Act, the compound could not be held to be "land" and it was, therefore, not land within the meaning of s. 2 (2) (g), U. P. Agriculturists' Relief Act.

Ex. F. A. from the decision of the District Judge, Cawnpore, dated March 21, 1938.

Mr. Shiva Prasad Sinha, for the Appellants.

Mr. S. N. Seth, for the Respondent.

Iqbal Ahmad, J.—This is an appeal by Sheo Prasad and his three minor sons and is directed against an order of the District Judge of Cawnpore rejecting an application filed by the appellants under ss. 5 and 30, Agriculturists' Relief Act, XXVII of 1934. The application was made under the following circumstances: On November 10, 1930, Sheo Prasad on his own behalf and on behalf of his minor sons executed a simple mortgage-deed in favour of Kalka Prasad, respondent, for a sum of Rs. 13,000. The parties to the mortgage-deed appointed two pleaders as arbitrators to determine the amount to which the respondent was entitled on the basis of the mortgage. This reference to arbitration was without the intervention of the Court. Before the arbitrators the parties entered into a compromise and the arbitrators decided the dispute in accordance with that compromise. They passed a decree in favour of Kalka Prasad for a sum of Rs. 13,000 together with interest at a certain rate from the date of the mortgage. This decree was, on an application by

Kalka Prasad, made a rule of the Court. Kalka Prasad then, on May 8, 1937, filed an application for execution of the said decree. The amount claimed by him on account of principal and interest was Rs. 20,434-12-6 and he prayed that the said amount be realised by sale of the mortgage property. The appellants then filed an application under ss. 5 and 30, Agriculturists' Relief Act, praying for reduction of interest and for the decretal amount being made payable by easy instalments. The appellants claimed to be agriculturists by virtue of the provisions of s. 2(2) (g) of the Act, which provides that a person holding land free of rent, the area of which does not exceed 80 acres, is an agriculturist for the purposes of the Act. Kalka Prasad, respondent, contended that the appellants did not hold "land" within the meaning of the Act, and as such, were not entitled to the benefit of the provisions of the Act. The learned Judge accepted this contention of the decree-holder and rejected the application filed by the appellants. The appeal in this Court was wrongly filed as an execution first appeal. It is really a first appeal from order under the Agriculturists' Relief Act.

It is common ground that the appellants hold an area of 7 *biswas* 2 *biswansis* which is rent-free. The appellants' contention was that that area was "land" within the meaning of the Act, whereas Kalka Prasad's contention was that the area did not constitute "land" and was mere *abadi*. By s. 2 (9) of the Act, it is provided that "land" shall have the same meaning as in the Agra Tenancy Act, 1926. In the Tenancy Act "land" is defined as meaning

"land which is let or held for agricultural purposes, or as grove-land or for pasturage but does not include land for the time being occupied by dwelling houses or appurtenant thereto."

The area held by the appellants was shown as grove in the settlement of 1283 *Fasli*. In the next settlement of 1311 *Fasli* again the area was recorded as a grove. But in the last settlement which took place in 1338 *Fasli*, 1 *biswa* 15 *biswansis* out of the total area of 7 *biswas* 2 *biswansis* was recorded as *abadi* and the rest of the area was recorded as a grove. The same entry was repeated in *khataunis* for 1343 and 1344 *Fasli*. But in the *khassra* of 1343 and 1345 the whole of the area was recorded as *abadi*. As the dispute between the parties could not be satisfactorily disposed of without ascertaining the nature of the property

held by the appellants, the learned District Judge appointed an Amin to prepare a map and to submit a report after local inspection. The Amin prepared a map and submitted a report to which no objection was taken by either party. It appears from the map and the report that the area held by the appellants is a walled compound within which there is a bungalow and some out-houses. In the compound, there are two old trees and a small vegetable garden. In short, the property presents the appearance of a bungalow and compound in a residential area. This compound is either within the municipal limits of Cawnpore or within the Juhi Notified Area which is adjacent to the city of Cawnpore. The question, therefore, arises whether this area can be held to be "land" within the meaning of s. 2 (2) (g), Agriculturists' Relief Act. In accordance with the definition of "land" in the Tenancy Act, an area which is for the time being occupied by dwelling-houses or is appurtenant thereto is not land. As the compound held by the appellants is occupied by a residential house and outhouses for servants and the open space therein is appurtenant to the residential house, the compound cannot be held to be "land" within the meaning of the Tenancy Act and is, therefore, not land within the meaning of s. 2 (2) (g), Agriculturists' Relief Act. The appellants could not, therefore, be held to be agriculturists, and as such, the application was rightly rejected by the learned District Judge. The appeal accordingly fails and is dismissed with costs.

S.

Appeal dismissed.

MADRAS HIGH COURT

Second Appeal No. 245 of 1935

January 31, 1939

WADSWORTH, J.

RAJA OF VIZIANAGARAM AND ANOTHER

—APPELLANTS

versus

MUDUMOORU SANYASIRAJU—

RESPONDENT

Irrigation—Controlling authority constructing new work in interest of irrigation facilities—Its duty stated—Person suffering damages due to new work, whether has right to insist that new work should not work to his detriment.

It is the duty of the controlling authority when constructing a new work in the interests of irrigation facilities generally to take such reasonable precautions as are obviously necessary to prevent damage to others. Although the person who suffers on account of the new work has no right to require the autho-

rities to maintain the course of the channel for ever in one particular bed, yet he has the right to insist that any alterations which the controlling authority may find necessary, shall not work to his detriment. *Krishna Chandra Deo v. Raja of Vizianagaram* (1), *Rylands v. Fletcher* (2) and *Sankara Vadivelu Pillai v. Secretary of State* (3), referred to.

S. A. against the decree of the Sub-Judge, Vizagapatam, in Appeal Suit No. 34 of 1934.

Mr. S. Venkatesa Ayyangar, for the Appellants.

Mr. Govindarajachari, for the Respondents.

Judgment.—This appeal is preferred by defendant No. 1 representing the Vizianagaram Estate against the decision in a suit for an injunction to restrain defendant No. 1 from altering the course of the channel to the detriment of the plaintiff. It seems to be established on the findings of the Courts below that the channel marked DD in the plan attached to the plaint and also in the Commissioner's plan, flowing from west to east has been diverted by means of an embankment so that it flows southwards along the path marked EF-1 on the plan and that an incidental consequence of this diversion has been damage to the plaintiff's land which is situated to the west of the diversion. It is contended for the appellant that the duty imposed upon a *zamindar* to construct and maintain irrigation works gives him a right to create any new works which he finds to be necessary in the interests of irrigation and imposes an obligation on third parties to construct such protective works as may be necessary to prevent damage to their lands resulting from the new works. It seems to me that this is an overstatement of the legal position of the *zamindar* with reference to irrigation. It is true that this Court held in *Krishna Chandra Deo v. Raja of Vizianagaram* (1), that the rule in *Rylands v. Fletcher* (2), is not applicable to Indian irrigation conditions. The storing of water in an agricultural tank is a natural and a lawful user and is not actionable for damage in the absence of negligence. This is quite another matter from holding that either a *zamindar* or Government are entitled to construct new irrigation works so as to damage the lands of others without any liability for the damages so caused. It was held by a Bench of this Court in (1) 60 M L J 662; 135 Ind. Cas. 349; A I R 1931 Mad. 561; (1931) M W N 23; 34 L W 771; Ind. Rul. (1932) Mad. 93.

(2) (1868) 3 H L 330; 37 L J Ex. 161; 19 L T 320.

Sankara Vadivelu Pillai v. Secretary of State (3) that

"the rights of Government in connection with the distribution of water, do not include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit."

I know of no principle upon which the rights of a *zamindar* can be placed any higher than the rights of the Government with reference to irrigation. It is one thing to say that the Government or the *zamindar* has the right to restore an irrigation work to its former condition without regard to the fact that the restoration will result in the submersion of lands which, owing to the disrepair of the work, had for some time been immune from submersion. It is another thing to say that the controlling authority has the right to construct the new work so as to submerge the lands of third parties not hitherto liable to submersion without compensation for the damage thereby caused. To my mind it is the duty of the controlling authority when constructing a new work in the interests of irrigation facilities generally to take such reasonable precautions as are obviously necessary to prevent damage to others. This is not to say that the irrigation authority is *prima facie* liable for the consequence of any escape of water from an irrigation tank owing to an act of God or to some unforeseen and improbable rush of water; but that there is a duty to provide such protection against the ordinarily anticipated flow of water, as would safeguard third party's lands from damage as a result of the new work of irrigation. Applying this principle to the present case, it would appear that the estate has diverted the flow of water along a pathway without any precautions to prevent the water from damaging the plaintiff's land which lies adjacent to that pathway. The plaintiff has, in my opinion, a right to require the estate to construct such protective works as may be necessary to prevent damage to the plaintiff's lands from the flow of water which may ordinarily be expected in the channel and the plaintiff has a right to demand that the pre-existing course of the channel shall not be altered except after the completion of the protective works necessary. I do not think that the plaintiff has the right to require the defendant to maintain the course of the channel for ever in one particular bed. But he has the right to insist that any alterations which the controlling

(3) 28 M 72; 15 M L J 33.

authority may find necessary, shall not work to his detriment.

In this view it seems to me that the injunction granted by the lower Appellate Court goes too far and requires modification. The modification which I propose to introduce will make it unnecessary to go into the question whether the injunction cannot be granted for want of the presence of the owners of the land through which the old course of the channel passed from the record of the case. But I observe that the plaintiff asserted that defendants Nos. 8 and 9 were the owners of that land, that this assertion was not traversed in the written statement and that in the absence of an issue regarding non-joinder of any plea to substantiate such an issue, it is not proper to non-suit the plaintiff for want of other parties. In the result, the appeal is allowed and the injunction granted will be modified, defendant No. 1 being restrained from damaging the plaintiff's land by the diversion of the course of the channel marked DD in the plaintiff's plan so as to flow along the path marked EE-1 in that plan and defendant No. 1 being required to construct such an embankment as may be sufficient, or so to alter the course of the channel, as to prevent such damage. The appellant having substantially failed will pay the costs of the respondent in this Court. Leave refused.

N-8.

Order accordingly.

BOMBAY HIGH COURT

First Appeals Nos 95 and 255 of 1936

February 3, 1939

BROOMFIELD AND MACLIN, JJ.

Mahant NARSIDASJI BALMUKUNDDASJI

AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAI JAMNA—PLAINTIFF—RESPONDENT

Hindu Law—Maintenance—Widow—Arrears of—Principles applicable—Husband giving part of estate to charity—Maintenance, how calculated—General principle—Husband keeping carriage in his lifetime—Widow, if entitled to allowance for conveyance—Civil Procedure Code (Act V of 1908), O. VII, r. 11, s. 92—Rule, if precludes amendment of plaint which under O. VI, r. 17, may be made at any time—Hindu dying disposing of his property by will and trust deed in favour of charitable institutions—Will providing for certain amount as maintenance for widow—Suit by widow challenging validity of deeds and alternatively claiming suitable maintenance for her according to Hindu Law—If governed by s. 92—Practice—Pleadings—Moffatt pleadings, construction.

Generally speaking the same principles apply to arrears as to future maintenance, although, the Court is not bound to award arrears of maintenance at the same rate as might be considered reasonable for the future. *Ekradeshwari Bahusin v. Homeshwar Singh* (6) and *Gurushiddappa Mallappa v. Parvatewva Shivappa* (7), relied on. [p. 49, col. 2.]

Hindu Law and opinion regard charitable gifts and bequests with favour, and if a Hindu husband of his own free will chooses to diminish his estate by giving away part of it to charity (assuming of course that he is not doing it with the object of defeating his widow's reasonable claims), the widow is entitled to say that she should be given maintenance in proportion to what the income was before the charitable gifts or bequests were made. [*ibid.*]

The general principle in awarding maintenance to a Hindu widow is that the amount awarded to her must enable her to live as consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in the lifetime of her husband. Where her husband had during his lifetime kept a carriage for several years, it may be regarded as a reasonable luxury and a reasonable allowance for conveyance may be awarded to the widow. *Ekradeshwari Bahusin v. Homeshwar Singh* (6), relied on. No doubt O. VII, r. 11, Civil Procedure Code, uses the words "shall reject" which are mandatory words. But *prima facie* the Rule is mandatory only *rebus sic stantibus*, that is to say, when the Court has to deal simply with the position referred to in the Rule, and would not preclude an amendment of the plaint which under O. VI, r. 17, may be made at any stage of the proceedings. Order VII, r. 11, and O. VI, r. 17, ought to be read together. *Midnapore Zamindari Co., Ltd v. Secretary of State* (1), dissented from, *Valli v. Mahmud* (2), explained. [p. 47, col. 1.]

A Hindu died disposing of his property by will and a trust deed in favour of charitable institutions. The will provided for a certain amount to be paid to the testator's widow for her maintenance. The widow brought a suit challenging the validity of the deeds and alternatively, if this could not be done, claiming maintenance suitable for her requirements and status to which she was entitled under the Hindu Law:

Held, that the widow was not seeking to enforce the trust. She was claiming what she considered reasonable maintenance not on the basis of the trust but in spite of the trust, relying on principles of Hindu Law to which the trust, though valid in other respects, must conform. She was not asking the Court to administer the trust but administer her husband's estate in accordance with these principles simply for the purpose of giving her proper maintenance. Hence the suit was not governed by s. 92, Civil Procedure Code, and not liable to be dismissed because it had not been filed as a representative suit with the sanction of the Collector. *Narsidas Jekisondas v. Ravishankar Prabhaskar* (3), *Annappa Ramchandra Pai v. Krishna Narayan Prasad* (4) and *Abdur Rahim v. Abu Mohamad Barkat Ali* (5), distinguished.

Moffatt pleadings should not be construed too strictly, if to do so, would work injustice. [p. 48, col. 2.]

F. As. from the decision of the First Class Sub-Judge, Ahmedabad, in Special Civil Suit No. 937 of 1931.

Mr. M. G. Setalvad, Advocate-General,

Messrs. K. J. Khandalawala and H. M. Choksi, for the Appellants.

Messrs. G. N. Thakor N. N. Majumdar and B. G. Thakor, for the Respondent.

Broomfield, J.—First Appeal No. 95 of 1936, is an appeal against a decree of the First Class Subordinate Judge, Ahmedabad, awarding the plaintiff Rs. 5,014 in respect of arrears of maintenance. The facts leading to the litigation were shortly these: The plaintiff's husband Ambalal, who was a wealthy and pious Hindu, died on July 27, 1929, leaving properties immovable and movable which have been described in a schedule annexed to the plaint. They consisted of lot No. 1 a large residential house in Jamalpur, Ahmedabad, containing several buildings in one compound, lot No. 2 a shop forming a portion of the above, lot No. 3, a building, and lot No. 4 a *dehla* also situated in Jamalpur, lot No. 5 a building known as the *apangashram* or Cripples' Home which was constructed by Ambalal in his lifetime on land belonging to the temple of Shri Jagannathji, and lot No. 6 a building on the Richey Road, Ahmedabad, in which Ambalal in his lifetime had started a dispensary. The movable properties consisted of 12 shares in the National Mills, ten shares of the Saraswati Oil Mills Co. which is now in liquidation, a certain amount of outstandings of the deceased Ambalal, and two deposit receipts for Rs. 10,000 each, one in the name of the plaintiff and the other in the name of Ambalal's sister Kashi now deceased. At the time of Ambalal's death, there was a sum of Rs. 20,000 and over lying on deposit in the National Mills and this was divided into two separate deposits of Rs. 10,000 each.

Ambalal disposed of his property by four wills and a trust deed dated September 29, 1925, and two subsequent wills dated May 5, 1928. All these documents were registered. Without going into detail, it may be stated that of the four wills executed on September 29, 1925, one, Ex. 35, gives the income of the Saraswati Oil Mills Co., shares and deposit for the maintenance of the *apangashram*. Another Ex. 36, gives the shares of the National Mills and some other moneys and outstandings for the maintenance of the same institution. The third will, Ex. 145, gives all Ambalal's immovable properties in the event of his having no son to provide *rajbhog* (i. e. food for the deity and Sadhus) in Shri Jagannathji's temple of which defendant No. 1 is

the *mahant*. This is subject to provision being made for the residence of Ambalal's wife, the plaintiff, and his sister Kashibai. The fourth will, Ex. 146, provides for the maintenance of Kashibai, who was to have Rs. 600 a year, and also a sum of Rs. 5,000 for charity, etc. Rs. 10,000 deposited in the National Mills were to be set apart for her maintenance. A similar provision was made for the maintenance of the plaintiff, and it was provided that after her death Rs. 5,000 were to be spent on her obsequies. The trust deed, which is Ex. 160, provided for the dispensary. The house on Richey Road, which Ambalal had purchased for Rs. 60,000, was given for housing the institution, and it was to be maintained by letting part of it on rent. Three years later, two further wills were executed. Exhibit 47 provides for the maintenance of Ambalal's sister and wife in much the same way as before but with slight modifications. By this will it is provided that the wife as well as the sister was to be allowed to spend Rs. 5,000 on *punyadan* or pilgrimage instead of the money being spent only after her death. Exhibit 48, the last will, contains further dispositions for the *apangashram* which had in the meantime been built. Ambalal's shares in the National Mills were assigned for this purpose.

Apart from these wills and the trust deeds, the plaintiff would have been her husband's heir. No action was taken by her till 1931. In April of that year she sent notices through a Pleader to the defendants, who are executors under the wills or trustees under the trust deed or both, contesting the validity of these deeds and claiming maintenance suitable to her requirements and status in life. The plaint in the suit in which this appeal arises was presented on September 28, 1931. It is a long and prolix document the gist of which is, that the wills should be declared null and void as having been obtained by the undue influence of defendant No. 1, the *mahant* of the temple, and defendant No. 2, who was Ambalal's doctor, and that alternatively, if this could not be done, plaintiff should be awarded the maintenance to which she claims to be entitled under Hindu Law; and that the defendants should be called upon to account for the losses alleged to have been sustained owing to their mismanagement and should be removed, and that new trustees should be appointed. The reliefs asked for were: (a) A declaration that the six wills were executed by Ambalal owing to the undue influence of defendants

Nos. 1 and 2, and that plaintiff is the legal heir and owner of all the property of her deceased husband. This relief was valued at Rs. 5,250. Plaintiff reserved the right to bring a separate suit for similar relief in respect of the trust deed; (b) A permanent injunction restraining all the defendants from taking possession of any of the suit properties, from collecting rents, making *vahivat* and so on, and from obstructing the plaintiff or interfering with her enjoyment of the properties. This relief was valued at Rs. 200; (c) The Court was asked to take accounts from the defendants of their management and to settle their liability to the estate of the deceased for any loss that the estate might have suffered owing to their negligence and mismanagement. This relief was valued at Rs. 200; (d) The Court was asked to determine the amount which defendant No. 1 should pay in respect of the superstructure of the *apangashram* which had been erected by Ambalal on the premises of the temple. This relief was valued at Rs. 2,000, but the plaintiff expressed her willingness to pay the deficit stamp, if any.

In the alternative, the plaintiff prayed for two reliefs. In the plaint as originally framed, the first prayer was for maintenance at the rate of Rs. 400 or Rs. 350 in addition to the Rs. 50 provided by the wills. She claimed this for the future and also claimed arrears at the same rate for 26 months from the date of Ambalal's death, and she prayed that the estate should be administered to enable these payments to be made. The relief was valued at Rs. 8,000. By an amendment, which was allowed on December 13, 1934, the claim was limited to past maintenance only at the rate of Rs. 350 or Rs. 300 in addition to the Rs. 50 given by the wills. This was done to avoid the payment of the additional court-fees on the sum of Rs. 42,000 which the plaintiff had been ordered to pay. The second alternative relief prayed for is that true and proper accounts should be taken of the defendant's management and of the loss sustained by the estate of the deceased owing to their mismanagement and negligence that the Court would decide the liability of the defendants to the estate and would remove them from their trusteeship and appoint new trustees and make proper administration of the estate. This relief was valued at Rs. 200.

In their written statements, the defendants denied the allegation that the wills were obtained by undue influence, and contended

that the plaintiff is not entitled to any higher rate of maintenance than that provided by the wills. Defendant No. 1 claimed credit for certain expenditure on the plaintiff's behalf. Some technical defences were also raised, viz. that the court-fees paid were insufficient, that the suit is governed by s. 92, Civil Procedure Code, and is, therefore, bad for want of the sanction of the Collector, and that it is not maintainable as an administration suit. There were certain interlocutory proceedings to which I may just refer. In February, 1932, an application was made by plaintiff for appointing a Receiver and for *interim* maintenance. The Subordinate Judge refused to appoint a Receiver, and as to *interim* maintenance ordered that the plaintiff should continue to recover the rent of lots Nos. 2 and 3 as she was doing. There were cross-appeals against these orders, but they were dismissed. Plaintiff also applied to be examined on commission and this was granted by the trial Court but the order was set aside in revision by the High Court.

The issue as to court-fees was tried as a preliminary issue. Defendants Nos. 2 and 4 in their written statement contended (1) that the court-fee should be paid on the value of property as the relief sought was really possession, (2) that the court-fees on the future maintenance should be paid on Rs. 42,000, i. e. ten times the annual sum claimed. The Subordinate Judge who tried this issue thought that the suit should be treated as in essence one for increased maintenance and nothing else, and he ordered the plaintiff to pay court-fees on Rs. 42,000. That was on October 10, 1934, and a fortnight's time was given for payment. This time was extended by a month on October 25 and by another week on November 22. In the meantime on November 20, plaintiff made an application for amending the plaint by dropping the prayer for future maintenance, and this was allowed, as I have said, on December 13, 1934. The case was then disposed of on the merits. The dispositions by the six wills were held to be valid, but the plaintiff was held to be entitled to maintenance at the rate of Rs. 275 a month less Rs. 50 a month already paid under the wills and less Rs. 806 which she had recovered as rent for 26 months. A decree was accordingly passed for the sum of Rs. 5,044 from the estate of Ambalal in the hands of the executors. Defendants Nos. 1, 2 and 4 have appealed, and there are cross-objections by the plaintiff.

Then first point taken by the learned

Advocate-General, who appears for the appellants, is that the suit is in effect one for possession of the properties enumerated in the schedule to the plaint and fees should have been paid on the value of these properties. The point has not been discussed by the trial Judge, and apparently was not seriously argued before him. The argument of the learned Counsel for the respondent is that this is not to be regarded as a suit for possession. The plaintiff does not need to sue for possession. She is now in possession admittedly of lots Nos. 1 and 4; lot No. 1 she occupies as her residence and lot No. 4 she has been using as a stable. She is also in possession of lots Nos. 2 and 3 through tenants. She does not seek possession of lot No. 5, which is the *apangashram*, but claims only the amounts spent on building it, and in the present suit she does not seek any relief at all in respect of lot No. 6 which is the dispensary. As for the shares they are in the name of Ambalal, and if she gets the injunction asked for, that would be sufficient to protect her rights. We think that this reasoning is sound, and that the Judge was right in holding that the reliefs, apart from the claim for maintenance, were correctly valued in the plaint. The second point is, that, as the additional court-fees which plaintiff was ordered to pay were not paid, the plaint should have been rejected under O. VII, r. 11, Civil Procedure Code, and that an amendment of the plaint was not permissible. The rule says:

"The plaint shall be rejected in the following cases (a) where it does not disclose a cause of action; (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so."

No doubt the rule uses the words "shall reject" which are mandatory words. But *prima facie* the rule would seem to be mandatory only *rebus sic stantibus*, that is to say, when the Court has to deal simply with the position referred to in the rule, and would not preclude an amendment of the plaint which under O. VI, r. 17, may be made at any stage of the proceedings. It might obviously lead to great hardship if a plaintiff were unable to pay the enhanced fees ordered, and if there were no alternative but the rejection of the plaint. The learned Advocate-General suggested that in that case he might apply to continue the suit *in forma pauperis*. But if the rule is

to be construed as strictly as the learned Counsel contends that would not be a compliance with it. It would be as much an avoidance of payment of the fees as an amendment of the plaint.

We were referred to *Midnapore Zemindary Co., Ltd. v. Secretary of State* (1) which does no doubt support the argument which has been put forward. With all deference, however, to the learned Judges who decided that case, we think that it takes too technical a view of the rule. There is no authority of this Court which is really in point. In *Valli v. Mahmud* (2) the trial Court had dismissed a suit for non-payment of court-fees under s. 10, Court Fees Act, and in appeal the District Judge held that the proper procedure was to reject the plaint under this rule. But he allowed the plaintiff an option to abandon part of his claim and so avoid the payment of further fees. This Court held that this procedure was unjustified. The learned Judges said (p. 766*):

"... we are not aware of any provision of law or any authority which shows that a plaintiff who has not properly valued his claim or paid a sufficient court-fee is entitled at the last moment to an option such as was allowed to him by the District Judge."

The Court did not hold or intend to hold, we think, that once an order under the rule has been made, no amendment of the plaint may ever be permitted. It may be mentioned that the plaintiff have intimated her willingness to abandon the claim for future maintenance even before the Court passed orders on the question of court-fees (see the *purshis* dated October 8, 1931, at p. 461 of the paper-book). We think that O. VII, r. 11 and O. VI, r. 17, ought to be read together, and are not prepared to say that the amendment was not properly allowed in this case. It seems worthy of note that cl. (b) and (c) of r. 11 are differently worded. The Judge in this case did not call on the plaintiff to correct the valuation although the case clearly comes under cl. (b) and not under cl. (c). He corrected the valuation himself and called on the plaintiff to pay the fees. The fact that the party is to be called on to correct the valuation, which must mean apparently to remove the inconsistency between the relief claimed and the valuation, instead of being merely told to pay the deficit, rather seems to suggest that it is open to him to remove the

(1) 44 O 352; 40 Ind. Cas. 96; A I R 1917 Cal 77; 21 O W N 834.

(2) 16 Bom. L R 763; 26 Ind. Cas. 746; A I R 1914 Bom. 117.

*Page of 16 Bom. L. R — [84]

inconsistency by abandoning part of his claim. On that view the plaintiff has in fact corrected the valuation which is all that is necessary under cl. (b) of the rule and the plaint after the amendment was no longer undervalued. This reasoning may perhaps be rather technical but then so is the objection. Then it was argued that the suit relates to a public charitable trust, the *apangashram*. It seeks some of the reliefs enumerated in s. 92 (1) of the Code, and therefore under cl. (2) of the section it could only be instituted according to the provisions of the section with the sanction of the Collector. As the sanction of the Collector has not been obtained, it is argued that the whole suit ought to be dismissed. In para. 19 of the plaint it is stated :

"It seems that defendant No. 1 has not put at all into practice the said scheme which was made for the *apangashram* under the two wills mentioned in para. 16 above. On the contrary, the Sadhus of defendant No. 1's *akhada* stay in the buildings erected in the name of *apangashram*. And they have been using it for the keeping of carriages, chariot and storing of grass belonging to defendant No 1. That is, really speaking, defendant No 1 enjoys the said property in the name of the *apangashram*."

The Court was asked to take accounts from the defendants and settle their liability for any loss caused by their negligence and mismanagement and has also been asked to remove them from their trusteeship and to appoint new trustees. In support of his argument, the learned Advocate-General relies on *Narsidas Jekisondas v. Ravishankar Prabhaskar* (3) and *Annappa Ramchandra Rai v. Krishna Narayan Prasad* (4). But in these cases and in the Privy Council case in *Abdur Rahim v. Abu Mahomed Barkat Ali* (5) which is referred to and discussed therein, suits had been brought by beneficiaries under a public trust to enforce the trust. In so far as the plaintiff here seeks to set aside the wills as having been brought about by undue influence, she is quite obviously not suing to enforce the trust and the learned Advocate-General concedes that so far the suit is not obnoxious to s. 92. There is we must admit considerable difficulty as regards the alternative reliefs which are certainly claimed on the footing that the wills are "legal and

fit to be confirmed" as stated in the plaint. But even here it may be argued, not unreasonably we think, that the plaintiff is not seeking to enforce the trust. She is claiming what she considers reasonable maintenance not on the basis of the trust but in spite of the trust, relying on principles of Hindu Law to which the trust, though valid in other respects, must conform. She is not asking the Court to administer the trust but administer her husband's estate in accordance with these principles simply for the purpose of giving her proper maintenance. This is the gist of the argument of the learned Counsel for the plaintiff, and we think on the whole it is sound. The plaint is very awkwardly drafted, but it has frequently been held that *mofussil* pleadings should not be construed too strictly, if to do so would work injustice, and reading the plaint as a whole we think it permissible to take this view of it. On this view we consider that it is not governed by s. 92 and not liable to be dismissed because it has not been filed as a representative suit with the sanction of the Collector.

On the merits of the case, that is to say, the propriety of the award of Rs. 5,014 for arrears of maintenance, Mr. Setalvad has argued, first, that whatever rate of maintenance be held suitable, the plaintiff must give credit for what she has received. The trial Judge has deducted from the gross amount found due to her at the rate of Rs. 275 a month, Rs. 50 a month provided in the wills and Rs. 806 the rent recovered for part of lot No. 1 at Rs. 31 per month. But she had also recovered, it is said, an equal amount as rent of lots Nos. 2 and 3 and has used lot No. 4 as a stable for which Rs. 10 a month should reasonably be charged as rent. Besides that, witness Natvarlal, a protegee of Ambalal, says that he paid to her a sum of Rs. 108 which was owing from him to Ambalal. If these sums are deducted, the amount to be awarded, whatever it is, would be further reduced by Rs. 806 plus Rs. 260 plus Rs. 108 = Rs. 1,174. But the amount actually recovered as rent for lots Nos. 2 and 3 seems to have been Rs. 380 only (see pp 212 and 214 of the paper-book). As for lot No. 4 which plaintiff used as a stable, we do not think she can be charged rent for this if she was entitled to maintain the carriage, and in our opinion, she was. The proper deductions to be made in our opinion are Rs. 1,360 paid under the wills, Rs. 806 for rent of part of lot No. 1, Rs. 380

(2) 32 Bom. L R 1435; 128 Ind. Cas. 891; A I R 1931 Bom. 33; Ind. Rul. (1931) Bom. 107.

(4) 38 Bom. L R 808; 165 Ind. Cas. 1601; A I R 1936 Bom. 412; 9 R B 202

(5) 55 I A 96; 108 Ind. Cas. 361; A I R 1928 P O 16; 55 O 519; 9 P L T 65; I L T 40 Cal. 19; 27 L W 339; 32 O W N 482; 26 A L J 484; 54 M L J 609; 30 Bom. L R 774; 48 O L J 55 (P O.)

for rent of lots Nos. 2 and 3 and Rs. 108, i. e. in all Rs. 2,594.

It was argued that the amount should be still further reduced by a sum of Rs. 2,500 which plaintiff is said to have realised by the sale of ornaments not proved to be her *stridhan* ornaments. The amount recovered was perhaps only Rs. 2,100 as plaintiff says. But the point to be noted is that the second and final will which dealt with plaintiff's maintenance, Ex. 47, provided that the ornaments are to be sold on plaintiff's death and the proceeds spent within one month in connection with her obsequies. That being so, we do not think the ornaments can be regarded as forming part of Ambalal's estate or that they have to be taken into consideration in the calculation of the plaintiff's maintenance. As the ornaments have been sold, the amount to be spent on the obsequies may have to be diminished *pro tanto*. But we can see no justification for deducting the amount from the sum to be allowed for arrears of maintenance.

The Municipal taxes on the buildings occupied by the plaintiff are fairly heavy and in providing for the future, this may have to be taken into consideration. But the accounts at p. 220 of the paper-book and the bills and receipts Exs. 36 to 44 show that defendant No. 1 paid the tax for the year 1930-31 and there is no evidence that plaintiff paid any taxes at all during the period with which we are concerned. As regards the rate of maintenance allowed by the trial Court, which is made up of Rs. 200 for household and other expenses and Rs. 75 for a carriage, Mr. Setalvad's contentions are that plaintiff has produced no evidence as to her actual expenditure and the trial Judge has not based his figures on actuals but on what he considers the plaintiff might reasonably have spent, that whereas the present income of the estate is only about Rs. 4,000 a year—and that was the income for the last four years of Ambalal's life—the Judge allowed himself to be influenced by the fact that the income used to be much more and the average for ten years was about Rs. 10,000 a year, that it is unreasonable to allow the plaintiffs Rs. 3,300 a year for her maintenance when for the last four years of his life Ambalal and his sister and plaintiff together had little more than this to live upon, that there is no necessity for plaintiff to have a carriage and her husband gave express directions to defendant No. 2 on several occasions that the horse and carriage were to be sold, and, lastly, that the estimate of Ambalal's house-

hold expenses on which the Judge has based plaintiff's allowance is exaggerated and includes a great deal of expenditure which there is no need for plaintiff to incur.

We do not think that the absence of reliable evidence as to what plaintiff has actually spent is very important. She may have spent more or less than she was entitled to charge the estate with for her maintenance. The principles on which maintenance is to be calculated are expounded in *Ekradeshwar Bahwasin v. Homeshwar Singh* (6), to which the trial Judge has referred, and generally speaking the same principles apply to arrears as to future maintenance, although, as pointed out in *Gurushiddappa Mallappa v. Parwatewva Shivappa* (7), the Court is not bound to award arrears of maintenance at the same rate as might be considered reasonable for the future. We agree with the learned Advocate-General that the maintenance ought to be calculated with reference to the income of the estate as it is now and not as it was before Ambalal began to spend so much money on charity. Hindu Law and opinion regard these charitable gifts and bequests with favour, and if a Hindu husband of his own free will chooses to diminish his estate by giving away part of it to charity (assuming of course that he is not doing it with the object of defeating his widow's reasonable claims), the widow is entitled to say that she should be given maintenance in proportion to what the income was before the charitable gifts or bequests were made. Such a claim would be quite absurd in the present case because it appears that Ambalal's ordinary expenditure remained pretty much the same throughout, and he spent no more on himself and his family for ordinary living expenses when his income was Rs. 20,000 a year than he did when it was Rs. 4,000. But although there is one passage in the judgment which rather suggests that the trial Judge thought the gift of the Richey Road bungalow in trust for the dispensary might be disregarded in the calculation of maintenance, I doubt if this really has affected his conclusions. At any rate he professes to base his award not on Ambalal's income but on his normal expenditure on his household.

(6) 56 I A. 132; 116 Ind. Cas. 409; A I R 1929 P O 128; 8 Pat. 810; 33 O W N 637; 10 P L T 345; 49 O L J 679; 31 Bom. L R 816; 6 O W N 526; (1929) A L J 695; 30 L W 1; 57 M L J 50; (1929) M W N 468; Ind. Rul. (1929) P O 193 (P O.)

(7) 33 Bom. L R 1293; 167 Ind. Cas. 973; A I R 1937 Bom. 135; 1 L R (1937) Bom. 113; 2 R B 347.

As regards the allowance for a conveyance, Ambalal had kept a carriage for fifteen or sixteen years with one short interval of six months. Sometimes he kept two conveyances. We think it may be regarded as a reasonable luxury within the meaning of the rule laid down in *Ekradeshwari Bahusin v. Homeshwar Singh* (6) and we are not prepared to say that the allowance of Rs. 75 a month for this purpose is unwarranted. We may say that when the time comes for making provision for the future this allowance might fairly be taken to include stabling. On the other hand we think, there is a good deal of force in the argument that the figures of household expenditure in Ambalal's diaries which are accepted as correct by both sides do not justify an allowance of Rs. 200 a month for the expenses of plaintiff alone. The trial Judge says that Ambalal's household expenses were on the average Rs. 4,500 per annum. This figure appears to be taken from the statement compiled from the diaries and put in on plaintiff's behalf. In this statement household expenses and miscellaneous expenses of Ambalal, dharmada, etc., have been lumped together. A jumbled total of this kind is meaningless. There is no reason why plaintiff's miscellaneous and charitable expenditure should be on a scale comparable to her husband's. The statement put in by the defendants shows that the household expenses proper were never more than about Rs. 1,600 a year and often much less. In the years when the income was at its highest, in 1921 and 1922, the figures were Rs. 976 and Rs. 1,297. The average for the last three years of Ambalal's life was Rs. 1,400 or less than Rs. 120 a month for three people and their servants. The plaintiff's dress costs roughly Rs. 180 a year or Rs. 15 a month.

A very considerable item in plaintiff's statement is under the heading of personal and medical expenses. The annual totals for the years Samvat 1980 to 1984 (omitting the year Samvat 1981 for which the diary is not forthcoming) were Rs. 362, Rs. 1,302 made up of two items of Rs. 677 and Rs. 625, Rs. 874 and Rs. 451. In the defendant's statement there is no separate heading for plaintiff's personal expenses. The corresponding figures for her medical expenses are Rs. 13, Rs. 334, Rs. 386 and Rs. 11. In 1925, when the plaintiff's last child was born and died soon after delivery, she had a difficult confinement and heavy medical expenses had to be incurred. But that is a long time ago. It is vaguely stated

that she is still weak and infirm, but there is no reliable evidence, the evidence of any medical man or nurse for instance, to show that she is a confirmed invalid or in need of constant or expensive medical treatment. An allowance of Rs. 50 a month for medicine and miscellaneous expenses including charity ought, in our opinion, to be quite sufficient. Rupees 75 for a conveyance, Rs. 60 for medicine and cook, Rs. 15 for dress; and Rs. 50 for other expenses, comes to Rs. 200 a month, and we see no reason why that allowance should be exceeded. The amount due for twenty-six months is therefore Rs. 5,200, from which, as I have said, Rs. 2,594 are to be deducted as having been already recovered, leaving a balance of Rs. 2,606 as the amount to be decreed.

In the cross-objections Mr. Thakor for the plaintiff has repeated the contention that the wills are void for undue influence. He relies on s. 16, Contract Act, s. 89, Trusts Act, and on the equitable rule which has been referred to in *Shivgangawa Madiwalappa Vulavi v. Baiangouda Govindgouda Patil* (8), that when a person obtains any benefit from another, whether under a contract or as a gift, by exerting his influence, which, in the opinion of the Court, prevents the grantor from exercising an independent judgment in the matter, the latter can set aside the contract or recover the gift. It is argued that it is for defendants Nos. 1 and 2 to prove that these wills were not induced by undue influence. This argument, however, presupposes that these defendants were in a position to dominate the will of Ambalal, and we agree with the trial Judge that there is no good reason to suppose that they were in that position. Ambalal was a religious man and might perhaps be described as a religious fanatic. But we can see no reason to suppose that he was under the domination of defendant No. 1. He was a devotee of the temple of which defendant No. 1 is the mahant and claims to be the proprietor. He regarded defendant No. 1 with reverence and treated him accordingly. But we think that the plaintiff and her witnesses are exaggerating when they say that Ambalal regarded defendant No. 1 as a God or imposed a blind confidence in him. The evidence shows that he used to visit other temples as well, and was in the habit of making charitable gifts for the benefit of *sadhus* and cripples and cows. The dispositions of his property,

(8) 40 Bom. L R 132; 176 Ind. Cas. 187; A I R 1936 Bom. 304; 11 R B 25.

which have been impugned, seem to have been quite in keeping with his character.

Defendant No. 2 was his medical attendant and, as he was somewhat frequently ailing, he may have seen a good deal of him. But defendant No. 2 was not his only doctor, and we can find no reliable evidence that he dominated the will of his patient in any way. The plaintiff has admitted in her evidence that Ambalal used to consult defendant No. 2 about medicine but not about business. The suggestion that Ambalal was depressed by the loss of his infant son in 1925 and that the defendants took advantage of his state of depression seems to us to be far-fetched. It was in 1925 that the child died. He lived for four years after that during which he took active steps to start the *apangashram* and the dispensary.

We can find no proof at all that the defendants exerted any pressure on him in connection with the wills. The writer of the wills and the trust deed, who is a retired Sub-Registrar and apparently a respectable witness, has deposed that Ambalal himself gave him all the instructions for the documents and approved of the drafts and that neither defendant No. 1 nor defendant No. 2 had anything to do with the wills or made any suggestions in connection with them. Practically, all that has been elicited in the cross-examination of this witness is that defendant No. 2 paid him his writing charges on Ambalal's behalf. The writer had asked for a sum of Rs. 250 and Ambalal, apparently at the suggestion of defendant No. 2, decided to pay Rs. 110 only. That is one point; and the other is that the witness says that Ambalal told him not to talk about the wills. Then it is to be noted that according to the evidence Ambalal was not by any means a weak-minded sort of man. On the contrary he seems to have been a shrewd businessman who dealt in shares, quite profitably as it appears and was a director in several companies.

Then again the dispositions made by these wills cannot be regarded as in any way unconscionable. It is true that the provision made in them for Ambalal's wife is below the standard which the law considers reasonable, but it is not so patently unreasonable as to rouse any suspicion that Ambalal was not acting on his own volition. The house which has been assigned for plaintiff's residence is apparently a very good one. Ambalal had expended a lot of money on re-building it shortly before

his death. He very probably anticipated that she would be able to let part of it and he may well have thought that an additional allowance of Rs. 50 a month would suffice. Plaintiff has alleged that she was kept in ignorance of these wills. It seems to me that that is a little doubtful. It is an admitted fact that Ambalal constructed the *apangashram* and started the dispensary in his lifetime. So that plaintiff must have known all about them and indeed she admits that she did. She has also admitted that her husband once told her "you are an illiterate woman. So I have asked defendant No. 2 and Popatlal (defendant No. 4) to look after all this work." In any case a man does not necessarily consult his wife about his testamentary dispositions. It has been suggested that Ambalal's letters to defendant No. 2 show a spirit of subservience to him. These letters are at pp. 437 and 438 of the paper-book. They show no doubt extreme devotion on Ambalal's part to the God of Sri Jagannathji temple. But we cannot find in them any indication that he was under the influence of defendant No. 2. On the contrary the letters rather suggest that the dispositions made in the wills were Ambalal's own and that he was instructing defendant No. 2 to carry them out. The learned trial Judge has expressed the opinion that two of the defendant's witnesses, the *pujari* of the temple and a retired *talati*, have given false evidence about one of the wills, the one which related to the *apangashram* having been deposited in the temple by Ambalal in the presence of the plaintiff. This conclusion seems to be mainly based on discrepancies as to time which are not necessarily at all suspicious after the lapse of ten years. But anyhow, as the learned Judge says, this has little or no bearing on the question of undue influence. We cannot find any real similarity in the circumstances present here to such a case as *Sital Prasad v. Parbhu Lal* (9) on which learned Counsel for the plaintiff relied. In that case the plaintiff was obviously under the thumb of the defendant who had housed and financed him and helped him to recover his property, which he then induced him to transfer half to his brother and half to a temple of which he was the proprietor but in which the plaintiff was not interested at all. The evidence in this case has been examined by the trial

Judge with meticulous care, and the opinion of an experienced Hindu Judge on a point of this kind must be given great weight. We hold that there is no substance in the cross-objections.

The result is that the decree of the trial Court is modified by substituting the figure Rs. 2,606 for Rs. 5,044. The order as to costs in trial Court will stand, and as each party here has partly succeeded and partly failed, we propose to make the same order in the appeal, *viz.* that each party should bear his own costs. The cross-objections will be dismissed with costs, and First Appeal No. 255 of 1936, which relates to the rent of lot No. 4 and which is not pressed, is dismissed with costs.

B.

*Decree modified.***PATNA HIGH COURT**

Appeal No. 134 of 1936

December 23, 1938

FAZL ALI AND VARMA, JJ.

RADHEY LAL—DEFENDANT—APPELLANT

versus

KANHAI LAL—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), Sch. II, Paras. 16, 1—Decree in accordance with award—Award in excess of powers conferred on arbitrators—Appeal, if lies—Partition suit—Parties not agreeing as to mode of division of properties and referring matter to arbitration—Such case, if covered by Para. 1—Parties agreeing as to their respective shares—Agreement incorporated in preliminary decree and division of properties referred to arbitrators—Final decree wholly based on award—Case, if falls under Sch. II.

There is ample provision in Paras. 14 and 15 of Sch. II, Civil Procedure Code, to enable the Court, to which the award is submitted, to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the Court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the Court should be challenged in appeal. Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely, the Court through which reference is made to arbitrator and not that Court and an Appellate Court. No appeal, therefore, lies from the decree when it is in accordance with the award, even if the award itself is in excess of the powers conferred upon the arbitrators. *Durga Charan Deb Nath v. Gangadhar Deb Nath* (3), dissented from. [p. 55; cols. 1 & 2.]

The expression, "the matter in difference between the parties" which has been used in Para. 1, Sch. II, Civil Procedure Code, is quite general and fully covers a case where in a partition suit the parties not having agreed among themselves as to how the property was to be divided, referred the matter to the arbitrators. [p. 53, col. 2.]

There is nothing in the Code of Civil Procedure to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit. Where in a partition suit the parties have agreed among themselves as to their respective shares and this agreement is incorporated in the preliminary decree but the division of the properties is referred to the arbitrators and the division of the properties which is wholly a subject of the final decree, is wholly based upon the award of the arbitrators, the case falls under Sch. II, [p. 54, col. 1.]

The essential difference between a Commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the Commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in Sch. II of the Civil Procedure Code. *Bholanath Roy v. Bata Kriasho Roy* (1), followed. [p. 53, col. 2.]

A. from the original decree of the Sub-Judge, Patna, dated December 23, 1935.

Sir Manmatha Nath Mukherjee, Messrs. B. C. De, S. N. Mukherjee, Mehdi Imam and K. P. Varma, for the Appellant.

Messrs. Khurshaid Husnain, N. K. Prasad II and Ramanugrah Prasad, for the Respondent.

Fazl Ali, J.—This is an appeal from a final decree in a partition suit which purports to be based upon an award given by certain arbitrators appointed by the parties just before the final decree in the suit was passed. The parties are brothers, the plaintiff being the younger brother of the defendant and both being the sons of one Basant Lal. On June 18, 1934, the plaintiff instituted the present suit for the partition of properties, both movable and immovable, and in Sch. I of the plaint he claimed that one of the items of the properties to be divided between him and the defendant was cash amounting to nine lakhs of rupees. The plaintiff also made an application to the Court for the appointment of a Commissioner to make an inventory of the joint properties on the allegation that the movable properties were in danger of being removed by the defendant. The defendant did not file any written statement, but he filed an application in which he denied some of the allegations made by the plaintiff and tried to resist the appointment of the Commissioner. Ultimately a Commissioner was appointed and before

him on June 23, 1934, the parties presented a compromise petition. This petition recited that it had been settled between the parties (1) that the plaintiff would accept 7 annas share in all the movable properties, articles, cash, ornaments, etc., and the defendant would take the remaining 9 annas, and (2) that the properties should be partitioned by three persons who had been chosen by the parties, the names of these persons being Nanda Lal Bhagat, Lechman Sao and Hari Kishun. The petition further stated

"that in whatever manner the aforesaid arbitrators shall partition and allot the properties, cash, articles and bond, *ijara* (deeds), decrees, etc., shall be acceptable to both parties, and should, for any reasons, they fail to agree in the partition of any property, the opinion of the majority shall prevail and the partition shall take effect accordingly."

The arbitrators subsequently gave their award setting out therein details of properties allotted to the plaintiff and the defendant, respectively. They decided that the defendant had concealed a sum of three lakhs and not over nine lakhs of rupees as was alleged by the plaintiff, and to equalize the share of the plaintiff in the total asset, they directed the defendant to pay to him a sum of Rs. 98,773 odd. Certain objections were preferred by the defendant to the award, but they were disallowed by the Subordinate Judge who directed the preparation of the final decree in accordance with the award. The defendant then moved this Court against the order of the Subordinate Judge giving effect to the award, but their application was dismissed. They have now preferred this appeal from the final decree passed by the learned Subordinate Judge and the main question which has been argued in this Court is whether an appeal lies from the decree. Paragraph 16 (2), Sch. II, Civil Procedure Code, provides :

"Upon the judgment pronounced according to the award, a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

Prima facie, therefore, no appeal can be entertained from the decree passed in the present suit. It is however contended by Sir Manmatha Nath Mukherjee who appears on behalf of the appellant that in the present case an appeal will lie, because in the first place Sch. II, Civil Procedure Code, has no application to the facts of the present case; and, secondly, because the so-called award of the arbitrators was without jurisdiction and was therefore in law no award at all. As to the first point it is contended that the parties having agreed among

themselves as to their respective share in the properties to be divided, there was no longer any matter in difference between them so as to bring the case under Para. 16, Sch. II and the position of the so-called arbitrators was not unlike that of a Commissioner who is usually appointed for the partition of properties in a suit for partition after the preliminary decree is passed. This contention is obviously untenable, because the compromise petition itself shows that all the differences between the parties had not been settled. Indeed, in the very preamble of the petition it is recited that the reference to the three persons named in the petition became necessary because

"many kinds of harassment and monetary loss are involved in a dispute between the parties and it is not known how long the suit will be going on and what will be the result."

Evidently the parties were not agreed among themselves as to how the properties were to be divided, otherwise there would have been no necessity of referring the question to the arbitrators. The expression "the matter in difference between the parties" which has been used in Para. 1, Sch. II, is quite general and I have no doubt that it fully covers the present case. As to the distinction between a Commissioner and an arbitrator it has been clearly pointed out in *Bholanath Roy v. Bata Krishto Roy* (1), and I shall merely quote the following passage from the judgment delivered in that case :

"The essential difference between a Commissioner appointed to effect a partition and an arbitrator appears to me to be that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the Commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in Sch. II of the Code."

Thus the first contention put forward on behalf of the appellant must fail.

It is next contended that the present case does not fall within Sch. II, Civil Procedure Code at all, because this schedule is intended to apply to those cases only where a decree is based wholly upon the award of the arbitrators, whereas in the present case the final decree is based partly upon a preliminary decree and partly upon the award of the arbitrators. This conten-

(1) 7 P L T 739; 95 Ind. Cas. 321; A I R 1937 Pat. 135; (1926) Pat. 161.

tion must be negatived on the short ground that there is nothing in the Code to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit and that it is not quite correct to say that the final decree which has been passed in the suit is not wholly based upon the award of the arbitrators. It is true that the parties agreed among themselves as to their respective shares and this agreement was incorporated in the preliminary decree but the division of the properties which is the subject of the final decree was wholly based upon the award of the arbitrators.

Lastly, it was contended that the award of the arbitrators is void, because they had no authority to divide the cash which was not produced before them. It is contended that the arbitrators had been authorized merely to divide those properties, the existence of which was admitted and they went beyond their jurisdiction in deciding that the defendants had concealed a sum of three lakhs of rupees. It appears that this was precisely one of the points raised by the appellant before this Court in the civil revision to which reference has already been made, but it was overruled, it being pointed out that the arbitrators had been empowered not only to divide the properties but also to ascertain what was to be divided. It appears to us that the view which was expressed in that case is the only reasonable view which can be taken when the compromise petition is carefully read. As I have already stated, one of the properties which the plaintiff asked the Court to divide was cash amounting to about nine lakhs of rupees. The compromise petition does not suggest anywhere that the allegations of the plaintiff in this respect were to be entirely ignored nor does it say that the arbitrators were to divide only such properties as were produced before them. On the other hand, it recites that in whatever manner the arbitrator shall partition and allot the properties including the cash shall be acceptable to both parties. I do not think, therefore, that the compromise petition which is the basis of the arbitrators' authority imposed any such limitation upon the power of the arbitrators as to prevent them from trying to ascertain what was to be divided. This is quite sufficient to dispose of the contention put forward on behalf of the appellant; but the legal aspect of the matter must also be examined, inasmuch as the learned Advocate for the appellant argued upon it at

some length and cited various authorities in support of his contention.

It appears that previous to the decision of the Judicial Committee in *Ghulam Khan v. Mohammad Hassan* (2) it was held in a number of cases that though a decree might be in accordance with an award, an appeal would lie from the decree if the award upon which the decree was passed was invalid. This view, however, has been abandoned by the majority of the High Courts in India since the pronouncement of the Judicial Committee in that case. The Judicial Committee dealing with s. 522 which corresponded to Para. 16 of Sch. II, Civil Procedure Code, observes as follows with reference to the concluding words of this provision which are to the effect that no appeal shall lie from a decree passed upon a judgment pronounced according to an award except in so far as a decree is in excess of or not in accordance with the award :

"Those words appear to be perfectly clear. Their Lordships would be doing violence to the plain language and the obvious intention of the Code if they were to hold that an appeal lies from a decree pronounced under s. 522 except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decision in this country. The time has long gone by since the Courts of this country showed disposition to sit as a Court of appeal on award in respect of matters of fact or in respect of matters of law."

It may be pointed out here that the Civil Procedure Code does take into account those cases where an award determines any matter not referred to arbitration and Para. 14 of Sch. II clearly provides that in such cases the Court may remit the award to the re-consideration of the arbitrator upon such terms as it thinks fit. In the present case, the defendant did not ask the Court specifically to remit the award or any part of it to the arbitrators under Para. 14, but it is pointed out that one of his objections to the award was that the arbitrators had gone beyond the scope of the reference in awarding a decree for Rs. 98,773-2-3. This objection, however, even if we assume it for the purpose of this appeal to have been an objection under Para. 14, was considered and overruled and the application made by the appellant to the High Court to revise the order of the Subordinate Judge overruling his objection did not also succeed. Then comes Para. 15 which provides firstly, that the award remitted under Para. 14 becomes

(2) 29 O 167; 29 I A 51; 6 O W N 226; 8 Sar. 154 (P O).

void on the failure of the arbitrators to reconsider it; and secondly, that an award may be set aside on certain grounds specified in that paragraph. The first part of the paragraph had no application to the case, as the award was never remitted to the arbitrators and the defendant did not succeed in persuading the Subordinate Judge to set it aside under the second part of the paragraph. Paragraph 16 says :

"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in the manner provided in Para. 14 and where the Court has refused an application made to it to set aside an award, the Court shall proceed to pronounce judgment according to the award."

In the present case the Court below followed the course clearly indicated in this paragraph and pronounced a judgment according to the award. It follows therefore, that under cl. (2) of this paragraph, in order to determine whether an appeal lies from a decree based upon a judgment so pronounced, all that is to be ascertained is whether the decree is in excess of, or not in accordance with, the award. Here it is not disputed that the decree is in accordance with the award but it is contended that the award itself is in excess of the powers conferred upon the arbitrators. It appears to me in these circumstances that no appeal lies from the decree of the arbitrators and I am fortified in this view by several decisions of this High Court and other High Courts of this country. Sir Manmatha Nath Mukherjee referred us to the decision of a Division Bench of the Calcutta High Court in *Durga Charan Deb Nath v. Gangadhar Deb Nath* (3) in which it was held that there is a distinction between an award which is irregular and an award which is void, and that where the decree is based upon an award which is without jurisdiction, the decree is really based on something which is not an award. That case, however, has not been followed by the other High Courts and with great respect to the learned Judges who decided it, I am unable to agree to the proposition enunciated therein.

The expressions "void" and "without jurisdiction" are sometimes used in a loose sense as bearing the same meaning as the terms invalid and illegal. But in whatever sense they may be used, I think that there is ample provision in Paras. 14

and 15 of Sch. II, Civil Procedure Code, to enable the Court, to which the award is submitted, to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the Court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the Court should be challenged in appeal. Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely the Court through which reference is made to arbitrator and not that Court and an Appellate Court. I would thus prefer to follow the decision of our own Court which seem to be in consonance with the decision of the Judicial Committee as well as the plain language of Para 16 of Sch. II, Civil Procedure Code. I would, therefore, dismiss this appeal with costs. Hearing fee ten gold mohurs.

Varma, J.—I agree. The contention on behalf of the appellants against the decree is not that the decree is in excess of, or not in accordance with, the award but that the award itself is defective in some of the ways pointed out by Sir Manmatha Nath Mukherjee. Firstly, he contends that the arbitrators had exceeded the powers that were conferred upon them, because although the plaint referred to the property ascertained and unascertained, the petition of compromise did not refer to the unascertained portion of the property. Now, reading the various documents in connection therewith, namely the petition of compromise and the preliminary decree passed thereon, it is clear to me that even the unascertained cash was included because when the arbitrators were to divide the property between the brothers, all the properties could not be known to the arbitrators from the very beginning and they had to ascertain as to what the properties were which they were to divide. Moreover, the defendants raised this point before the Court below. The petition of objection shows that they wanted to question (though not very clearly but in a round-about way) the authority of the arbitrators to give an award with regard to the property not ascertained by them. But that objection was disallowed. That is to say, even if we assume that there was a petition under Para. 14 of Sch. II, Civil Procedure Code, that petition was

rejected and then comes the mischief of Para. 16 of Sch. II that after a petition under Para. 14 is rejected, a judgment must follow and a decree passed thereon, and when that decree is passed, then unless the party questioning the decree can show that the decree is in excess of the award or not in accordance with the award, he has no right to appeal. About the other point that this is not a decree passed entirely upon the award, it is clear from the materials before us that although a large number of documents had to be referred to, it is really a decree based on the award. I agree that no appeal lies in this case.

S.

*Appeal dismissed.***BOMBAY HIGH COURT**

Appeal No. 44 of 1938

March 16, 1939

BEAUMONT, O. J. AND B. J. WADIA, J.
NARIMAN EDULJI CONTRACTOR—

APPELLANT

versus

PIROJBAI NARIMAN CONTRACTOR

—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 11—Petitions by husband and wife under Guardians and Wards Act—Consent order passed by which husband was to pay for maintenance and schooling of children to wife or school authorities as the case may be—Wife taking out summons for leave to execute consent order as if it were money decree—Order held valid but could not be executed as decree for payment of money.

Husband and wife made cross-petitions under the Guardians and Wards Act but arrived at an agreement with regard to the maintenance and custody of their minor children. A consent order was passed, whereby the husband was to pay the expenses of the maintenance and schooling of the children and the wife or the school authorities, as the case may be, were to receive the money for the said purpose. Subsequently the wife took out a summons for leave to execute the consent order as if it were a decree for the payment of money under O. XXI, r. 11, Civil Procedure Code:

Held, that the order did not fall within the terms of the Guardians and Wards Act, which does not confer on the Court any power to order a parent, or anybody else, to pay the school bills of the minors, but as the parties consented to the Court passing an order, which was within its ordinary jurisdiction, and as they were properly before the Court, the order was a valid order. The consent order, however, could not be regarded as a decree for payment of money to the decree-holder, the wife, for a part, and possibly the whole amount might be paid to third parties, and could not, therefore, be executed as such.

Mr. F. J. Coltman, for the Appellant.

Sir Jamsheджи Kanga and R. J. Colah,
for the Respondent.

Beaumont, C. J.—This is an appeal against an order made by Engineer, J. giving leave to the applicant to execute a consent order dated August 6, 1929, to the extent of Rs. 9,008. The consent order of August 6, 1929, was made on two cross-petitions by a husband and a wife under the Guardians and Wards Act, VIII of 1890. By consent the two petitions were consolidated and certain orders were made as to the custody of the minor children of the marriage of the husband and wife (of whom there were three), and as to their maintenance and then the order contained this provision:

"And I do by and with the like consent further order that the said Nariman Edulji Contractor (i. e., the husband) do pay all the expenses of the maintenance and schooling of all the said minors and that the said Pirojbai Nariman Contractor (i. e., the wife) or the school authorities, as the case may be, do receive the money sent by him from time to time for the said purpose and do forward to him proper receipt and vouchers therefor."

In the year 1937, there were divorce proceedings and ultimately a decree for divorce was made in favour of the wife. On March 7, 1938, the wife took out a summons for leave to execute the consent order inserting in col. G, in the form under O. XXI, r. 11, a sum of Rs. 15,400 odd, which she alleged to be the amount due for schooling and maintenance under the consent order. On that application, there was a reference to the Commissioner to find out what was the amount due for schooling and maintenance, and on July 25, 1938, the Commissioner reported to the Court that the parties had agreed the sum at Rs. 9,008. On that report the learned Judge made the order, which is the subject of this appeal, in which he ordered that the husband do pay to the wife a sum of Rs. 9,008 and further ordered that the wife be granted leave to execute the consent order dated August 6, 1929, to the extent of Rs. 9,008. The husband objects to the order giving leave to execute the consent order, and his objection is based on three grounds. It is said, first, that the consent order regarded as a decree of the Court is a nullity, as it was made without jurisdiction; secondly, that if it is a valid decree, it is not a decree for payment of money; and thirdly, that there is no method of quantifying the amount for which a decree is passed when such amount is not specified in the decree.

With regard to the first point, Mr. Coltman relies on *Somakka v. Ramiah* (1)

(1) 36 M 39; 13 Ind. Cas. 251; 22 M L J 193; (1911) 2 M WN 519.

and *Parvathammal v. Chokkalinga Chetty* (2) as authorities for the proposition that an order directing the father to pay a sum for the maintenance and schooling of his children is not an order which can be made under the Guardians and Wards Act, and that if such an order is made under the Act, it cannot be treated as a decree made under the ordinary original jurisdiction and executed as such. I am quite prepared to accept the propositions which those cases lay down, and I think that the order made in this case did not fall within the terms of the Guardians and Wards Act, which does not confer on the Court any power to order a parent, or anybody else, to pay the school bills of the minors. But neither of the Madras cases dealt with a consent order. It is no doubt well established that parties cannot by consent confer upon a Court jurisdiction which it does not possess, but that is not quite the case with which we have to deal. In this case the parties were properly before the Court in a matter under the Guardians and Wards Act, under which no doubt the Court had only a limited jurisdiction, and it seems to me that the parties were justified in consenting to the Court making an order, which it was within the general competence of the Court to make, though it was not within the special jurisdiction which alone the Court could have exercised in the absence of consent. As the parties consented to the Court passing an order, which was within its ordinary jurisdiction, and as they were properly before the Court, I think that the order was a valid order.

The second question is whether this is a decree for the payment of money. Order XXI, r. 11, provides that where a decree is for payment of money, the Court may execute it in the manner therein provided, and then sub-r. 2 provides for the application for execution containing various particulars, and under the heading (g) the amount due upon the decree has to be stated. I am not prepared to say that every decree, to come within the description of a decree for payment of money, must state the exact sum due. You may certainly have a decree for payment of money not presently due, and when the amount claimed by the decree-holder is not admitted by the judgment-debtor, I see no objection to the Court adopting the course, which it adopted in this case, and directing an inquiry to ascertain the amount due. I am not, therefore,

(2) 41 M 241; 41 Ind. Cas. 341; A I R 1918 Mad. 389; (1917) M W N 602; 6 L W 526.

impressed with the appellant's third objection to the order appealed from. But the difficulty I feel is in holding that this is a decree for payment of money. It is a decree for payment of all the expenses for the maintenance and schooling of the minors, and it provides that the wife or school authorities, as the case may be, are to receive the money. It is quite plain that it is not a decree for payment of money to the decree-holder, the wife, for a part, and possibly the whole amount might be paid to third parties. It seems to me that a decree in that form cannot be regarded as a decree for payment of money, which can be executed as such. On that ground I think that the appeal must be allowed and the order of the learned Judge set aside, so far as it relates to execution of the consent order of 1929. The respondent to pay to the appellant the costs in this Court as well as in the Court below.

B. J. Wadia, J.—I agree.

s.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT

Suit No. 25 of 1939

February 20, 1939

LOBO, J.

DALMIA CEMENT, LTD.—PLAINTIFFS

versus

NARAIN DAS ANANDJI BEOHAR—

DEFENDANT

Trade Unions Act (XVI of 1926), s. 18—Scope—Does not afford immunity to trade union for an act of deliberate trespass—Tort—Trespass—Lawful entry—Burden of proof—Stranger entering on premises built by employer on his land for housing workmen for convenience of his business—Entry without permission of employer—Such person must show that his entry was justified—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Temporary injunction in suit for declaration and injunction, when could be granted—Prima facie case and balance of convenience must be made out.

Section 18, Trade Unions Act, does not afford immunity to a trade union or to an officer thereof for an act of deliberate trespass.

Where the employees are housed by their employer for the convenience of his trade in the houses built on his own land, the relationship between them are not those of landlord and tenant at all. These workmen therefore are mere licensees of the employer and the entire property is in the occupation of the employer. If, therefore, a third person enters upon such land without the permission and against the wishes of the employer, the burden of showing that the entry was lawfully justified lies on such a person. *White v. Bayley* (1), *Smith v. Overseers of St. Michael, Cambridge* (2) and *The King v. Oadby* (3), relied on.

In a suit for a declaration and injunction it was alleged by the plaintiff that the defendant accompanied by some persons armed with *lathis* was trespassing on the plaintiff's land and was staging demonstrations thereon which were calculated to overawe and intimidate the plaintiff and his workmen :

Held, that if the plaintiff had made out a *prima facie* case and the balance of convenience was on his side, the temporary injunction under O. XXXIX, r. 2, Civil Procedure Code, if prayed for, could be granted.

Mr. D. N. O'Sullivan, for the Plaintiffs.

Mr. Srikishindas H. Lulla, for the Defendant.

Order. — This is a suit for a declaration and injunction and along with the plaint the plaintiffs applied under O. XXXIX, r. 2, Civil Procedure Code, for a temporary injunction. On January 27, I granted the prayer for *interim* injunction and issued notices to the defendant. It is this matter which is before me for disposal now. A brief statement of the facts will suffice. The plaintiffs are the Dalmia Cement, Ltd., a large industrial concern which recently acquired an extensive piece of land near Drigh Road where they set up and completed a cement factory as recently as July, 1938. The plaintiffs employ a very large number of mechanics, labourers and workmen, a good proportion of these are provided with quarters near the factory on the plaintiffs' land. In January 1938, it is alleged by the plaintiffs, a Trade Union was formed by the men employed in their factory which was registered under the Trade Unions Act as the 'Cement Factory Workers' Union' and Mr. R. K. Sidhwa, M. L. A., was elected President thereof. The plaintiffs allege that in or about September, 1938, the defendant Naraindas Anandji Bechar resenting this establishment of a Labour Union otherwise than under his leadership started a campaign, the object of which was to destroy the union under the leadership of Mr. R. K. Sidhwa and establish one under his own leadership. That on December 22, 1938, owing to the defendant's activities in this regard, the plaintiffs informed the defendant that he was not to enter the plaintiff's premises. It is alleged that for some time, in fact, till January 19, 1939, the defendant created no trouble, but it is the plaintiffs' case that from January 19, 1939, the defendant from day to day with an ever-increasing body of men armed with *lathis* began to trespass on the plaintiffs' land and stage demonstrations thereon calculated to overawe and intimi-

date the plaintiffs and their workmen, that for these activities the defendant chose the hour of 7-30 A. M. which was the time when the plaintiffs' workmen came to their work either from outside or from their lodgings in the plaintiffs' property.

No written statement has yet been filed by the defendant but his defence has been set out in great detail in his counter-affidavit. It is the defendant's case that he is the President of the Karachi Factories Workers' Union, the President of the Sind Provincial Trade Union Congress, and the representative of labour on the Sind Provincial Legislative Assembly: that it is his business in life to protect the interests of labour, that the labourers employed by the plaintiffs were subjected to considerable hardships and disadvantages, that over 400 of them had joined his Union and that in going to the premises of the plaintiffs he was doing so for an entirely peaceful purpose in the interest of labour and in the interest of the employees of the plaintiffs. The 400 of the labourers who were members of his Union had invited him to their quarters and it was for the purpose of meeting them that he went to the plaintiffs' property. He admits that because obstruction had been caused to him in these peaceful activities he had been obliged to take with him "an increasingly large number of members" of his Union; but there had been no demonstrations, there had been no force or violence or show thereof, he and his men had never gone anywhere near the factory and works, everything was peaceful and legitimate. The plaintiffs' suit was for trespass, there could be no case of trespass when the defendant was there on the invitation of the workmen of the plaintiffs' tenants on the plaintiffs' property; the suit was clearly barred by s. 18, Trade Unions Act, XVI of 1926. I have heard the learned Advocates for the plaintiffs and the defendant and have come to the conclusion that the rule issued by me must be made absolute. In granting or refusing a temporary injunction in such a suit the Courts generally consider two matters: (1) Has the plaintiff made out a *prima facie* case? (2) On which side lies the balance of convenience? It does not appear to me in the first instance that s. 18 of Act XVI of 1926 is any bar to the present suit. If the section is carefully read and if the object of the Legislature is carefully considered, it will be clear that whereas ordinarily a person is liable in tort if he

deliberately brings about a breach of contract of employment between employer and employee, the section provides that a registered trade union or an officer or member thereof is protected from a suit or a legal proceeding if he induces some person to break a contract of employment or interferes with the trade, business or employment of some other person, in contemplation or furtherance of a trade dispute, &c. The important and significant words in the section are "on the ground only." The section does not afford immunity to a trade union, or to an officer thereof for an act of deliberate trespass.

It is not necessary for me at this stage to go any further into the matter. This is merely an interlocutory application and any detailed discussion of the merits of the suit on law or facts is undesirable. Nor do I think that there is any substance in the contention of the learned Advocate for the defendant that the defendant is not a trespasser because he enters the premises of the plaintiffs on the invitation of their tenants. The relations between the plaintiffs and such of their workmen as they have housed on their own property are not those of landlord and tenant at all. These workmen are housed by the plaintiffs for convenience of their trade. These workmen therefore are mere licensees of the plaintiffs and the entire property is in the occupation of the plaintiffs. Reference on this point may be made to the case in *White v. Bayley* (1) and to the cases in *Smith v. Overseers of St. Michael, Cambridge* (2) and *The King v. Oadby* (3). The plaintiffs are, therefore, in possession and the defendant in coming upon their land without their permission and against their orders is a trespasser and the burden lies on him to prove lawful justification for his entry. I am not prepared to accept on the bare statement of the defendant the allegation that he has been coming on the property of the plaintiffs on the invitation of the plaintiffs' workmen. The defendant could have supported this statement with a number of affidavits since he states that no less than 400 or 500 workmen of the plaintiffs are members of his Union. He has not chosen to file the affidavit of a single workman. Nor am I prepared to accept the defendant's assertion that his visits with "an increasingly large number of

(1) (1861) 128 R R 681; 10 O B (N.S.) 227; 32 L J O P 253; 7 Jur. (N.S.) 948.

(2) (1860) 3 El. & El. 383; 30 L J M O 74; 7 Jur. (N.S.) 24; 3 L T (N.S.) 687; 122 R R 748.

(3) (1818) 1 B & Ald. 476; 106 R R 175.

members" to the plaintiffs' premises are entirely peaceful in their nature. The plaintiffs have with their affidavit filed a number of photographs taken on each morning after January 19 and it is obvious from a look at these photographs that the persons who trespass on the plaintiffs' premises, in some instances near the office and factory of the plaintiffs, are armed with *lathis*, and their attitude is defiant and menacing. In most of the photographs, the defendant figures. In my opinion there can be no doubt that the plaintiffs have made out a *prima facie* case for a temporary injunction. As regards the balance of convenience, there can be no question. The demonstrations have been systematically staged at a time when the plaintiffs' workmen come to their work and the obvious result of this is to terrorize the plaintiffs' workmen and disorganize the plaintiffs' business. It is the plaintiffs alone who suffer. I therefore make the Rule absolute and award the plaintiffs the costs of this application.

D.

Rule made absolute.

PATNA HIGH COURT

Appeal from Appellate Order No. 85
of 1939

September 13, 1939

HARRISS, C. J. AND FAZL ALI, J.
SARJU PRASAD AND ANOTHER—
JUDGMENT-DEBTORS—APPELLANTS

versus

DEOKI SINGH AND OTHERS—DECREE-
HOLDERS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 182, Expl. 1—Partition decree giving plaintiff and defendants joint possession of part of property and also separate possession of other properties—Decree must be regarded as joint—Application for execution of such decree by one of the parties takes effect in favour of all parties—Appeal—Parties—Application for execution of partition decree—All parties to partition decree impleaded—Only one of them filing objection impleading decree-holder alone and objection allowed—Decree-holder can in appeal implead only objector as respondent without impleading other parties.

Where a decree in a partition suit gives the plaintiffs and defendants joint possession of part of the property, though it also gives them separate possession of other properties, the decree must be regarded as a joint decree and cannot be regarded both as a joint decree and a decree held by each of the parties in severalty. If therefore an application is made by one of the interested parties for the execution of the decree within three years of the decree, it takes effect in favour of all the parties and a subsequent application made by the decree-holder within three years of the previous application but beyond three years from the date

if the decree is not barred by Art. 182, Limitation Act, *Ram Nath Rai v. Harendra Kumar Rai* (1), distinguished, *Man Mohan Gope v. Madhusudan Gope* (2), followed, *Muhamad Sahoob Levai v. Mayamad Ammal* (3), referred to.

Where in application for the execution of a partition decree, the decree-holder impleads all the parties to the partition decree and only one of them files an objection impleading the decree-holder alone and the objection is treated as a separate miscellaneous suit and decided against the decree-holder, the decree-holder is fully entitled in appeal to implead only the objector as respondent without impleading other parties to the partition decree. The objector by his objection having invited the Court to decide the matter between him and the decree-holder only, cannot subsequently raise an objection that the decree-holder should have impleaded other parties in appeal.

A. from an order of the District Judge, Gaya, dated December 21, 1938, reversing an order of the Subordinate Judge, Gaya, dated May 3, 1938.

Mr. Rajkishore Prasad, for the Appellants.

Mr. K. V. Varma, for the Respondents.

Harries, C. J.—This is a second appeal from an order of the learned District Judge of Gaya in an execution matter.

The decree-holders, who are respondents in this appeal, brought proceedings claiming partition of an estate. A preliminary decree was passed which was eventually made final. Four *takhtas* were prepared and allotted to the respective parties and one plot of land was left joint between the parties. The date of the final decree in this partition suit is October 26, 1923.

On December 22, 1936, the decree holder-respondents filed an execution application praying for delivery of possession of the *takhta* allotted to them. It is to be observed that this application was made more than three years after the date of the partition decree; but it is common ground that during the interval two of the interested parties had made applications in execution and had obtained possession of their respective *takhtas*. If these two applications enure for the benefit of all the parties, then it has to be conceded that the application of the decree-holder-respondents was within time.

In the execution case filed on December 22, 1936, the decree-holders impleaded all the parties to the partition suit, but only the present appellant raised any objection. On September 27, 1937, the appellant Sarju Prasad filed an objection praying that the execution case be dismissed on the ground that it was barred by limitation. It is to be observed that in this objection the appel-

lant Sarju Prasad impleaded only the present decree-holder-respondents. He did not implead the other parties to the partition proceedings. This objection was treated as separate miscellaneous case and numbered Miscellaneous Case No. 99 of 1937, and in due course, this miscellaneous case was heard and determined by the learned Subordinate Judge. He held that the previous application in execution did not enure for the benefit of the decree-holder-respondents, and accordingly he came to the conclusion that their application for execution was barred by limitation in that it was presented beyond the period of three years from the date of the partition decree. On appeal the learned District Judge was of opinion that the execution application was not barred by time and reversed the decision of the Court below. It is against the order of the learned District Judge that the present second appeal has been filed.

In the first place, it has been argued that the application for execution made by the decree-holder was barred by time. Counsel for the appellants has urged that the two previous applications made by other parties could not be regarded as applications made by holders of a joint decree and thus would not enure for the benefit of the decree-holder-respondents. Counsel has relied upon the case of *Ram Nath Rai v. Harendra Kumar Rai* (1). In that case it was held that an application by one of several parties to a partition decree to be put in possession of land allotted to him in severalty is not an application by one of a number of joint decree-holders, and thus such an application would not prevent time running against other parties to the partition decree. It must be remembered that in the case of *Ram Nath Rai v. Harendra Kumar Rai* (1) no property had been left joint by the partition decree.

The facts of the present case cannot be distinguished from the facts in *Man Mohan Gope v. Madhusudan Gope* (2). In this latter case the partition decree allotted certain properties in severalty to each of the parties but reserved a certain property as *ijmali* between the plaintiff and the defendants, the plaintiff applied for execution and received part satisfaction. Subsequently some of the defendants applied for execution beyond three years of the date

(1) 35 O W N 448; 131 Ind. Cas. 860; 53 O L J 225; Ind. Rul. (1931) Cal. 208; A I R 1931 Cal. 581; 56 O L J 1102.

(2) 36 O W N 772; 189 Ind. Cas. 786; 56 O L J 10; Ind. Rul. (1937) Cal. 655; A I R 1937 Cal. 869.

of the decree but within three years of the plaintiff's application for execution. A Bench held that the decree was passed jointly in favour of the plaintiff and the defendants within the meaning of Explanation I of Art. 182 of the Limitation Act and the defendants' application having been made within three years of the plaintiff's application for execution, it was not barred by time. No distinction whatsoever can be drawn between the present case and the case of *Man Mohan Gope v. Madhusudan Gope* (2) and in my judgment this latter Calcutta case should be followed.

Explanation I to Art. 182 of the Indian Limitation Act, is in these terms:—

"Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in cl. 5 of this article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all".

The question to be decided here is whether the decree passed in this partition suit was a joint decree or not. It certainly gave the plaintiffs and defendants joint possession of part of the property, though it also gave them separate possession of other properties. The decree cannot be regarded as both a joint decree and a several decree. It cannot be regarded as though there is one decree for joint possession in favour of the plaintiffs and the defendants and another decree for separate possession of their respective allotments. In *Man Mohan Gope v. Madhusudan Gope* (2) at p. 713* Rankin, C. J. observed:—

"It seems to me that the decree before us is certainly one passed jointly in favour of the plaintiff and the present respondents so far as the Kalikhola and the road are concerned, and unless the decree is for the present purpose to be regarded as though there was one decree for joint possession in favour of the respondents and the plaintiff and another and different decree for separate possession of their allotments by the respondents, I think this appeal must fail."

He held that the decree in that case which was very similar to the decree in the present case, was a joint decree and could not be regarded both as a joint decree and a decree held by each of the parties in severalty.

The view expressed by the Calcutta High Court has been approved of in the case of *Muhammad Sahoob Levai v. Mayamad*

Ammal, 145 Ind. Cas. 968 (3). In my judgment the present decree must be regarded as a joint decree, and that being so, the previous applications for execution must be regarded as applications which would take effect in favour of all the parties. It is common ground that the present application was made within three years of the previous execution application, and that being so, the application was not barred by Art. 182 of the Indian Limitation Act.

In the second place, it has been argued that the appeal before the learned District Judge was bound to fail for want of parties. The learned District Judge held that there was no defect, but it has been strenuously urged before us that the learned District Judge could not decide the question of limitation in the absence of all the parties to the partition decree. The decree holders impleaded all the parties to the partition decree in their execution application but as I have stated only one of them, namely the appellant raised an objection. He filed an objection impleading the decree-holder-respondents only, and this objection was treated as a separate miscellaneous case. What the Subordinate Judge decided was a proceeding between the appellant and the decree-holders and having decided it in favour of the appellant the decree-holders were fully entitled, in my view, to appeal to the District Judge and implead only the appellant as respondent to the appeal. The appellant by his objection had invited the Court to decide the matter between him and the decree-holders, and that being so, he cannot now raise an objection that the decree-holders should have impleaded other parties who were not made parties by the appellant himself in Miscellaneous Case No. 99 of 1937. The matter was one purely between the parties to this appeal, and that being so, the respondents were not bound to implead the other parties to the partition decree.

It has been contended that a decision of the Court on the question of limitation binds all the other parties to the execution decree. Clearly in this case the appellant only invited a decision between him and the decree-holder, and it is unnecessary for us to consider at this stage what the possible effect of any finding on limitation might be. It is sufficient to say that the order under appeal was an order made between the parties to this appeal, and that being so, it

(3) 145 Ind. Cas. 968; 38 L W 568; A I R 1933 Mad. 789; 9 R M 174; 65 M L J 582; (1933) M W N 1295.

cannot be said that the appeal before the learned District Judge could not be sustained by reason of failure to join other persons who might be interested. The appellant himself limited the scope of the proceedings and he cannot object to the manner in which the appeal was preferred in the Court of the learned District Judge. In my view, there is no merit whatsoever in this objection.

For the reasons which I have given, I hold that this appeal fails and would accordingly dismiss it with costs.

Fazi Ali, J.—I entirely agree.

s. *Appeal dismissed.*

MADRAS HIGH COURT

Civil Revision Petition No. 488 of 1936

February 10, 1939

PANDEANG ROW, J.

KANNAYYA REDDI—PETITIONER

versus

MUTHU REDDI—RESPONDENT

Contribution—Claim for contribution as between partners, when cannot be entertained—Debt borrowed for partnership trade—Joint decree against partners—One partner paying off whole decretal amount, if can claim contribution against others.

It is one thing to say that money was borrowed as it was required for the partnership trade by both the partners, the borrowing itself not being a partnership transaction though the partners borrowed it in order to advance it to the partnership as capital, and it is quite another thing to say that the borrowing itself was by the partnership. It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership that it would be excluded by the general doctrine that as between partners there can be no claim for contribution.

Where the claim for contribution is not based on the ground that as a partner the defendant is liable to contribute but the basis of the claim is a joint decree made against the plaintiff and the defendant in respect of debt contracted for partnership trade in execution of which the plaintiff alone had to pay the entire amount due under the decree in such a case, the law of partnership does not prohibit the entertainment of a claim for contribution against other partner. *Subbarayudu v. Adinarayadu* (1) and *Ellappa Mudaliar v. Swaminatha Mudaliar* (2), relied on.

O. R. P. to revise the decree of the District Court, North Arcot at Vellore, dated August 29, 1935.

Messrs. Ch. Raghava Rao, S. Rajaraman and S. Kothandarama Nayanar, for the Petitioners.

Mr. C. R. Rajagopalachari, for the Respondent.

Order.—The point raised in this petition is whether the claim of the plaintiff,

who is the petitioner in this Court, for contribution is not maintainable. This objection to the claim was not made in the trial Court which passed the decree in favour of the plaintiff; it was only in the lower Appellate Court that for the first time it was contended that on the admission of the plaintiff in his evidence that the debt in respect of which a decree had been passed against the plaintiff and the defendant had been borrowed by himself and the defendant for the purpose of a partnership trade carried on by them, the claim for contribution was not maintainable. It is not possible to say that the admission of the plaintiff clearly show that the borrowing itself was a partnership transaction. It is one thing to say that money was borrowed as it was required for the partnership trade by both the partners, the borrowing itself not being a partnership transaction though the partners borrow it in order to advance it to the partnership as capital, and it is quite another thing to say that the borrowing itself was by the partnership. In any case the present claim is not based on the ground that as a partner the defendant is liable to contribute. The basis of the claim is a joint decree made against the plaintiff and the defendant in execution of which the plaintiff alone had to pay the entire amount due under the decree. In such a case, the law of partnership does not prohibit the entertainment of a claim for contribution. It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership that it would be excluded by the general doctrine that as between partners there can be no claim for contribution.

I have had occasion already to consider the question and I have expressed my opinion that in cases of this kind where the claim for contribution is based on the payment by the plaintiff in its entirety of a joint decree debt due by him and by the defendant, the claim for contribution cannot be defeated even if the original debt in respect of which the decree was passed was a partnership debt. The Advocate for the petitioner has relied on two cases, namely, those reported in *Subbarayudu v. Adinarayadu* (1) and *Ellappa Mudaliar v. Swaminatha Mudaliar* (2). The latter case was one in which the decree had been obtained by a stranger in respect of a

(1) 18 M 134.

(2) 38 L W 316; 145 Ind. Cas. 858; A I R 1933 Mad. 755; 6 R M 139.

partnership debt and the plaintiff alone had to pay up the whole of the decree amount and it was held that the plaintiff was entitled to recover contribution. The decree of the lower Appellate Court therefore is not in accordance with law and must be set aside. It is accordingly set aside and the decree of the trial Court is restored. The petitioner who is the plaintiff in the suit, will be entitled to his costs in this and in the lower Appellate Court.

N.S.

Decree set aside.

PATNA HIGH COURT

Appeal from Appellate Decree No. 778 of 1938

September 1, 1939

HARRIES, C. J. AND FAZL ALI, J.

SHEONARAIN PRASAD SINGH AND

OTHERS—DEFENDANTS—APPELLANTS

versus

GANGA PRASAD SAHU—PLAINTIFF—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Assignment of decree for certain amount—Portion of money kept with assignee to be paid to assignor's creditor if decree is realized—Suit by creditor of assignor to recover amount—Nature of—Article applicable—Interest—Suit for compensation for breach of contract—Interest, if recoverable—Measure of damages.

P who had obtained a mortgage decree against A assigned the decree to D for certain amount a portion of which was left with D to be paid to X who was creditor of P. This amount was not to be paid to X until D had realized the decree. D realized the decretal amount but refused to pay X who then brought a suit to recover the amount:

Held, that the suit was neither one for specific performance of a contract nor for indemnity but was a suit for compensation for breach of contract and was therefore governed by Art. 116, Limitation Act. *Ram Rachhya Singh Thakur v. Raghunath Prasad Misir* (1), relied on.

In a suit for compensation for breach of contract, the plaintiff can recover the interest on the amount of compensation as he is entitled to such an amount as would compensate him for the loss which he has suffered by reason of the defendants' breach of contract. The correct measure of damages is the actual loss sustained by the plaintiff plus a reasonable rate of interest thereon. *J. H. Pattinson v. Srimati Bindhya Debi* (2), distinguished.

A. from a decision of the District Judge of Gaya, dated January 11, 1938, confirming a decision of the Subordinate Judge of Gaya, dated July 1, 1937.

Messrs. Nawal Kishore Prasad II and R. P. Jaruhar, for the Appellants.

Messrs. B. C. De and K. N. Lal, for the Respondent.

Harries, C. J.—This is a defendants' appeal from concurrent decrees of the Courts below decreeing the plaintiffs' claim for Rs. 1,700 and interest thereon at the rate of twelve per cent. per annum from July 27, 1933.

On July 12, 1920, one Prasad Sahu predecessor-in-interest of plaintiffs Nos. 2 and 3, obtained a preliminary mortgage decree for Rs. 7,379 against Asfandiar Khan, and on June 13, 1921, this decree was made absolute. On August 1, 1924, Prasad Sahu assigned this mortgage decree to defendants Nos. 1 to 3 and two other persons for Rs. 5,000. A sum of Rs. 3,300 was paid to Prasad Sahu and the remainder, namely Rs. 1,700, was left with defendants Nos. 1 to 3 to be paid to plaintiff No. 1 who was a creditor of Prasad Sahu. It was a term of the agreement that this sum was not to be paid to plaintiff No. 1 until defendants Nos. 1 to 3 had realised the decree.

Defendants Nos. 1 to 2 executed the decree assigned to them in execution case No. 289 of 1932 and on July 11, 1933, the judgment-debtor deposited the decretal amount in Court. On July 18, 1933, this amount was attached by some third party, but on July 21, 1933, the attachment order was withdrawn and the execution case was dismissed on full satisfaction to the decree-holder. On July 24, 1933, defendants Nos. 1 to 3 withdrew the money which had been so deposited. For some reason or other defendants Nos. 1 to 3 refused to pay the sum of Rs. 1,700 to plaintiff No. 1 as they had agreed in the contract of August 1, 1924, and on July 22, 1936, the plaintiffs brought this suit to recover the sum of Rs. 1,700 together with interest. Both the Courts below decreed the plaintiffs' claim; but it has been contended by Mr. Nawal Kishore Prasad on behalf of the appellants that the decrees of the Courts below cannot be sustained.

The first point taken by the appellants is that this suit was barred by limitation. As I have stated earlier, the sum of Rs. 1,700 was not payable by defendants Nos. 1 to 3 to plaintiff No. 1 until the defendants had realised the decree. The decretal amount was deposited by the judgment-debtor in Court on July 11, 1933, but this was attached by a third party. However, on July 21, 1933, the attachment order was withdrawn and the execution case dismissed because the decree had been fully satisfied. It has been contended that the decree was realised at latest by July 21, 1933, and that

time ran from that date. The suit was actually brought on July 22, 1936, over three years from the date when the decree was realised.

If this was a suit to recover a sum of money due, it would have been barred in three years, and it might well be said that the present suit was out of time. The trial Court appears to have thought that the present suit was one for specific performance and that Art. 113 of the Limitation Act applied. It was, however, held that time began to run not from the date when the execution case was dismissed on the ground of full satisfaction but from the date when the money was actually withdrawn, namely, July 24, 1933. Accordingly the learned Munsif held that the suit was within time.

The lower Appellate Court was of opinion that this was a suit to which Art. 116 of the Limitation Act applied and as that article gave the plaintiffs six years to bring the suit, the suit was well within time.

It has been strongly urged that this is a suit for specific performance, but, in my view, it is clearly not so. Specific performance can only be asked for in suits falling within s 12 of the Specific Relief Act, and clearly this is not such a suit.

It was further argued that this was a suit for indemnity; but in my view it is not such a suit. The contract entered into by defendants Nos. 1 to 3 was not to indemnify plaintiffs Nos. 1, 2 and 3 against any loss but it was a contract to pay plaintiff No. 1 a sum of money on the happening of a specific event, namely the realisation of the decree. It appears to me that this is a case where compensation is sought for breach of contract. Defendants Nos. 1 to 3 promised to pay plaintiff No. 1 Rs. 1,700 when the decree was realised, and this promise they have broken. It is not a suit to recover money lent or money due as a result of some transaction similar to a loan. It is clearly a case where the plaintiffs are suing for compensation for the defendants' breach of contract. That being so, Art. 116 of the Limitation Act applies, and that article gives the plaintiffs six years to bring the suit. The suit, therefore, was well within time, and the defence of limitation was of no avail to the defendants.

In my view this case cannot be distinguished from the case of *Ram Rachhya Singh Thakur v. Raghunath Prasad Misser* (1). In this latter case money had been

left with a vendee to pay a debt due from the vendor to a third party. The vendee failed to pay, and a Bench of this Court held that his failure gave the vendor a right to sue for compensation for breach of contract, and that Art. 116 of the Limitation Act applied to such a suit. It is impossible to distinguish that Bench case from the case now before the Court, and that being so, it must be held that the present suit is within time.

It was further argued that if this suit was a suit for compensation, then the plaintiffs' claim was bound to fail by reason of the fact that the plaintiffs Nos. 2 and 3 had failed to establish that they had suffered any loss. It was contended that before plaintiffs Nos. 2 and 3 could succeed, they would have to show that they had been compelled to pay plaintiff No. 1 the sum of Rs. 1,700 which the defendants had contracted to do.

In the first place, this argument entirely overlooks the fact that plaintiff No. 1, the person who was to receive the money, is a party to the suit. Both the Courts held that he was a privy to this contract, and that being so, he has obviously suffered loss, because he has not received the sum which the defendants contracted to have paid over to him. Further, it appears to me that plaintiffs Nos. 2 and 3 have suffered serious loss even if they have not been called upon as yet to pay what is due to plaintiff No. 1. Their liability to plaintiff No. 1 is still undischarged, and that being so, they can sue for compensation for breach of contract. This point also has been clearly decided in the case of *Ram Rachhya Singh Thakur v. Raghunath Prasad Misser* (1) to which I have already referred. In my view, however this case is regarded, the plaintiffs have a cause of action for compensation.

Lastly, the appellants have argued that the Courts below were wrong in granting interest upon this sum of Rs 1,700, and reliance has been placed upon a Bench decision of this Court. *J. H. Pattinson v. Srimati Bindhya Debi* (2), in which it was held that in the absence of an agreement, express or implied, interest on money wrongfully detained is not recoverable either under the Interest Act or under the proviso to the only section in that Act. If this was a claim for money wrongfully detained, there can be no doubt that interest could not be recovered; but if the suit is to be regarded as a suit for compensation, then

(1) 8 Pat. 880; 122 Ind. Cas. 244; A I R 1930 Pat. 46; Ind. Rul. (1930) Pat. 196.

(2) 12 Pat. 216; 146 Ind. Cas. 56; 14 P L T 149; A I R 1933 Pat. 196; 6 R P 225.

the plaintiffs are entitled to such an amount as would compensate them for the loss which they have suffered by reason of the defendants' breach of contract. The defendants, the moment they realised this money, were bound by their contract to pay it to plaintiff No. 1, and this they failed to do. The Court must, therefore, consider what damage the plaintiffs have suffered. It appears to me that plaintiff No. 1 has clearly suffered damage in excess of Rs. 1,700, and if this is regarded as a claim by plaintiffs Nos. 2 and 3 they also suffered loss in excess of Rs. 1,700. They have been deprived of the use of this money because of the defendants' breach of contract and the latter are bound to compensate the plaintiffs for their loss. It appears to me that the correct measure of damages is the loss sustained by the plaintiffs, and such loss can very properly be estimated as Rs. 1,700 plus a reasonable rate of interest thereon. That would be a fair and reasonable manner of ascertaining the amount of compensation due by reason of the breach of contract. Both the Courts below have considered twelve per cent. per annum simple to be reasonable interest upon this money. It may be that the lower Courts were wrong in granting a decree for Rs. 1,700 together with interest in terms; but the decree can be justified when it is regarded as a decree which gives the plaintiffs the actual loss which they have suffered. In my view interest at twelve per cent. together with the amount of Rs. 1,700 fairly and reasonably represents the loss suffered by the plaintiffs. That being so, they were entitled to recover such a sum by way of damages for breach of contract. The argument that they were not entitled to interest as such is really academic. If they are entitled to the full amount granted by the Court below by way of damages, then the decrees of the Courts below must be sustained.

The result, therefore, is that this appeal fails and is dismissed with costs.

Fazl Ali, J.—I agree.

E.

Appeal dismissed.

LAHORE HIGH COURT

First Appeal No. 358 of 1938

March 21, 1939

DALIP SINGH, J.

AMAR NATH KHOSLA AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

M. C. MOHAN—PLAINTIFF AND OTHERS—
DEFENDANTS—RESPONDENTS

Copyright—Assignment—Work incomplete when document assigning copyright is drawn up—Copyright, if transferred—Direct words not used—Evidence of parties, if uninterested, whether guide to meaning of phrases used—Deed—Construction

There cannot possibly be a transfer of copyright or assignment of copyright in a non-existing work where there is no proof that the work was substantially completed at the time when document transferring copyright was drawn up and on the face of it the document refers to a future work, copyright cannot be transferred by it. *Performing Right Society, Ltd. v. London Theatre of Varieties Ltd.* (1), relied on. [p. 66, col. 2]

Where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, then the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used. [p. 67, col. 1.]

F. A. from the decree of the Additional District Judge, Lahore, dated July 9, 1938.

Mr. Achhru Ram, for the Appellants.

Messrs. M. C. Mahajan and Dina Nath Bhasin, for the Respondent (Plaintiff).

Judgment.—In this case the plaintiff, the publisher of a work called "The Public Service Commission General Knowledge Questions with Answers" sued the defendant, the editor and publisher of a work called "Manual of Public Service Commission General Knowledge Question Papers with Answers" for breach of copyright with consequential injunctions and delivery of copies and for rendition of accounts. The defendant denied infringement of copyright and also among other pleas, which do not now concern us, took the plea of the plaintiff, not having *locus standi* to bring the suit. The trial Court framed two relevant issues:

"(1) Has the plaintiff copyright in the work 'Public Service Commission General Knowledge Questions with Answers'?"

"(2) Has there been infringement of this copyright, etc., etc.?"

On the first question it came to the conclusion that the author of this work, one Mr. Vatsayayana, had transferred his copyright to the plaintiff, Mr. Mohan, by means of a document, Ex. P-7, dated October 10, 1934, and that therefore the

plaintiff had copyright in the said work. The plaintiff having thus copyright obviously had *locus standi* to sue. On the second question it came to the conclusion that the defendant had undoubtedly infringed copyright, the Court pointing out that the defendant's so-called original work contained not only copies of the plaintiff's answers but even copies of the mistakes made in the plaintiff's book. It therefore decreed the suit, granting the plaintiff a perpetual injunction against the defendant from printing and producing the work and injunction for delivery to the plaintiff of copies in the defendant's possession and a preliminary decree for accounts of copies already printed and sold and ordering that the defendant shall pay to the plaintiff amounts realized by him or his agents by reason of the sale of the defendant's work and its copies and reproductions. The defendant has come in appeal and the first point raised is that the Court should not have made the defendant pay to the plaintiff the entire amounts realized by him or his agents by sale of the defendant's work, but only the profits realized by him. The learned Counsel for the respondent concedes this contention and the decree would have to be amended by changing the word "amounts" to the words "the profits."

The next contention raised by the learned Counsel for the appellant is more serious and it refers to the plea raised as to the *locus standi* of the plaintiff. The contention of the learned Counsel is (i) that Ex. P-7 could not transfer the copyright in a book which was non-existent at the time when Ex. P-7 was written; (ii) that Ex. P-7 as a matter of fact does not purport to assign any copyright; and (iii) that the plaintiff's case was that he was the owner of the copyright and he had not alleged any assignment or transfer by Ex. P-7 or any other document; and that on the evidence it was clearly shown that the plaintiff was not the author of the book and therefore could not be said to have the copyright vested in himself. On the last contention it was contended by that learned Counsel for the respondent that the evidence on the record showed a joint collaboration on the part of Mr. Vatsayayana and Mr. Mohan in the working of the book. I have no hesitation in rejecting this contention. It seems to me perfectly clear on the evidence of Mr. Vatsayayana, which I see no reason to doubt, that Mr. Vatsayayana was the sole

author of the book in the sense that he wrote the answers to the questions and he also, as I shall presently show, selected the questions. But the evidence is not clear on the second point.

It is, however, I think fairly inferable, reading the evidence as a whole and any doubt that might have existed on the matter has been set at rest, by taking the evidence of Mr. Vatsayayana in this Court who has stated on oath that he did select all the questions to be answered. There is therefore no force in the contention of the learned Counsel for the respondent that the plaintiff owned the copyright in this work by reason of being its joint author along with Mr. Vatsayayana. It is also clear that Mr. Vatsayayana could not be said to be an employee of Mr. Mohan for the purpose of writing this book. Mr. Vatsayayana states that he had commenced writing this book in 1932 and finished it some time at the end of 1934. Mr. Mohan admits that he had not met Mr. Vatsayayana till about a month before the execution of Ex. P-7, that is October 10, 1934, that is to say, he must have met Mr. Vatsayayana some time in September or August at the earliest in 1934. The agreement itself clearly does not show any contract of service in the sense that Mr. Mohan was to control Mr. Vatsayayana in his answer to the questions or in their selection. On the contrary, there is a clause stating that Mr. Vatsayayana is to indemnify Mr. Mohan against any claims, actions, damages and costs arising from infringement of copyright. Infringement of copyright in this work could only arise either by reason of the answers or by selection of the questions. If Mr. Mohan had any hand in either writing the answers or selecting the questions, it was hardly likely that a general indemnity clause should cast the entire burden of infringement of copyright on Mr. Vatsayayana. This being so, it follows that the author of this work was Mr. Vatsayayana.

And the next question that arises is, did Mr. Vatsayayana transfer the copyright which vested in him in this work to Mr. Mohan by Ex. P-7, as contended by the plaintiff? The learned Counsel for the appellant has contended that there could not possibly be a transfer of copyright or assignment of copyright in a non-existing work and this he has supported by Halsbury's Laws of England, Vol. 7, Edn. 2, p. 556, para. 869 and *Performing Right Society, Ltd. v. London Theatre of Varieties*

Ltd. (1), at p. 12 and also by Copinger on the Law of Copyright, Edn. 7, p. 99. The learned Counsel for the respondent has not contested this position but he contests that the work had really been substantially completed at the time when Ex. P-7 was signed and that therefore the copyright that was transferred at that time was in an existing and not a non-existing work. On this point the evidence on the record was far from clear, because the attention of the Counsel on both sides does not appear to have been directed to the essential points in the case. I therefore under the provisions of O. XLI, r. 27, took the evidence of Mr. Vatsayayana to clear up this question. Mr. Vatsayayana, however, was unable to throw any light on the question at all and the case must be decided on the evidence as it stands. On the evidence as it stands, there is no proof that the work was substantially completed at the time when Ex. P-7 was drawn up. On the face of it the document appears to refer to a future work and this being so, copyright could not be transferred by it. This being so, it becomes unnecessary to consider the other question, namely that if the work did exist, would the terms of Ex. P-7 amount to a transfer of copyright? Had such a question arisen, I think I would have upheld on the whole that Ex. P-7 did transfer such a right.

In all cases where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, then I consider that the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used and the evidence of Mr. Mohan, and Mr. Vatsayayana leaves no doubt that the parties intended to convey the copyright in this book to Mr. Mohan. This is also the conclusion of the trial Court based on the clause prohibiting the author from taking any interest directly or indirectly in a competing publication and on the clause making it compulsory for the author to revise new editions of the work to entitle him to receive royalty. Evidently, the issue of new editions was left entirely to the discretion of the publisher, which would not be the case if the owner of the copyright remained the author, who could terminate the agreement at the end of the first edition otherwise. But the difficulty remains that in the absence of anything

to show that the work was a completed transaction, this document cannot be held to transfer any copyright and therefore the inevitable result follows that the plaintiff had no *locus standi* to sue. I arrived at the result with great reluctance, for, I am convinced that the case is genuine enough and the defendant is taking advantage of a technical plea, but I cannot avoid the conclusion. It is contended that this person, Mr. Vatsayayana, should be added as a party now. No doubt this could be done but this would merely mean a re-trial from the beginning and the only thing would be the saving of court-fee which is not very excessive in this case. I therefore do not see that any useful object would be served by directing a re-trial with Mr. Vatsayayana added as a party. The same suit can be brought over again with proper precautions taken. I therefore do not accept this contention. I am obliged therefore to accept the appeal and dismiss the suit. In the circumstances I would leave the parties to bear their own costs.

D.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 10 of 1936
September 23, 1938

DAVIS, J. O. AND TYABJI, J.
KHODROMAL JERAMDAS—

APPLICANT

versus

MENGHOMAL JESSOMAL AND ANOTHER—
OPPONENTS

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1—Order amending final decree, if in itself appealable—Whether can be treated as amending preliminary decrees and appealed against.

On an application under s. 151, Civil Procedure Code, the Subordinate Judge believing that he was in error when he passed the final decree purported to amend his own final decree by altering the same in order to correct what was believed to be a mistake. The District Judge on appeal treated the order of the Subordinate Judge amending the final decree as a decree and allowed the appeal.

Held, that the order of the Subordinate Judge amending the final decree was not an appealable order in itself; but that he should be treated to have amended the preliminary decree which amended decree could be appealed against.

O. R. App. from the decision of the District Judge, Sukkur, dated October 25, 1935.

Mr. Dipchand Chandumal, for the Applicant.

Mr. Kundanmal Dayaram, for the Opponents.

Davis, J. C.—This is a revision application against an order of the District Judge of Sukkur setting aside an order of the Subordinate Judge of Jacobabad whereby he had amended his own final decree passed in Suit No. 331 of 1932 which was before him. This was a suit for settlement of partnership accounts in which one Menghomal, opponent No. 1 in this revision application, was the plaintiff, and one Seyomal, opponent No. 2, was defendant No. 5, and as a result, Rs. 1,034-1-4 was found due to defendant No. 5, Sevomal. But one Khodromal who was the plaintiff in another suit in which Sevomal was a defendant obtained as long ago as 1927 a decree for Rs. 3,000 against Sevomal, and in execution of that decree, he obtained from the Court an order of attachment of this Rs. 1,034-1-4 found due to Sevomal in the suit of 1932. Sevomal though described as a simpleton was not so easily got at and in the proceedings which then commenced in the partnership suit he agreed that the Rs. 1,034 odd found due to him should be paid to the plaintiff Menghomal and accounts were made up on this basis and a final decree was passed accordingly; so Khodromal found he was deprived of this Rs. 1,034. He then applied to the Subordinate Court under s. 151, Civil Procedure Code, so freely invoked in the mofussil Courts to correct mistakes and to right all real or supposed wrongs, and the Subordinate Judge believing that he was in error when he passed the final decree based upon accounts in which this Rs. 1,034 was allotted by the Commissioner to Menghomal purported to amend his own final decree by an order dated December 11, 1934, whereby he gave effect to the attachment of Khodromal, found that the Rs. 1,034 should not and could not have been allotted to Menghomal by the Commissioner, and therefore reduced the sum found due under the final decree to Menghomal by this Rs. 1,034. Menghomal then appealed to the District Court, and the District Judge treated the order of the Subordinate Judge amending the final decree as a decree, and allowing the appeal, set aside the order of the Subordinate Judge of December 11, 1934, amending the final decree and restored the unamended decree dated October 31, 1934.

Now, it is argued in revision on behalf of Khodromal who has lost this Rs. 1,034 to

Menghomal, that the District Judge had no power to deal in appeal with this order of the Subordinate Judge amending his own decree under s. 151, Civil Procedure Code, as the order of the Subordinate Judge amending the final decree was without jurisdiction; an application in revision under s. 115, Civil Procedure Code, would lie to this Court, but no other remedy was available. No appeal lies against an order under s. 151, Civil Procedure Code. To this it is contended for the opponent that the nature of an order is not determined by the section of the law to which it may quite wrongly have been assigned; the true test is, what is the order in itself? It does not change its true nature merely because it is given a wrong name, and reference is made to the case in *Syed Mahomed Maliha v. Chowdhury Mahomed Ismail Khan* (1) at p. 206. This case is only one of a number of cases wherein it is laid down that a Court cannot evade the appellate jurisdiction of the Court above it by arbitrarily placing its order under a section the orders of which are not appealable. In that case, as in this, a Judge altered a decree already signed and sealed in order to correct what was believed to be a mistake made by the Commissioners, and the Appellate Court said:

"The view taken by them that the Commissioners had distributed the rent of the tenures with reference to the Record of Rights is baseless. Moreover, the report of the Commissioners was considered and modified as regards the amount of rent payable by the defendants, by the Subordinate Judge in his judgment of June, 1916. There was no arithmetical or clerical error in the judgment of the Subordinate Judge which might have been corrected under s. 151 or s. 152, Civil Procedure Code. If there was any error, that error ought to have been corrected on appeal; or if there was any error apparent on the face of the record, there might have been an application for review of judgment under O. XLVII, r. 1, Civil Procedure Code. The Subordinate Judge after consideration of the facts came to the conclusion that the rent payable by the defendants was Rs. 129-2-0. The decree as originally drawn up was quite in accordance with the judgment and there was nothing wrong in it. Without the judgment being amended or set aside, that decree could not have been amended or set aside, by an indirect attack. On behalf of the respondent it was urged that we might amend the judgment under those sections of the Civil Procedure Code, because some wrong has been done to his client. There is nothing in the judgment which comes within the purview of s. 151 or s. 152, Civil Procedure Code. The proper remedy, as already indicated was by way of review or appeal against the judgment if there was anything wrong in it. The result therefore is that this appeal is allowed and

(1) A I R 1927 Cal. 203 at p. 206; 100 Ind. Cas. 309; 44 O L J 441.

the decree as amended must be set aside and it should be brought in accordance with the judgment delivered on June 27, 1916."

We think, therefore, that the District Judge should not have treated the order of the Subordinate Judge dated December 11, 1934, altering the final decree, as an appealable order in itself, but he should have regarded the decree of October 31, 1934, as amended by the later order. In short, it was the amended decree which was appealable. He should then have allowed the appeal, set aside the amended decree and restored the decree as first drawn up. Looked at thus, we think there is no doubt that the District Judge had jurisdiction, and this revision application must fail and we dismiss it with costs accordingly. We are not now prepared to hear the revision application as a second appeal. Order accordingly.

D. *Application dismissed.*

LAHORE HIGH COURT

Criminal Revision No. 627 of 1939

June 26, 1939

ABDUL RASHID, J.

GHULAM MOHAMMAD—PETITIONER
versus

Musammat ALLAH RAKHI—RESPONDENT

Criminal Procedure Code (Act V of 1898), s 488—Wife living with husband for short while during pendency of her application for maintenance, by husband's subterfuge—Maintenance, if should be disallowed on the ground.

Where the husband has neglected his wife for a number of years and the fact that he has succeeded by means of a subterfuge in making her live in his house for a short while during the pendency of an application for maintenance by her, should not be allowed to affect the decision of the application presented by her for maintenance. *Peary Lal v. Naraini* (1), relied on.

Or. R. case reported by the Sessions Judge, Jhelum, dated April 18, 1939.

Facts.—The evidence on the record proves that the petitioner *Musammat Allah Rakhi*, even during the pendency of her petition before the Magistrate was living in the house of her husband *Ghulam Mohammad*. This fact is admitted even by one—petitioner's own witness—*Haidar Khan*. The respondent *Ghulam Mohammad* as well as all his three witnesses, who are *lambar-dars* of the village, have unanimously deposed that the petitioner was living with her husband. The following quotations from the order of the Magistrate show that he virtually accepts the evidence on this point as true :

"If I were not to grant her maintenance, I am satisfied that *Ghulam Mohammad* would immediately turn her out I think it quite possible that during the pendency of this case *Allah Rakhi* has on occasions lived with her husband."

Report.—As the evidence on the file proves that during the pendency of her petition *Musammat Allah Rakhi*, petitioner, was residing in her husband's home, no question of her husband neglecting or refusing to maintain her arose and her petition should have been dismissed forthwith. I accordingly forward these proceedings to the High Court with the recommendation that the order passed by the Sub-Divisional Magistrate be set aside and *Musammat Allah Rakhi's* petition be dismissed.

Mr. M. L. Puri, for the Respondent.

Order.—It appears that during the pendency of the present proceedings *Ghulam Mohammad* fabricated a false case of theft against his wife *Musammat Allah Rakhi* and her father who is deaf and dumb. During the course of the investigation, the Police summoned *Musammat Allah Rakhi* and her father, and in order to bring about a compromise between the parties advised *Musammat Allah Rakhi* to go and live with her husband. *Musammat Allah Rakhi* therefore entered into a compromise and went to the house of her husband. She states emphatically that she entered into the compromise with her husband as he had brought a false criminal case against her and her father, and that her husband took her to his house by force. She began unwillingly to live in his house in order that he may not prosecute her for theft. She is unwilling to live with her husband as she is afraid that he might do her bodily harm. It appears that her husband has succeeded by means of a subterfuge in inducing his wife to live with him for a short period. This is, however, no ground for rejecting her application for maintenance. *Ghulam Muhammad* has married again and is living with his second wife. He has neglected *Musammat Allah Rakhi* for a number of years and the fact that he has succeeded by means of a subterfuge in making her live in his house for a short while should not be allowed to affect the decision of the application presented by *Musammat Allah Rakhi* for maintenance. Reference may be made in this connection to *Peary Lal v. Naraini* (1). I am, there-

(1) A I R 1935 All. 977; 159 Ind. Cas. 308; (1935) Or. Cas. 1197; 58 A 379; 37 Or. L J 62; (1935) A L J 1186; 1935 A L R 1106; 8 R A 426.

fore unable to accept the recommendation of the learned Sessions Judge and dismiss the petition presented by Ghulam Mohammad for reversal of the order of the Magistrate. The Magistrate's order granting maintenance of Rs. 4 per month to Allah Rakhi from November 21, 1938, is maintained.

D.

Petition dismissed.

RANGOON HIGH COURT

Special Second Appeal No. 47 of 1939

May 17, 1939

ROBERTS, O. J. AND DUNKLEY, J.
MAUNG MAUNG AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

V. V. R. CHETTYAR FIRM—DECREE-HOLDERS—RESPONDENTS

Execution—Limitation—Plea of—Execution application not fructified but withdrawn and dismissed—Judgment-debtor, if barred by res judicata or estoppel from raising question of limitation later—Limitation Act (IX of 1908), Sch. I, Art. 162 (5)—Application—Plaint in suit under O. XXI, r. 63, Civil Procedure Code (Act V of 1908), whether application under Art. 182 (5)—Or application made to proper Court

Orders in execution proceedings are binding upon the parties thereto on principles analogous to those of *res judicata*, or of estoppel. *Ram Kirpal v. Rup Kari* (1), and *Mungul Pershad Dichit v. Grija Kant Lahiri* (2), relied on [p. 70, col. 2.]

Where, however, no objection to execution is taken and the application for execution does not fructify, but is withdrawn and dismissed, the judgment-debtor is not debarred by the principles of *res judicata* or estoppel from raising the question of limitation later. [p. 71, col. 1.]

[Case-law referred to]

A "suit" is a proceeding which is instituted by the presentation of a plaint and is in its nature different from an "application made" under the Limitation Act. *Hansraj Gupta v. Dehra Dun Electric Tramway Co., Ltd.* (9), relied on. [p. 71, col. 2.]

An application which is to save limitation under Art. 182 (5), Limitation Act, must be made "to the proper Court for execution," a suit to have an order in claim case set aside cannot be treated as an application under Art. 182 (5). *Raghunandan Pershad v. Bhugoo Lal* (10), referred to.

A suit under O. XXI, r. 63, Civil Procedure Code, cannot keep the execution proceedings pending when there has been a definite order of the executing Court dismissing the execution application; in such a case, if the decree-holder succeeds in the suit, he will have to file a fresh application for execution and re-attach the property. A plaint in such a suit cannot, therefore, be treated as an application, within the meaning of cl. 5 of Art. 182. *Hasan Shah v. Mohamed Amir Mirza* (8), distinguished. [p. 73, col. 1.]

Nor can the filing of such a suit be an application to the proper Court for execution when the filing of the suit in the Court which has jurisdiction to execute the decree or in some other Court must depend upon the fortuitous circumstance of the value of the attached property. [*Ibid.*]

Sp. S. A. against the decree of the District Court, Thaton, dated November 24, 1938.

Mr. U Kyaw Htoon, for the Appellants.

Mr. M. A. Ruuf, for the Respondents.

ROBERTS, C. J.—The respondent, the V. V. R. Chettyar firm, obtained a decree against the appellants, Maung Maung and Ma The Yin Mai, in the Sub-Divisional Court of Thaton on May 22, 1931, for the sum of Rs. 1,270. They made an application for execution, but the attachment was removed at the instance of a third party, who claimed the paddy land which had been attached as his own property; and the case was closed on January 11, 1932. On July 1, 1935, fresh execution proceedings were taken out, and the question of whether these proceedings were time-barred was never agitated: notices were issued directed to the appellants and were served on them, but the respondent firm discontinued the proceedings on July 12, 1935. A third application was made by the respondents on June 28, 1938. It is quite plain that the period of three years within which application must be made begins to run in the words of Art. 182 (5) from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take "some step-in-aid of execution of the decree or order." The learned Sub-Divisional Judge seems to have overlooked this provision in holding that the application was time-barred; and on appeal to the District Court this omission was rightly pointed out. But then there arises the further question as to whether the application made on July 1, 1935, was time-barred, or rather whether the appellants could contend that it was, and as it was whether once the respondents' remedy was barred by statute the decree could be revived against the judgment-debtors. The learned District Judge was of opinion that the present appellants (respondents in the Court below) could not raise the matter at that stage: it is from this decision that the present appellants have appealed. Now, it is perfectly true that their Lordships of the Privy Council have held that orders in execution proceedings are binding upon the parties thereto on principles analogous to those of *res judicata*, or of estoppel: *Ram Kirpal v. Rup Kari* (1) and *Mungul Pershad Dichit v. Grija Kant Lahiri* (2). But where no order

(1) 6 A 269; 11 I A 37; 4 Sar. 489 (P O).

(2) 8 C 51; 8 I A 123; 11 O L R 113; 4 Sar. 249 (P O).

for execution has been made the question of limitation appears to me to remain still open for determination.

The principle involved was considered in *Subramania Aiyar v. Raja Rajesware Sethupathi* (3). In that case notice went to the sons of a deceased judgment-debtor to show cause why they should not be brought on the record as legal representatives of their father, a decree holder having applied for execution by attachment and sale of properties in the respondents' possession; they did not appear and an order was made *ex parte* against them: it was held that they were not estopped from moving to set aside the attachment on the ground that the properties did not belong to the judgment-debtor. It was observed that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is to be decided against him and should have an opportunity of putting forward his contentions against such a decision. Again in *Umed Ali v. Abdul Karim* (4) it was pointed out that in *Mungul Pershad Dicit v. Grija Kant Lahiri* (2) their Lordships of the Privy Council had declined to differ from a Full Bench decision, *Bisseshur Mullick v. Mahatab Chunder* (5) in which it was held that the mere service of notice on the judgment-debtor to show cause why an execution should not proceed after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it. In *Genda Lal v. Hazari Lal* (6) a Full Bench of the Allahabad High Court held that where no objection to execution is taken but the application for execution does not fructify, the judgment-debtor is not debarred by the principle of *res judicata* from raising the question of limitation later. The principles underlying these decisions have been applied in this High Court in *Ma Tin v. Ko Ba Thet* (7) and I respectfully agree with the decision of my learned brother in that case. There must be orders in the execution proceedings which bind the parties, before it can be said that the question of limitation has been finally disposed of; a mere application for execution which is withdrawn and dismissed does not fall

within the principle of the decisions of their Lordships of the Privy Council to which I have referred. I have come to the conclusion therefore that there is no rule of estoppel nor application of the principle of *res judicata* which precluded the appellants here from raising the contention that the earlier application was time-barred.

Dr. Rauf urges that even if this is so the respondents filed a suit on January 25, 1932, for a declaration that certain properties were those of the judgment-debtor. This suit was not disposed of till January, 1933, and it is contended that the second application for execution is thus saved from limitation since it was brought within the requisite period of three years, namely on July 1, 1935. In other words, he says that the plaint in this suit is an application made in accordance with law to the proper Court for execution within the meaning of Art. 182 (5). He cites *Hasan Shah v. Mohamed Amir Mirza* (8) as an authority for the proposition that a plaint in such a declaratory suit can be treated as an application under Art. 182 (5). Now the Chief Court of Oudh seems to be alone in taking this view: on the facts before them they held that the effect of the suit was to keep the execution proceedings pending till the suit was decided. Even though the application in execution proceedings was ordered to be "filed" they held that this was not a final decision in respect of it. In the present case, however, the execution proceedings had been brought to an end at the instance of the decree-holder himself on January 11, 1932. They were not "pending" when the suit was filed on January 25: on the contrary, the application for execution had been dismissed. Apart from this, s. 2, Limitation Act, declares that "suit" does not include an appeal or an application. A "suit" is a proceeding which is instituted by the presentation of a plaint and is in its nature different from an "application made" under the Limitation Act: see *Hansraj Gupta v. Dehra Dun Electric Tramway Co., Ltd.* (9). Again the application which is to save limitation under Art. 182 (5) must be made "to the proper Court for execution." Now if a suit is brought for a declaration under O. XXI,

(3) 40 M 1016; 38 Ind. Cas. 627; A I R 1918 Mad. 1167.

(4) 35 C 1060; 8 C L J 193.

(5) 10 W R 8; Beng. L R Sup. Vol. 967 (F B).

(6) 58 A 313; 160 Ind. Cas. 394; A I R 1936 All. 21; (1935) A L J 1189; 1936 A L R 118; 8 R A 599 (F B).

(7) (1939) Rang. 152; 184 Ind. Cas. 74; A I R 1939 Rang. 245; 12 R Rang. 121.

(8) 6 Luck 234; 128 Ind. Cas. 723; A I R 1930 Oudh 468; 7 O W N 887; 15 R D 55; 11 L R (O) 294; Ind. Rul. (1931) Oudh 58.

(9) 54 A 1087; 142 Ind. Cas. 7; A I R 1933 P O 63; 60 I A 13; Ind. Rul. (1933) P O 43; (1933) M W N 190; (1933) A L J 175; 35 Bom. L R 319; 37 L W 445; 64 M L J 403; 37 C W N 379; 57 C L J 166 (P O).

r. 63, the extent of the Court's jurisdiction will be the governing factor in deciding whether to bring it in the same Court as that which had cognizance of the execution proceedings; it will be a matter of chance whether it is brought in the proper Court for execution or not. I cannot, therefore, hold that such a suit should be treated as an application under Art. 125 and in the circumstances of the present case, I am satisfied that the respondent's contention is of no weight and that this appeal ought to be allowed. I concur with the order proposed by my learned brother with regard to costs.

Dunkley, J.—The final order passed on Execution Application No. 63 of 1931 was passed on January 11, 1932, and it was to the effect that the application was dismissed at the request of the Advocate for the decree-holder. The next application was Execution Application No. 42 of 1935, which was filed on July 1, 1935. Consequently, on the face of it, this application was time-barred. Objection on this ground was not taken at the time by the judgment-debtors, who did not appear. In fact, the record of Execution Application No. 42 of 1935 shows that all that was done on that application was to issue notices to the judgment-debtors, and on the day fixed for the return of these notices, the Advocate for the decree-holder asked that the case might be closed and it was closed at his request. The objection that execution of the decree is barred by limitation has been taken by the judgment-debtors in the third application for Execution No. 25 of 1938 and the learned District Judge on first appeal has correctly appreciated that the question for decision is the application of the principle of *res judicata* to execution proceedings. I have recently dealt with this question in *Ma Tin v. Ko Ba Thet* (7) the report of which was not available to the learned District Judge, and the arguments which we have heard in the present appeal have served to convince me of the correctness of my judgment in that case. I relied mainly on the decision of a Full Bench of the Allahabad High Court in *Genda Lal v. Hazari Lal* (6). Part of the head note of the report of that case reads as follows:

"If the judgment-debtor does not appear and offer any objection, and the Court had issued notice on the supposition that the application for execution was in time, no occasion arises for the Court to enter upon an inquiry as to whether the application is or is not barred by time. A mere order that the decree should be executed, which under O. XXI, r. 23 (1), has to be automatic, cannot be regarded

as a definite adjudication, as between the decree-holder and the judgment-debtor, of any objection which might have been raised if the judgment-debtor had appeared, so as to operate as a bar by implication at all subsequent stages of the proceeding. If the application does not fructify and is struck off, there is no bar of *res judicata* against the judgment-debtor. If, on the other hand, some further step is taken, which amounts to the application for execution fructifying, so as to become analogous to a suit being decreed, then the judgment-debtor would be barred by the principle of *res judicata* from raising the question subsequently."

Now in Application No. 42 of 1935, even if the judgment-debtors had appeared in response to the notices, they would have had no opportunity of raising an objection because on the day fixed for their appearance the application was withdrawn by the decree-holder. Hence the principle of *res judicata* has no application to the present matter and it is open to the judgment-debtors to object to execution on the ground that it is barred by limitation. For the decree-holder it is argued that Execution Application No. 42 of 1935 was made within time and for this purpose reference is made to Suit No. 8 of 1932 of the Sub-Divisional Court of Thaton. This was a suit under the provisions of O. XXI, r. 63, Civil Procedure Code which was brought by the decree-holder after the attachment in Execution Application No. 63 of 1931 had been removed and the execution application had been dismissed. The plaint was filed on January 25, 1932, and the suit was finally decided on January 12, 1933. The argument is that a plaint in a suit under O. XXI, r. 63, is an application to take a step-in-aid of execution of the decree within cl. 5 of Art. 182, Limitation Act, and that if the plaint is filed in the proper Court for execution, then such a suit satisfies completely the conditions of cl. 5 of Art. 182, so that the date of the final judgment in the suit forms a fresh starting point for the running of time under that clause. Reliance is placed on the case in *Hasan Shah v. Mohamed Amir Mirza* (8) but that case is readily distinguishable because the *ratio decidendi* of the learned Judges is to be found at the close of their judgment, where it is stated:

"We are of opinion that the effect of such a suit (under O. XXI, r. 63) is to keep the execution proceedings which have given rise to it pending till the decision of the suit. If the suit succeeds, proceedings continue. If the suit fails, the proceedings fail simultaneously. The order cancelling or maintaining an attachment is liable to be affected by the result of the suit. This is clear from the terms of r. 63 itself. If that is so, it follows that an order cancelling or maintaining an attachment becomes final only on the date of the disposal of the suit. In this particular case what the Court did was that it

ordered the application to be "filed." This we are unable to construe as a final decision of the application."

Consequently, what the learned Judges really held was that there was no "final order" no the execution application until the suit under O. XXI, r. 63, had been decided. With the greatest respect, that was undoubtedly true in the case before them; but if this is to be taken as a general proposition of law applicable in every instance in which a suit under O. XXI, r. 63 is filed, then, in my opinion, it is too broadly stated. A suit under O. XXI, r. 63, cannot keep the execution proceedings pending when there has been a definite order of the executing Court dismissing the execution application; in such a case, if the decree-holder succeeds in the suit he will have to file a fresh application for execution and re-attach the property. In the present case, Execution Application No. 63 of 1931 was dismissed by the Court at the request of the decree-holder. I am prepared to concede that a suit under O. XXI, r. 63, is a step-in-aid of execution, but, with the greatest respect, I am unable to agree that a plaint can be treated as an application, within the meaning of cl. 5 of Art. 182. This construction appears to me to be contrary to the express provisions of the Limitation Act, s. 2, sub-s. (10) of which enacts that in the Act, unless there is anything repugnant in the subject or context, "suit" does not include an appeal or an application. A suit means a civil proceeding instituted by the presentation of a plaint: *Hansraj Gupta v. Dehra Dun Electric Tramway Co., Ltd.*, (9) at p. 1074*. Nor am I able to hold that the filing of such a suit can be an application to the proper Court for execution when the filing of the suit in the Court which has jurisdiction to execute the decree or in some other Court must depend upon the fortuitous circumstance of the value of the attached property. In *Raghunandun Pershad v. Bhugoo Lall* (10) a Bench of the Calcutta High Court held that cl. 4 of Art. 179, Limitation Act of 1877, (now cl. 5 of Art. 182) contemplates an application made in the course of execution to the Court whose duty it was to execute the decree, and cannot be taken to include a suit to have an order in a claim case set aside. With all due respect, this is, in my opinion, the correct interpretation of the law. Hence execution of the decree obtained by the respondent against the

appellants in Suit No. 23 of 1931 of the Sub-Divisional Court of Thaton is barred by limitation. This appeal is, therefore, allowed, the judgment and decree of the District Court of Thaton in Civil Miscellaneous Appeal No. 65 of 1938 are set aside, and the order of the Sub-Divisional Court of Thaton, dated August 11, 1938, in Execution Application No. 25 of 1938, is restored. The respondent must pay the appellants' costs in all Courts; Advocate's fee in this Court five gold mohurs.

s.

Appeal allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 936 of 1937

September 14, 1939

HARRIS, C. J. AND FAZL ALI, J.
GANESH MAHTO—APPELLANT

versus

BHAWAN MAHTO AND ANOTHER—
RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 99—Suit for contribution—Question of date of payment by plaintiff is one of fact—Held on facts that suit was within limitation.

It is not safe to lay down any rigid formula for the purpose of determining the date of payment, as the question of payment being a question of fact, must be determined with reference to the circumstances of each case.

One M had a joint decree for rent against the plaintiff and defendants, and in execution of that decree he obtained from the executing Court an order for the attachment of a sum which had been deposited into X Court by a judgment-debtor of the plaintiff, to the credit of the latter. Subsequently, on August 20, 1932, the executing Court by its order directed to transfer the money to the credit of the decree-holder and to send the payment order to X Court. On September 3, 1932, the payment order was made over by X Court to the decree-holder. The plaintiff brought a suit for contribution against defendants within three years from September 3, but beyond limitation from August 20:

Held, that the suit was not barred by limitation. The payment by the plaintiff to the decree-holder must be deemed to have been made on September 3, and time began to run from that date. *Gahar Ali Howladar v. Abdul Owahab Shikdar* and (1) and *Palegar Meghavarnam Naidu v. A. M. Mahamad Mohideen Sahib* (2), distinguished.

A. from a decision of the Subordinate Judge of First Court, Chapra, dated July 26, 1937, reversing a decision of the Munsif, Third Court, Chapra, dated September 19, 1936.

Mr. Hareshwar Prasad Sinha, for the Appellant.

Messrs Harnarayan Prasad and B. B. Sahay, for the Respondents.

Fazi Ali J.—This is an appeal by the plaintiff in a suit for contribution which was decreed by the trial Court but has been dismissed on appeal by the lower Appellate Court on the ground of limitation. The only question to be decided in this Court is whether the decision of the lower Appellate Court as to limitation is correct.

It appears that one Jitan Mahto had a joint decree for rent against the plaintiff and defendants, and in execution of that decree he obtained from the third Munsif of Chapra, to whom he had applied for the execution of the decree, an order for the attachment of a sum of Rs. 163-2-6, which had been paid into the Court of the Fourth Munsif by one Parmeshwar Mahto, a judgment-debtor of the plaintiff, to the credit of the latter. On July 30, the original order of attachment was modified by the third Munsif as follows :

"Decree-holder is allowed to withdraw Rs. 40-8-3 only out of Rs. 163-2-6 and in respect of the balance amount, the attachment is withdrawn. Inform the Court concerned accordingly. Put up on the date fixed for further orders."

Subsequently on August 20, the same learned Munsif passed the following order :

"Let the attached money be transferred to the credit of decree-holder and send the payment order to the Court concerned and put up on September 2, 1932, for orders."

On September 3, 1932, the payment order was made over by the Fourth Munsif to the decree-holder's Pleader.

Article 99 of the Indian Limitation Act which is undoubtedly the proper article applicable to the present suit provides that the period of limitation in a suit for contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, is three years from the date of the payment in excess of the plaintiff's own share. Thus the real question to be decided in this appeal is what was "the date of the payment" in the present case. The plaintiff's contention is that the date of the payment was September 3, 1932, when the payment order was handed over by the Fourth Munsif who held the plaintiff's money, to the decree-holder's Pleader. On the other hand, it is contended on behalf of the defendants that the date of the payment was August 20, 1932, because on that date the third Munsif directed that the attached money be transferred to the credit of the decree-holder and the payment order sent to the Court concerned. The learned Subordinate Judge whose

judgment is under appeal has held that limitation began to run from August 20, and as the present suit was brought more than three years after this date, it was barred by time.

In my opinion the view expressed by the learned Subordinate Judge is not correct. It is to be remembered that the attached money was in deposit in the Court of the Fourth Munsif and that before it was paid to Jitan Mahto (the decree-holder under the rent decree), a payment order had to be sent to him by the Third Munsif who had issued the order of attachment. All that happened on August 20, was that the Third Munsif directed his office to note the transfer of the attached money to the decree-holder's account and send the payment order to the Court of the Fourth Munsif. There is nothing in the judgments of either of the two Courts below to show when the payment order was actually prepared and when it was actually sent to the Fourth Munsif, but both the Courts below are agreed that it was not until September 3, that the payment order was actually issued to the decree holder's Pleader. It further appears that the Third Munsif did not record satisfaction of Jitan Mahto's decree until September 16, and presumably he did so only after he received intimation that money had been withdrawn by Jitan Mahto. In my judgment the payment to the decree holder cannot on these facts be deemed to have been made prior to September 3, 1932.

The learned Advocate for the respondents has in support of his contention that the payment in the present case must be deemed to have been made on August 20, referred us to (1) *Gahar Ali Howladar v. Abdul Owahab Shikdar* (1) and *Polegar Meghavarnam Naidu v. A. M. Mahamad Mohideen Sahib* (2). The facts of both these cases, however, are easily distinguishable from those of the present case. In *Gahar Ali Howladar v. Abdul Owahab Shikdar* (1) the landlords of a certain *taluk* had obtained a decree for rent against the plaintiff and defendants who were co-sharers in that *taluk* and when the property was advertised for sale, the plaintiff deposited the entire decretal amount in Court, which was accepted by the Court and the landlord's decree was

(1) 56 O 192; 114 Ind. Cas. 134; A I R 1928 Cal. 361; 32 O W N 1030; 49 O L J 5; Ind. Rul. (1929) Cal. 198.

(2) A I R 1936 Mad. 782; (1936) M W N 658; 44 L W 135.

recorded as satisfied. The deposit was made by the plaintiff in Court on February 4, 1920, and the money was actually withdrawn by the decree-holders on February 14, 1920. On these facts it was held in a suit for contribution brought by the plaintiff against the defendants that the period of limitation for the suit began to run from the date on which the money was appropriated by the Court in payment of the decree-holder's dues and not from the date when the decree-holder withdrew the money. In the second case the suit for contribution was based on a payment made by the plaintiffs, who owned lands in a holding of which defendants Nos. 2 to 4 were also *pattadars*, in order to save the holding from sale for arrears of rent due to defendant No. 1; and it was held that the period of limitation for the suit began to run from the date on which the plaintiff had deposited the amount in question for saving the property. It is to be noted that both these cases were cases of voluntary payment, and as such, are clearly distinguishable from the present case, where the alleged payment was made under compulsion. It is contended that the test as to the date of payment is as laid down in *Gahar Ali Howladar v. Abdul Owahab Shikdar* (1), to find out on what date the plaintiff lost dominion over the money which he paid. But in my opinion that is not a test which can be applied to every case, and it is certainly not the correct test so far as the present case is concerned, because here the plaintiff may well be said to have lost control over the money on the date the money was attached by the third Munsif at the instance of the decree-holder. It will be perhaps more accurate to say that the true test is to find out when the money ceased to become the money of the plaintiff; but it is not safe to lay down any rigid formula for the purpose of determining the date of payment, as the question of payment being a question of fact must be determined with reference to the circumstances of each case. In my opinion it is impossible to hold on the facts of the present case that time could begin to run against the plaintiff prior to September 3, and as the present suit was brought within three years of that date, I am unable to hold that it was barred by limitation.

I would, therefore, allow this appeal with costs, set aside the judgment and decree of the lower Appellate Court and decree the plaintiff's claim with interest at

six per cent. from September 3, 1932, until realisation.

Harrles, C. J.—I agree.

s.

Appeal allowed.

LAHORE HIGH COURT

First Civil Appeal No. 67 of 1938

November 3, 1938

BHIDE, J.

RAJA RAM—DEFENDANT—APPELLANT

versus

ALLAHABAD BANK, LTD., PLAINTIFF

AND OTHERS, DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4, O. XXIII, r. 3 — Preliminary decree under O. XXXIV, r. 4 — Terms thereof are imperative—Payment or adjustment out of Court without sanction cannot be recognized.

The terms of a preliminary decree passed according to the provisions of O. XXXIV, r. 4, Civil Procedure Code, as regards payment in Court, etc., are imperative, and payment or adjustment out of the Court without its sanction is inadmissible under O. XXIII, r. 3, Civil Procedure Code, and will not be recognized. A preliminary decree in a suit for sale is a formal adjudication of the rights of the parties with reference to the mortgage and the decree directs that the plaintiff's claim shall be satisfied by a payment in Court in a certain manner. Any adjustment out of Court would, therefore, be obviously contrary to the terms of the decree. *Inayat Khan v. Harbans Lal* (8), not followed.
[Case-law relied on.]

F. C. A. from the order of the Senior Sub-Judge, Delhi, dated March 21, 1938.

Mr. Achhru Ram, for the Appellant.

Messrs. Ram Kishore, B. D. Bansal and Kartar Singh, for the Respondents.

Judgment.—In a suit for recovery of Rs. 3,43,093-15-0 on the basis of a mortgage by the Allahabad Bank, Ltd., Lahore, a preliminary decree was passed on April 6, 1937, in terms of O. XXXIV, r. 4, Civil Procedure Code, directing that the defendant-mortgagors shall pay in Court the amount due by October 6, 1937, and in default of such payment the mortgaged property shall be sold on an application being made for a final decree. The necessary payment was not made in Court as ordered, but when an application was made for a final decree, it was opposed by the mortgagors on the ground that there had been a compromise out of Court. The learned Subordinate Judge has held that the alleged compromise could not be recognized in view of the terms of the preliminary decree and has therefore dis-

missed the application of the mortgagors for the compromise being recorded as an adjustment of the decree either under O. XXIII, r. 3, Civil Procedure Code, or s. 151, Civil Procedure Code. From this decision, the present appeal has been preferred. The learned Subordinate Judge has relied on *Banarsi Das v. Nathu Mul* (1), *Piara Lal v. Bulatji Mul & Sons* (2), *Rasan Chettiar v. Rangayya Chettiar* (3) and *Adari Sanyasi v. Nookalamma* (4), in support of his decision. It may be pointed out here that *Piara Lal v. Bulatji Mul & Sons* (2) is a Single Bench ruling, but is based on a Division Bench ruling of this Court reported in *Durga Devi v. Nand Lal* (5).

It was conceded before me by the learned Counsel for both the parties that the preliminary decree not being executable, the provisions of O. XXI, r. 2, Civil Procedure Code, do not apply. It was, however, contended on behalf of the defendant-appellant that as the suit is not terminated by the preliminary decree, *cf Kishen Chand v. Sohan Lal* (6) at p. 97, there is no reason why the provisions of O. XXIII, r. 3, Civil Procedure Code, should not apply. As regards the Punjab rulings, it was contended that they are distinguishable as they relate only to payment out of Court, and strong reliance was placed on *Harihar Prasad v. Gopal Saran* (7) and *Inayat Khan v. Harbans Lal* (8) which support the appellant. The contention that the Punjab rulings relate merely to the question of recognition of a payment made out of Court does not appear to be correct. It appears that in *Banarsi Das v. Nathu Mul* (1) it was pleaded that there had been a settlement out of Court by which the "plaintiff-respondents had agreed to take over part of the property in satisfaction of the debt". There is no specific reference to O. XXIII, r. 3, Civil Procedure Code, in the ruling, but it seems clear enough that that was the rule which the Court was considering. In *Durga*

Devi v. Nand Lal (5), *Banarsi Das v. Nathu Mul* (1) was followed. In that case the whole of the decretal amount was apparently alleged to have been paid out of Court. It was, however, remarked that the

"alleged payment could not be recognized as an 'adjustment, compromise or satisfaction' under O. XXIII, r. 3, Civil Procedure Code"

The remarks would seem to cover not only payment out of Court but any adjustment out of Court. In *Piara Lal v. Bulatji Mul & Sons* (2) a private adjustment contrary to the terms of the preliminary decree was alleged, but it was held (following the decision in *Durga Devi v. Nand Lal* (5)) that the adjustment could not be recognized under O. XXIII, r. 3, Civil Procedure Code. It will thus appear that *Banarsi Das v. Nathu Mul* (1) and *Piara Lal v. Bulatji Mul & Sons* (2) at any rate were not mere cases of payment out of Court. But apart from this, I do not see that any material distinction can really be drawn between a payment out of Court and any other adjustment after the preliminary decree for the purpose of the point now under consideration. The payment out of Court would seem to fall under O. XXIII, r. 3, Civil Procedure Code, as part satisfaction of the subject-matter of the suit and would therefore stand on the same footing as any other adjustment. The main contention of the learned Counsel for the appellant was that if the suit remains pending till the final decree, there is no reason why the provisions of O. XXIII, r. 3, should not apply. But a preliminary decree in a suit for sale is a formal adjudication of the rights of the parties with reference to the mortgage and the decree directs that the plaintiff's claim shall be satisfied by a payment in Court in a certain manner. Any adjustment out of Court would therefore be obviously contrary to the terms of the decree. In this aspect of the question, the adjustment out of Court made without its sanction, may, I think, be looked upon as 'unlawful' and therefore inadmissible under O. XXIII, r. 3, Civil Procedure Code.

The terms of a preliminary decree passed according to the provisions of O. XXXIV, r. 4, Civil Procedure Code, as regards payment in Court, etc., are imperative. It may further be pointed out that under the provisions of the corresponding provisions of ss. 88 and 89, Transfer of Property Act, which were in force before the provisions of O. XXXIV were enacted in the Code of 1908, payment out of Court was permitted. But the law in this respect seems to have

(1) 12 P R 1913; 16 Ind. Cas. 987; A I R 1914 Lah. 534; 376 P L R 1914.

(2) A I R 1935 Lah. 182; 158 Ind. Cas. 83.

(3) A I R 1930 Mad. 105; 120 Ind. Cas. 72; 30 L W 551; Ind. Rul. (1929) Mad. 1032; (1939) M W N 887.

(4) A I R 1931 Mad. 592; 131 Ind. Cas. 427; 54 M 708; Ind. Rul. (1931) Mad. 535; 34 L W 536.

(5) A I R 1932 Lah. 231; 136 Ind. Cas. 732; 33 P L R 138; Ind. Rul. (1932) Lah. 268.

(6) 2 L 95 at p 97; 59 Ind. Cas. 710; A I R 1921 Lah. 270; 61 P L R 1921; 48 P W R 1921; 3 Lah. L J 126.

(7) 14 Pat. 488; 155 Ind. Cas. 976; A I R 1935 Pat. 385; 16 P L T 311; 7 R P 659.

(8) A I R 1936 AIL 9; 160 Ind. Cas. 373; 58 A 565; 1936 A L R 113; 8 R A 615.

been deliberately changed. This departure from the previous law also indicates that payment or adjustment out of Court was not intended to be recognized under O. XXXIV, Civil Procedure Code. If, of course, both the parties appear in Court and agree to a certain adjustment and the Court sees no reason otherwise to disallow it as 'unlawful', the position may be different. In such circumstances, the adjustment may be taken to have been made with the express or implied permission of the Court and consequently there will be no objection in principle to the variation of the terms of the decree: cf. *Vishwanath Ayyar v. Chimmu Kutti Amma* (9) at p. 330. In *Lachmi Narayan v. Balmakund* (10) a suit had been dismissed in default after a decree of a preliminary nature had been passed in a partition suit. Their Lordships of the Privy Council held that the suit could not be so dismissed after the preliminary decree and in giving their reasons remarked as follows:

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of a decree acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside."

It will thus appear that although a suit does not terminate till the passing of a final decree, the passing of a preliminary decree does fix the rights of the parties to a certain extent, and thus alter their position materially. In addition to the Punjab rulings, the Madras rulings relied on by the learned Subordinate Judge also seem to support his decision. The learned Counsel for the appellant relied strongly on *Inayat Khan v. Harbans Lal* (8) and *Harihar Prasad v. Gopal Saran* (7) as stated above. But in the former ruling, there is no discussion of any authorities while in *Harihar Prasad v. Gopal Saran* (7) the applicability of O. XXIII, r. 3, Civil Procedure Code, (in case O. XXI, r. 2, was held inapplicable) was apparently conceded by Counsel; see p. 503. It appears further that the preliminary decree in that case was one based on a compromise and not an ordinary one in accordance with the provisions of O. XXXIV, Civil Procedure Code. In my opinion, the Punjab rulings cover

the point raised and support the decision of the learned Subordinate Judge. I am also unable to see any adequate ground for referring the case to a Division Bench, as I have been requested to do. I dismiss the appeal, but in view of the conflict of judicial decisions, leave the parties to bear their costs.

D.

Appeal dismissed.

MADRAS HIGH COURT

Letters Patent Appeal No. 98 of 1936

February 22, 1939

LEACH, C. J. AND SOMAYYA, J.

SRI EMBERUMANAR JEER SWAMIGAL

—APPELLANT

versus

BOARD OF COMMISSIONERS FOR
HINDU RELIGIOUS ENDOWMENTS,

MADRAS AND OTHERS - RESPONDENTS

Certiorari—Writ of—Order of Board established under Madras Hindu Religious Endowments Act, declaring distribution of honours at a temple, nature of—Writ of certiorari cannot be issued in such a case.

A question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. In settling questions relating to the allocation of honours in religious institutions over which it has superintendence, the Board acts in its administrative capacity.

Hence where the Board established under Madras Hindu Religious Endowments Act, determines the order of the distribution of such honours, it cannot be said that it has declared any one's legal right or deprived any one of any legal right which he had and such a decision is merely an order dealing with the internal management of the temple. A writ of certiorari cannot be issued in such a case.

L. P. A. against the order of Pandrang Row, J., reported in 163 Ind. Cas. 256.

Messrs. V. Ramaswami Ayyar and N. G. Krishna Iyengar, for the Appellant.

Mr. P. V. Rajamannar, Mr. B. Sitarama Rao for Mr. A. Srirangachari, Messrs. S. Narayana Iyengar, S. Ramanujam, S. Rajagopalachari and K. E. Rajagopalachari, for the Respondents.

Leach, C. J.—This is an appeal from an order of Pandrang Row, J. refusing to issue a writ of certiorari. The appellant is the head of a *math* known as the Sri Emberumanar Jeer Math, which is situate in the village of Alwarthirunagiri in the Tinnevely District. In the *math* is a shrine and it is said that this shrine is a subsidiary shrine of the Sri Athinatha Alwar Temple

(9) 55 M 320 at p 330; 135 Ind. Cas. 535; A I R 1932 Mad. 115; 62 M L J 272; 34 L W 635; (1932) M W N 1141; Ind. Rul. (1932) Mad. 119.

(10) 4 Pat. 61; 81 Ind. Cas. 747; A I R 1924 P O 198; 51 I A 321; 35 M L T 143; 47 M L J 441; 20 L W 491; (1924) M W N 707; 10 O & A L R 1033; 5 P L T 633; 22 A L J 990; 26 Bom. L R 1139; 40 C L J 439; L R 5 A (P O) 171; 29 C W N 391; 1 O W N 629 (P O).

which also lies within the village limits. The Sri Embarumanar Jeer Math is one of four *maths* which are particularly interested in the temple, the others being the Vanamamalai, Sri Ahobila and Thirukkurangudi Maths, the heads of which are respondents Nos. 7, 8 and 9. There has been great strife with regard to the right to receive *theertham* and other honours in the temple on festival and non-festival days. The quarrel commenced so long ago as 1905 and in that year a suit was filed in the Court of the Subordinate Judge of Tinnevely by certain persons to establish what they claimed to be their right to recite in the temple the sacred texts. The appellant and respondent No. 7 were defendants. The suit was dismissed and appeal filed against this decision met with a similar fate: *vide* the judgment in *Athan Sadagopa Chariar v. Srinivasa Chariar* (1). In the course of that suit, the question was raised whether the present appellant or respondent No. 7, who is the head of the Vanamamalai Math, was entitled to precedence in the distribution of *theertham* on festival days. Sadasiva Iyer, J. who delivered the main judgment on appeal considered that respondent No. 7 was entitled to precedence and said so in his judgment, which was delivered on February 18, 1913.

The question as to the right of precedence continued to be agitated, and in 1927 the Madras Hindu Religious Endowments Board took action. By an order dated May 12, 1927, the Board settled a list setting out who should receive the honours on festival days and who should receive them on non-festival days. By this order the appellant was given the right to receive the honours first on non-festival days. Respondent No. 7 was dissatisfied with the Board's order, and on June 6, 1927 filed a suit on Original Side of this Court (O. S. No. 306 of 1927). The defendants were the Madras Hindu Religious Endowments Board and the trustee of the temple. Respondent No. 7 asked for a declaration that the order of May 12, 1927, was invalid. The suit was dismissed on September 21, 1932, on the ground that it was a suit relating merely to temple honours and involved no question of civil right. Respondent No. 7 appealed against this decision, but his appeal was dismissed on November 7, 1934. In 1930 respondents Nos. 2 to 6, who are said to be the disciples of respondent No. 7, filed a petition asking the Board to set aside its order of May 12, 1927. They claimed that they were entitled

to the ninth place in the order of precedence on all days. On this ground they said that the Board should cancel in its entirety the order complained of and re-open the question. This petition was heard by three members of the Board, who by order dated April 6, 1935, declined to interfere with the order of May 12, 1927. Five days later respondents Nos. 2 to 6 filed another petition asking the Board to review its order of April 6, 1935, one of the grounds advanced being that the petitioners had not been given the ninth place to which they said they were entitled. This application which was an application to review an order refusing to review a previous order, was heard by two of the three members of the Board who passed the order of April 6, 1935. This application succeeded and on May 15, 1935, the order of May 12, 1927, was set aside. The result was that the trustees of the temple were directed to follow the observations by the Court in the appeal arising out of O. S. No. 22 of 1905 in respect of non-festival days, but no change was made so far as festival days were concerned. The appellant then became the dissatisfied party and on May 30, 1935, filed an application asking the Board to review its order of May 15, 1935. This application was heard by one member of the Board who on August 7, 1935, held that the Board had no power to review its own order. The application was accordingly dismissed. This led to an application to this Court by the appellant for a *writ of certiorari* with a view to the order of the Board of May 15, 1935 being quashed. This was the application dealt with by Pandrang Row, J.

We consider that the decision of the learned Judge refusing to issue the *writ* asked was right. It is acknowledged that a question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. By s. 18, Madras Hindu Religious Endowments Act, 1926, the Board is given the power of general superintendence of all religious endowments in the Presidency, excepting those within the City of Madras. The Board may do all things which are reasonable and necessary to ensure that *maths* and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist. It is not disputed that the Board has by virtue of this section power to settle questions relating to the allocation of honours

in religious institutions over which it has superintendence, but in settling such questions the Board acts in its administrative capacity. We are in entire agreement with the learned Judge when he says that it cannot be said that the Board's decision has declared any one's legal right or deprived any one of any legal right which he had and that the order of the Board complained of was merely an order dealing with the internal management of the temple. The issue of the writ of *certiorari* is a matter which lies within the discretion of the Court but in a case like the present one, there is no question of discretion. It would obviously be improper to order the writ to issue. The appeal will be dismissed with costs. (One set).

N-8.

*Appeal dismissed.***PATNA HIGH COURT**Appeal from Appellate Decree No. 891
of 1934

July 25, 1939

FAZL ALI AND DHAYLE, JJ.

LAL TIRATHNATH SAHI DEO

AND OTHERS—PLAINTIFFS—APPELLANTS
versus

LAL MIRTUNJOYA NATH SAHI DEO

AND OTHERS—DEFENDANTS—RESPONDENTS

Decree—Nullity—Same manager representing both plaintiff and defendant whose estates were under protection of Chota Nagpur Encumbered Estates Act (VI of 1876)—Defendant not prejudiced—Decree passed is good one and not nullity—Court should look to substance and not form of action.

The fact that the same manager represents both the plaintiff and the defendant whose estates were under protection of the Chota Nagpur Encumbered Estates Act in a suit brought in 1919 undoubtedly makes the proceedings highly anomalous but this does not make the decree passed in that suit a nullity when the defendant is not in any way prejudiced, as, the anomaly is due to the provisions of the Act as it stood at the time of the suit. In such a case the question which the Court has to ask is whether there was a genuine and *bona fide* contest in the suit. The utmost that can be said is that the procedure adopted in the suit is somewhat irregular, but that by itself would not make the decree passed in the suit a nullity, especially when the Court has complete jurisdiction to try the suit. After all what the Court has to look to is the substance and not the form of the action and once it is clear that notwithstanding the fact that the parties are represented by the same manager, the proceedings in the suit does not represent a mere sham contest and that the suit is properly defended the decree must be held to be a good decree. *Rustomji v. Seth Purshotamdas* (1), distinguished. [p. 80, col. 2]

A. from a decision of the Judicial Commissioner of Chota Nagpur, dated April 28, 1934, reversing a decision of the Sub-

ordinate Judge of Ranchi, dated February 13, 1933.

The Government Pleader and Mr. K. K. Banerjee, for the Appellants.

Mr. N. N. Sen, for the Respondents.

Fazl Ali, J.—This appeal arises out of a suit in which the plaintiffs claimed partition of two annas share in a tenure known as the Badla estate. The suit was decreed by the trial Court but dismissed on appeal by the Judicial Commissioner of Chota Nagpur. Hence this second appeal by the plaintiffs.

It appears that on June 10, 1873, one Lal Gagan Nath Sahi Deo who owned a ten annas share in the estate executed two *mukarrari* deeds, one in respect of four annas share in favour of the plaintiffs' father and another in respect of three annas share in favour of certain other persons. Between the years 1917 and 1919 two suits were brought by the two sets of *mukarraridars* against defendants Nos. 1 and 2 (who alone disputed their title) for a declaration of their respective titles under the two *mukarrari pattas* and for possession and both the suits were ultimately decreed. The plaintiff's suit which was Title Suit No. 35 of 1919 was decreed in respect of only two annas share in the estate and it is not disputed that if the decree in that suit is held to be good and valid, the present suit must succeed. As to the legal effect of the decree, however, the two Courts below have expressed conflicting views. The trial Court has held that the decree was a perfectly valid one and both the parties were bound by it. The lower Appellate Court has on the other hand expressed the view that the decree is a nullity and the plaintiffs have therefore no subsisting title in the property sought to be partitioned. One of the main questions to be determined in this appeal is which of the two views is correct.

It appears that the plaintiffs' estate which is known as the Mesmano estate was placed under a Manager under the provisions of the Encumbered Estates Act in the year 1906. In 1919 the estate of defendants Nos. 1 and 2 also, who are *khorphoshdars* claiming ten annas interest in the Badla estate in spite of the decree passed against them in the suit brought on behalf of the plaintiffs in 1919, (there is no dispute with regard to the remaining six annas which is admittedly owned by

defendants Nos. 4 to 10), was brought under the protection of the Encumbered Estates Act. Thus when Title Suit No. 35 was instituted on behalf of the plaintiffs in 1919, the estate of the plaintiffs as well as the defendants Nos. 1 and 2 was in the hands of the common Manager named Mr. Durham Waite.

Now, s. 21-B of the Chota Nagpur Encumbered Estates Act (VII of 1876) provides firstly that

"every suit or appeal by the holder shall be instituted in his name by the manager"; and secondly that

"no person other than the Manager shall be ordered to sue or to be sued as next friend or guardian, or be named as guardian of the holder for a pending suit."

In view of these provisions Mr. Durham Waite had to represent both the plaintiffs and the contesting defendants as their next friend. The High Court in disposing of the appeal in Title Suit No. 35, noticed this anomaly and observed as follows:—

"If the plaint is accepted to be properly verified, the written statement must be held to be not verified in accordance with law. The written statement is a later document wherein the facts stated in the plaint have been contradicted. Therefore it becomes impossible to act upon the plaint also. The law requires that the pleadings must be verified by a person who either knows personally, or has reliable information as to the truth of the facts stated therein. In this view the pleadings become illegal in this case. But as the legal representatives of the parties do not press this matter and want a decision on the appeal and as the questions involved in the appeal are almost the same as those that arose in No. F. A. 65 of 1919, which we have just disposed of where the defendant was not under the Court of Wards, we do not want to throw out the pleadings. We, however, doubt if the defendants when released from the Court of Wards will not challenge the conduct of the case. This matter should be brought to the notice of the Manager and the authorities concerned."

Referring to these observations, the learned Judicial Commissioner says in his judgment:—

"It seems to me clear, therefore, that in view of these observations of the Hon'ble High Court and of the objections taken by the defendants in this present suit, that the decree of 1919 in the plaintiffs' favour cannot be held to be binding on the defendants. Further discussion of the other issues raised in this suit is, therefore, unnecessary."

Now the learned Judges of the High Court thought that any decree passed in the suit would be a nullity, they would not have upheld the judgment of the trial Court. Indeed they definitely remarked that in the circumstances of the case they did not feel disposed to throw out the pleadings which they said had not been verified in accordance with law. They have undoubtedly said that the defendants

might perhaps challenge the conduct of the case after the estate was restored, but they did not state that they would be able to challenge it successfully or that the decree passed in the suit could be avoided without bringing a suit to set it aside. The learned Advocate for the respondent relies strongly on an observation made in *Rustomji v. Seth Purshotamdas* (1) that

"It was an elementary rule of procedure that the same individual even in different capacities cannot be both a plaintiff and defendant to one and the same action."

But in my opinion those observations do not strictly speaking apply to the present case in which the parties were entirely different. The fact that the same Manager represented both the plaintiff and the defendant undoubtedly made the proceedings highly anomalous, but if we bear in mind the special circumstances of the case, it is difficult to hold that the decree is a nullity. The question which we have to ask, is whether there was a genuine and *bona fide* contest in the suit. I have already referred to the provisions of the Encumbered Estates Act which made it necessary that the parties should be represented by the Manager of the Encumbered Estate. Thus the anomaly which is pointed out on behalf of the appellant was to some extent due to the provisions of the Act as it stood at the time of the suit. The Manager of the Encumbered Estates had to bring the suit within the period of limitation, otherwise the plaintiff's right would have been barred. At the same time he seems to have done everything to ensure that the defendant's case was properly presented to the Court. Neither in the Court below nor before us it was suggested on behalf of the appellant that the manager did not properly defend the suit or that he failed to put forward any pleas which would have defeated the plaintiff's action. That the defendants were not in any way prejudiced in the litigation is borne out by the fact that a suit of a similar nature, which has been brought by the *mukarraridars* of the three annas interest to enforce their *mukarrari* lease was decreed both by the trial Court as well as by the High Court in spite of the fact that that litigation was contested by the defendants themselves on the same grounds as Suit No. 35 of 1919. Thus the utmost that can be said in favour of the appellant is that the procedure adopted in the suit was somewhat irregular, but that by itself

(1) 25 B 608; 3 Bom. L R 237.

would not make the decree passed in the suit a nullity, especially as the Court had complete jurisdiction to try the suit. After all what we have to look to is the substance and not the form of the action, and once it is clear that notwithstanding the fact that the parties were represented by the same Manager, the proceedings in the suit did not represent a mere sham contest and that the suit was properly defended, the decree must be held to be a good decree. It is not denied that the decree was fully given effect to and that the plaintiffs are still in possession under that decree. Thus the plaintiffs having established their title as well as possession are entitled to a decree in the suit and in this view I would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the decree of the trial Court. The appellants will be entitled to their costs in all the Courts.

Dhavlé, J.—I agree. The respondents challenge the decree in the suit of 1919 on the sole ground that the same individual Mr. Durham Waite acted both for the plaintiffs and for the defendants in that suit; but he did so under the express provisions of the Chota Nagpur Encumbered Estates Act as it stood at the time. The Act has since been amended to get over the patent anomaly of the same individual in different capacities appearing to act for the plaintiff and the defendant in one and the same action, but the rule against permitting an individual to do so is a rule of procedure. It is not a rule of jurisdiction. Where it otherwise, a case like *Rustomji v. Seth Purshotamdas* (1) could not have stood for a moment. That was a case where at the appellate stage it had come to pass that the same individual figured amongst the appellants and was also the sole respondent. The Court referred to what it called "the elementary rule of procedure, too often disregarded in this country," and observed that though the Courts of Equity had strictly followed the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. That in the circumstances of 1919 the rule could not possibly be regarded as more than a mere rule of procedure is indicated not merely by the terms of s. 21-B of the Chota

Nagpur Encumbered Estates Act without the proviso that has been subsequently added to it in 1924, but also by the fact that the learned Advocate for the respondents has not been able to urge that the application of the Act to an encumbered estate saves the limitation applicable to ordinary cases. The suit had therefore to be brought within the ordinary period of limitation, and it had to be brought in conformity with s. 21-B. It would have been impossible for any Court to have thrown out such a suit on the ground of jurisdiction or as not competently framed. There is also no question that if the decree in the suit of 1919 stands, the partition suit brought by the respondents must succeed, for we now have a definite finding of fact by the lower Appellate Court on remand that the plaintiff-respondents were at the date of the suit in possession of the two annas share which they had claimed as the subject of the partition, while the decree in the suit of 1919 establishes their title to that share *vis-a-vis* the appellant, the respondent's possession having, as a matter of fact, commenced under but some years after the passing of that decree.

3.

*Appeal allowed.***BOMBAY HIGH COURT**

Second Appeal No. 735 of 1936

February 14, 1939

LOKUR, J.

GANGUBAI PANDURANG DOMBE—**PLAINTIFF—APPELLANT***versus***PAGUBAI NARAYAN KORE AND OTHERS—****DEFENDANTS—RESPONDENTS**

Transfer of Property Act (IV of 1882), s. 52—Family property mortgaged to satisfy ancestral debts—Subsequent suit by widow for maintenance claiming it to be made charge on property—Sale of property to mortgagees during pendency of widow's suit—Widow's suit decreed—Sale, if affected by lis pendens.

The basis of the doctrine of *lis pendens* is that parties to a suit cannot be allowed to shorten the arms of the Court in dealing with the suit by transfers to a third party.

Ordinarily a suit by a Hindu wife for maintenance against her husband is a personal suit, and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendens*. But the doctrine of *lis pendens* does apply to a suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property. Although in the administration of a Hindu's estate, binding debts would take precedence, over mere claims

for maintenance, or residence, on the part of the female members of the family and a mortgage of family property for the satisfaction of ancestral debts binding on the family is not affected by any subsequent charge created on that property for widow's maintenance, yet the sale of the property in favour of the mortgagee during the pendency of the widow's suit for maintenance claiming maintenance to be made a charge on the property is affected by the doctrine of *lis pendens* and is subject to the final decree in the widow's suit. *Seetharamanujacharyulu v. Venkatasubbamma* (1), *Somasundaram Chetty v. Unnamalai Ammal* (2) and *Sudhirendra Deb v. Ramendra Deb* (3), relied on.

S. A. from the decision of the District Judge, Sholapur, in Appeal No. 165 of 1929.

Mr. Y. V. Dixit, for the Appellant.

Messrs. P. V. Kane and M. G. Chitale, for Respondent No. 3.

Judgment.—The facts out of which this second appeal arises are undisputed. The property in dispute belonged to one Narayan Dada Kore who died about the year 1920 or 1921, leaving behind him two sons Tatya and Malkarjun, and his widow Pagubai, the step-mother of Tatya and Malkarjun. He had left some debts, to satisfy which Tatya and Malkarjun mortgaged the property in suit to the plaintiff for Rs. 1,800 on June 1, 1922 (Ex. 84). Thereafter their step-mother Pagubai filed a suit for maintenance on April 11, 1923, in which the plaintiff also was impleaded as defendant No. 3. She claimed that her maintenance should be a charge on the property in suit. She asked for permission to file the suit *in forma pauperis*. The permission was granted on January 26, 1924, and the suit was duly registered. Thereafter Tatya having died, Malkarjun sold the property to the plaintiff for Rs. 2,000 on June 10, 1924 (Ex. 85). That consideration was made up of Rs. 1,800 due under the mortgage deed of 1922 and Rs. 200 paid in cash in the presence of the Sub-Registrar. In her maintenance suit Pagubai obtained a decree on January 30, 1925, and the amount of her maintenance was made a charge on the property in suit. Before the decree was passed, the plaintiff's name was struck off. In execution of the decree in *darkhast* No. 59 of 1935 Pagubai got the property in suit sold by auction and it was purchased by defendant No. 2 on May 10, 1926. Defendant No. 2 sold it to defendant No. 3 on May 12, 1927, and he took possession of the property. The plaintiff instituted this suit for a declaration that her sale deed from Malkarjun was for valuable consideration and taken in good faith, and that the property mentioned in

the sale deed was not liable to be sold in execution of Pagubai's maintenance decree. She also asked for possession of the property from defendants Nos 2 and 3. The trial Court awarded the plaintiff's claim; but the lower Appellate Court held that the plaintiff's sale deed was affected by the doctrine of *lis pendens*, reversed the decree of the trial Court and dismissed the suit with costs throughout.

On these facts, it is now urged on behalf of the plaintiff-appellant that as the consideration of her sale deed was utilized for the satisfaction of the debts of Narayan Dada Kore, the sale deed took priority over the auction sale in execution of Pagubai's maintenance decree. There is no doubt that when the plaintiff purchased the property from Malkarjun in 1924 under Ex. 85, Pagubai's suit for maintenance was pending. Ordinarily a suit by a Hindu wife for maintenance against her husband is a personal suit, and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendens*. But the doctrine of *lis pendens* does apply to a suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property; *Seetharamanujacharyulu v. Venkatasubbamma* (1). It is however urged that as the debts contracted by Narayan Dada Kore took priority over the right of maintenance after his death, the plaintiff's purchase ought to take precedence over the sale in execution of Pagubai's maintenance decree. As observed in *Somasundaram Chetty v. Unnamalai Ammal* (2), it may be stated as a general proposition that in the administration of a Hindu's estate, binding debts would take precedence, over mere claims for maintenance, or residence, on the part of the female members of the family; but there is no clear authority for the proposition that a charge *bona fide* created for maintenance can be defeated by a creditor who has lent money for family purposes. The real question in this case is whether the doctrine of *lis pendens* affects the plaintiff's purchase of the property on which a charge was created by the decree in that suit. The principle of *lis pendens* is based on the

(1) A I R 1930 Mad. 824; 137 Ind. Cas. 809; 54 M 132; 59 M L J 485; (1930) M W N 625; 32 L W 416; Ind. Rul. (1930) Mad. 1019.

(2) 43 M 600; 59 Ind. Cas. 1398; A I R 1920 Mad. 722; 39 M L J 179; 12 L W 163; (1920) M W N 458; 28 M L T 317.

maxim ut lite pendente nihil innovatur, which means that during a litigation nothing new should be introduced. So far as the mortgage of 1922 is concerned, as the property was mortgaged for the satisfaction of ancestral debts binding on the family and the mortgage was effected before Pagubai's suit for maintenance was filed any subsequent charge created on that property for Pagubai's maintenance cannot affect the mortgage. But by selling that property Malkarjun curtailed the right of the Court to create the charge which was prayed for in that suit. As observed by Sir George Rankin, O. J. in *Sudhirendra Deb v. Ranendra Deb* (3), at p. 543 :

"The basis of the doctrine [of *lis pendens*] is that parties to a suit cannot be allowed to shorten the arms of the Court in dealing with the suit [by transfers to a third party]."

That is what Malkarjun did in this case by absolutely transferring the property to the plaintiff when Pagubai's suit for maintenance asking for a charge on the property was pending. The plaintiff had already a mortgage on that property which may be said to have priority over Pagubai's claim for maintenance. If a further alienation had to be created during the pendency of her suit, then the proper remedy for Malkarjun and the plaintiff was to approach the Court for permission to do so. Section 52, Transfer of Property Act, provides that during the pendency of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. Assuming that the debts of Narayan Dada Kore which had to be paid had a priority over Pagubai's claim for maintenance, still when Pagubai filed a suit asking for a charge on the property, the property became the subject-matter of that suit and even a party who has to satisfy a debt having a priority over the claim for maintenance had to alienate the property under the authority of the Court and on such terms as it might impose. If the party fails to obtain the authority of the Court for the purpose, then the alienation will be subject to the final decree in that suit. The decree in Pagu-

bai's suit ultimately charged her maintenance on the property in suit, and for the recovery of that, the property was sold by auction. The plaintiff is therefore bound by that auction sale although his mortgage was prior to the institution of the maintenance suit and may have precedence over the claim in that suit. The present suit is based entirely on the strength of the sale deed. How the rights of the plaintiff under the mortgage deed can be enforced need not be discussed here ; but so far as the alienation during the pendency of the suit is concerned, it must be held to be subject to the result of the maintenance suit and the reliefs prayed for by the plaintiff cannot therefore be granted. The decree of the lower Appellate Court is confirmed, and I dismiss the appeal with costs.

S.

Appeal dismissed.

PATNA HIGH COURT

Miscellaneous Judicial Case No. 23 of 1938
August 24, 1939

FAZI ALI AND MANOHAR LALL, JJ.

THE COMMISSIONER OF INCOME-TAX,
BIHAR AND ORISSA

versus

JUG SAH MUNI LAL SAH—ASSEESSEE.

Income Tax Act (XI of 1922), ss. 13, 31—Income-tax Authorities adopting particular method of assessment—If can subsequently change method—What the law requires Income-tax Officer to see in respect of system of account to be kept by assessee, stated.

It is open to the Income-tax Department while taxing an assessee either to adopt the cash system or to adopt accrual basis; but having adopted the first system or the second, they cannot be allowed to change their ground whenever it suits them to do so. [p. 85, col. 2.]

What the law requires the Income-tax Officer to see is not a system of account to be kept by the assessee in respect of a particular loan which may have been omitted in that account, but the system of accounting which the assessee regularly employs for his own purposes with respect to all the loans which he discloses. If any loans are deliberately left out from the account kept regularly by the assessee, then it is open to the Income-tax Department to disbelieve the accounts and to proceed in any way they choose by acting under the proviso but on exercising a judicial discretion. *Commissioner of Income-tax, Bombay Presidency and Aden v. Sarangpur Cotton Manufacturing Company, Ltd. of Ahmedabad* (3), referred to. [p. 85, col. 1.]

Misc. J. Case by the Commissioner of Income-tax, Bihar and Orissa, forwarded on April 7, 1938.

Mr. S. M. Gupta, for the Income-tax Department.

Sir Sultan Ahmed and Messrs. Vishundeva Narayan and Prem Lall, for the Assessee.

Manohar Lall J.—This is a reference by the Commissioner of Income-tax of Bihar asking for the opinion of this Court on the questions which have been printed at p. 24. These questions are:—

"(i) Whether on a proper construction of s. 13, the sum of Rs. 90,000 being part of the interest in respect of the three loans to Raja Muhammad Yakub of Parsauni included in the amount realised under the decree executed in the accounting year 1340 *Fasli* could legally be assessed in 1934-35.

(ii). Whether the interest of Rs. 90,000 referred to escaped assessment in 1934-35 within the meaning of s. 34 and could be assessed under that section."

The questions as framed are somewhat confused. The real question which arises in the present case is whether the sum of Rs. 90,000 or part thereof can be assessed as being the income of the previous year under the provisions of s. 34 of the Indian Income Tax Act. The facts which have been stated by the Commissioner to determine these two questions are these:—

On September 10, 1915, the Raja of Parsauni executed a mortgage bond for Rs. 87,500 in favour of the assessee. The annual interest payable under the terms of the bond was Rs. 8,750. On August 5, 1919, the assessee took another mortgage from the Raja of Parsauni for a sum of Rs. 10,000. Finally on April 14, 1921, the assessee advanced a sum of Rs. 2,500 on the security of a mortgage executed by the Raja of Parsauni, the rate of interest being the same. The assessee was being assessed on his money-lending transactions from sometime before the year 1921-22, but the records of these years are not available. It is, however, clear that the interests on these three loans, which I have just mentioned, were never included in any of the assessments made prior to 1924-25. In the year 1924, the Income-tax Officer discovered for the first time the existence of the first loan of Rs. 87,500, that is, the loan on the mortgage bond of September 1915. Having come to know of the existence of that loan, he must have known that no interest on this loan had ever been received by the assessee as this is the common case of the parties before us. The Income-tax Officer, however, from the year 1924 onwards proceeded to add to the assessable income of the assessee a sum of Rs. 8,750 every year calculating this amount not on the basis of what the assessee actually received but on the basis of the amount of the interest accruing to the assessee from the year 1924 onwards. The assessment was persisted in this way for a period of eleven years, namely, up to 1935, with the result

that the assessee was actually taxed on a sum of Rs. 96,250 which was the calculation made on the accrued basis for the years 1924-35. In the year 1935 a fresh discovery was made by the Income-tax Officer in this way:—The assessee instituted a suit sometime before 1929 to recover his dues on all the three mortgages of 1915, 1919 and 1921. On April 5, 1929, a preliminary decree was passed in favour of the assessee for a reduced amount of Rs. 3,71,000 consolidating his aggregate dues, i. e., principal and interest on all the three documents. The final decree was passed sometime later for a sum of Rs. 4,00,000 odd. In execution of this decree the property of the mortgagors was put to sale, the sale was confirmed on December 16, 1932, which falls within the previous years of the assessee, that is, 1340 *Fasli*. The assessee thus realised in the shape of property a sum of Rs. 3,06,520. It will be seen that even the amount due on the first bond which we are told had swelled up to Rs. 3,40,000 on the date of the suit was not realised in full. It may be open to argument whether the amount realised should be spread over the three bonds of 1915, 1919 and 1921 in the proportion of the liabilities under those bonds, but that question has not been agitated either before the Income-tax Officers or before us. It is assumed, to answer the questions raised, that the amount realised in 1340 *Fasli* went to pay in part the amount due under the first bond of 1915. The Income-tax Officer had assessed the assessee for the previous year 1340 on the earlier basis adopted by him for 11 years, namely by including in the assessable income a sum of Rs. 8,750 in entire ignorance of the fact that in that year the total amount due on the bond of 1915 had been realised almost in full. This assessment was made on January 30, 1935, in the financial year ending March 31, 1935. Within one year of the end of that year, namely, on June 10, 1936, the Income-tax Officer started proceedings under s. 34 of the Indian Income Tax Act to recover the income which had escaped assessment, namely, the portion of the interest which in the view of the Income-tax Officer had escaped assessment on January 30, 1935. The Income-tax Officer overruled the contention of the assessee and held that he was liable to be taxed upon the total interest which had accrued due on the bond of 1915 and been realised in 1340 *Fasli*, namely, Rs. 1,91,000 after subtracting from it the amount of Rs. 96,250 which had already

suffered taxation during the eleven years. In other words, he assessed the assessee on this escaped income at a figure of Rs. 95,750. The matter was taken up in appeal before the Assistant Commissioner of Income-tax who by his order dated December 21, 1936, reduced the assessable income on this head by a sum of about Rs. 5,000, which we are told was in the nature of additional law expenses which were allowed by the appellate authority, thereby fixing the assessable figure at a sum of Rs. 90,345.

The questions formulated before us invite a decision of the contention raised that the assessee is not liable to be taxed upon this amount at all.

As I stated above, the questions have been framed in a somewhat confused manner. The real question which arises for decision is whether any income has escaped assessment so that the assessee can be caught by the provisions of s. 34 of the Indian Income Tax Act; and if so, how much. It is agreed before us, and indeed it is obvious, that some income by way of interest has escaped assessment. The Income-tax Officer never knew of the existence of the situation that the assessee had realised interest by the sale of the properties on December 16, 1932 and that therefore the assessee was liable to be taxed upon a higher figure than that adopted by him on the old accrued basis namely a sum of Rs. 8,750. In the circumstances whether the view taken by the Lahore High Court in *Madan Mohan Lal v. The Commissioner of Income-tax, Punjab, N.-W.F. and Delhi Provinces* (1) or by the Rangoon High Court in *Messrs. Dey, Brothers v. The Commissioner of Income-tax of Burma* (2) is correct, it is clear to my mind that some income has escaped assessment within the meaning of the language of s. 34.

The question, which really falls to be determined is whether the income which escaped assessment was Rs. 90,345 as taken finally by the Income-tax Officers or a lesser sum and also when did it or a part thereof escape assessment. Sir Sultan Ahmed appearing on behalf of the assessee strongly contends that no income escaped assessment in the year in which it was sought to be assessed by the Income-tax Authorities, but that whatever income escaped, escaped assessment earlier than 1924. Mr. Gupta on behalf of the Income-tax Department on

the other hand contends that as the assessee has not adopted any system whatsoever which may be said to be a system regularly employed in respect of his accounts, it was open to the Income-tax Department to consider the whole amount, which was admittedly received by the assessee, as being assessable on the cash basis because he argues that under s. 13 of the Indian Income Tax Act, it is open to the Income-tax Authorities to adopt any basis which they may choose under the proviso to that section in order to determine the assessable income. In my opinion s. 13 has no application whatsoever to the facts of the present case. The Income-tax Department had agreed that so far as the loan of 1915 is concerned, the assessee will be taxed always on the accrued system. In 1924 when the assessable income was computed by making an addition of Rs. 8,750 on the accrued basis income escaped assessment for the years prior to 1924. It was open to the department in that year either to adopt the cash system by which they could not have been able to tax any portion of the income from 1924 to 1935 or to have adopted, as they did, the accrual basis; but having adopted the first system or the second, they cannot be allowed to change their ground whenever it suits them to do so. It seems to me, therefore, that upon the facts which have been sent up by the Commissioner of Income-tax the conclusion which follows in law is that the assessee is liable to be taxed upon the sum of Rs. 90,345 after deducting from it the amount upon which he ought to have paid the tax for the years anterior to 1924 either in 1924 or within one year of the end of that financial year. The statement of the case has not worked out the figures on the accrual basis for the period from September 1915 to 1924, the year when the Income-tax Department first assessed the assessee for the sum of Rs. 8,750. That figure will be worked out by the Commissioner on receiving a copy of our order and the assessment will be reduced accordingly. The Commissioner will give a refund to the assessee of that overpaid amount so determined together with interest at such rate as he may think fit to allow under the proviso to s. 66 (7).

I wish to say a few words as to the argument of the learned Standing Counsel that no system has been regularly employed by the assessee. The Commissioner of Income-tax in para. 5 says at one place that it is clear that no method of accounting was employed by the assessee in respect

(1) 8 I T O 413.

(2) 9 I T O 313.

of the three loans referred to. At p. 25 he again says that when

"the Income-tax Officer went to make the re-assessment for 1934-35; he found that no method of accounting had been regularly employed by the assessee in respect of the interest on the three loans referred to"

In my opinion the learned Commissioner was entirely in error in approaching the case in the way he did. What the law requires the Income-tax Officer to see is not a system of account to be kept by the assessee in respect of a particular loan which may have been omitted in that account, but the system of accounting which the assessee regularly employs for his own purposes with respect to all the loans which he discloses. If any loans are deliberately left out from the account kept regularly by the assessee, then it is open to the Income-tax Department to disbelieve the accounts and to proceed in any way they choose by acting under the proviso but on exercising a judicial discretion. This matter has been recently dealt with by their Lordships of the Judicial Committee of the Privy Council in *Commissioner of Income-tax, Bombay Presidency and Aden v. Sarangpur Cotton Manufacturing Company Limited of Ahmedabad*.⁽³⁾ which now authoritatively decides how the terms of s. 13 are to be employed by the Income-tax Department.

For these reasons I answer the questions proposed in the following way :—

The first question does not arise for our decision as I have held that s. 13 has no application whatsoever to the facts of the present case.

The second question is answered thus—Such portion only of the interest of Rs. 90,345 can be assessed now as escaped assessment within the meaning of s. 34 as remains after making a deduction for the amount of interest calculated on accrued basis from September 1915 to 1924, as has been pointed out in the course of the observations made by me above.

In the circumstances, there will be no order for costs in this Court.

Fazl Ali, J.—It is common ground that though in the year 1924-25 the assessee did not receive any interest on the mortgage bond for Rs. 87,500, yet the Income-tax Authorities proceeded to tax them as if they had actually received a sum of Rs. 8,750,

that being the yearly interest payable by the mortgagor under the bond. The question is whether the Income-tax Authorities having once elected to adopt this mode of taxation, which was undoubtedly open to them, can now turn round and adopt a totally different mode. In my opinion they cannot do so and the whole matter can be tested in this way. Let us assume that the assessee's suit on the basis of the mortgage bond had not succeeded but failed either on the ground that the mortgage bond had not been duly executed or on the ground that it had not been properly attested, or that a decree had been passed for a smaller sum than that for which it was actually passed. The Income-tax Authorities could not then be made to refund either the whole or any part of the amount which they had realised during the last eleven years. Can they now, in spite of the fact that they have taxed the assessee so far on what they call mercantile basis, turn round and tax him now on the basis of the income actually accrued, especially as the interest which the assessee has now recovered includes interest prior to 1924-25. The Income-tax Authorities have already recovered taxed interest which was payable to the assessee between 1924-25 and the date of the decree. What they are now taxing is the interest which was due to them prior to 1924-25. In my opinion the clear implication of the step taken by them when they taxed for the year 1924-25 is that the so-called escaped income had already escaped prior to 1924-25. As their case is that the assessee had concealed their mortgage bond until they discovered it at the time of assessing them for 1924-25, they might have proceeded under s. 34 at that time and recovered from them whatever they could recover. Section 34 is quite clear and does not enable the department to tax escaped income more than a year after it ought to have been taxed. For these reasons I am of the same opinion as my learned brother and concur in the answer proposed by him to the reference.

B.

Reference answered.

(3) 65 I A 1; 172 Ind. Cas. 1; 1937 O W N 125; 10 R P C 121; AIR 1938 P C 1; 1937 O L R 611; 1937 A L R 978; 4 B R 171; (1938) A L J 48; 42 O W N 194; 47 L W 9; (1939) M W N 152; (1938) 1 M L J 1; 40 Bom. L R 257; 66 O L J 411; I L R (1938) Bom. 339; 32 S L R 225 (P O).

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 36 of 1936

October 3, 1938

DAVIS, J. C. AND TYABJI, J.

Musammât AISHA BIBI w/o SARDAR MUHAMMAD—DEFENDANT—APPELLANT

versus

Musammât BEGUM BIBI w/o HAKIM-UL-DIN AND OTHERS—PLAINTIFFS—RESPONDENTS

Muhammadan Law—Succession—Rule of—Custom, if can oust personal law—Burden of proof—Custom (Punjab)—Muslim agriculturist, if can give up custom and follow Muhammadan Law—Presumption in favour of parties being governed by customary law—Migration—Agriculturist tribe migrating to another colony takes its customary law with it—Manual of customary law—Value of—Jat agriculturist of Gurdaspur District of Punjab migrating to Sind under colonisation scheme, whether governed by Punjab customary law—Widows and daughters, if excluded by sons—Right to maintenance of widow is lost on her re-marriage.

Per Tyabji, J.—In the case of Muhammadans, the rule of succession must be according to their personal law, that is, Muhammadan Law, "the system of law which naturally follows from their religion," except in so far as this personal law is modified or is ousted by a valid and actually prevailing custom. Among Muhammadans the system of law which naturally follows from their religion is Muhammadan Law, and in every case where a custom at variance with Muhammadan Law is alleged to be prevailing, it must be shown that the body of persons claiming to be bound by that custom did definitely claim to be outside the system of law governing their other co-religionists. [p. 92, cols. 1 & 2.]

A Muslim may, except in the cases of a few well-defined prohibitions, affect his entire rights by making declarations, a power given equally to men as well as to women. By the very act of professing the Muslim faith, a person embraces Islam, no matter whether he be a Christian or a Buddhist or of any other religion, and no matter what customs and practices or manner of living he may have been following up to that moment, and immediately becomes subject to Muhammadan Law. This is in no way affected by the fact that where it is proved as a matter of fact that a Muhammadan and his ancestors had for a very long period not adopted the practices enjoined by Islam, but had been governed by ancient and not invalid customs, the customs actually practised and followed would be given effect to. Hence the Muslim agriculturists who desire to give up the customs by which they had been bound in the Punjab and to adopt Muhammadan Law, can do so by an express declaration to that effect. *Sardar Bibi v. Haq Nawaz Khan* (5), dissented from. [p. 94, col. 1; p. 93, col. 1.]

There is not even in the Punjab any presumption in favour of parties to a suit being governed by customary as against personal law. It must be proved. It may be proved easily in the Punjab by the production in evidence of Government records, the *riwaj-i-am*, in which the customs of the agriculturists are recorded. *Abdul Hussain Khan v. Bibi Sona Dero* (1), relied on. [p. 88, col. 1.]

Obiter per Davis, J. C.—In the Punjab when a

family or tribe of agriculturists moves from one canal colony to another canal colony, no question would really arise as to the binding force of their customary law. They bring with them, when they migrate, their customary laws including the customary law of succession prevailing in the district from which they migrated. *Sardar Muhammad v. Satyapal Singh* (2), relied on. [p. 82, cols. 1 & 2.]

The manuals of customary law prepared from official sources are of great authority. *Vishno Ditti v. Rameshri* (6), relied on, *Beg v. Allah Ditta* (8) and *Fazal Hussain v. Tafasal Hussain* (10), referred to [p. 89, col. 1.]

The Jat agriculturists of Gurdaspur District of the Punjab who migrated to Sind nearly forty years ago under a colonization scheme to cultivate land watered by Jamrao Canal have not adopted the system of law practised by the people of Sind but have continued to follow the Punjab customary law. Consequently amongst them widows and daughters are excluded by sons and the right of a widow for maintenance is lost by her re-marriage.

S. A. against the decision of the Second Assistant Judge, Hyderabad, February 29, 1936.

Syed M. Aslam, for the Appellant.

Mr. A. P. Fonseca, for the Respondents.

Davis, J. C.—This is an appeal against the judgment of the Second Assistant Judge at Hyderabad, dated February 29, 1936, who set aside a judgment of the Subordinate Judge of Mirpurkhas dismissing the plaintiffs' suit on the ground that they were women members of a Punjabi agricultural family governed by the customary law of the Punjab in the matter of succession and were thus excluded from inheritance. The plaintiffs are the widows and two daughters of one Hakim-ul-din. Since the death of Hakim-ul-din, the widow, who is plaintiff No. 1 has been twice married, her two daughters, plaintiffs Nos 2 and 3, are aged 21 and 19, respectively. The defendants are the widow and the infant daughter of Sardar Muhammad, the son of this Hakim-ul-din. The Subordinate Judge dismissed the plaintiffs' suit because he was of the opinion that they were governed by the customary law of succession of the Punjab according to which the widow and daughters were excluded in favour of the son and that the widow had no right of maintenance if she re-married as this widow had done. The Assistant Judge in appeal, however, was of the opinion, that it was not proved that the parties were governed by the Punjab customary law or that the Punjab customary law excluded women from succession and he awarded the plaintiffs, respectively, the shares to which they would be entitled under their own personal law as Sunni Muhammadans and decreed partition and possession as they prayed.

Now the questions for our decision are whether the parties are governed by the Punjab customary law and whether this law excludes them from succession. My answer to these questions is in the affirmative. The parties live at present in Sind. There is not even in the Punjab any presumption in favour of parties to a suit being governed by customary as against personal law. It must be proved. It may be proved easily in the Punjab by the production in evidence of Government records, the *riwaj-i-am*, in which the customs of the agriculturists are recorded. In *Abdul Hussein Khan v. Bibi Sona Dero* (1), the Privy Council laid it down that neither s. 26 of the Bombay Regulation, IV of 1827, nor s. 5, Punjab Laws Act, raises any presumption in favour of any custom as against the general or personal law. It is only when custom is established that it is to be the rule of law. It was also laid down in the same case that any special usage modifying the ordinary law of succession should be ancient and invariable and should be so established by clear and unambiguous evidence, and that the best evidence of custom is found in connection with the division of land; and the revenue records are therefore of considerable value.

Now it appears to me clearly proved that the parties to this case are agriculturists governed by the customary law of their community which excludes daughters and the mother in favour of the son. The parties are *Jats* from the Gurdaspur District of the Punjab and they came to Sind under a colonization scheme to cultivate land watered by the Jamrao canal nearly forty years ago. They came as members of the agricultural classes of the Punjab; it is clear, they came as agriculturists bringing their cattle and their implements and their womenfolk to live in Sind the same life as they lived in the Punjab. They passed over what was merely an artificial boundary; they tilled almost the same soil and watered their lands in all probability from the same river and lived the same lives under the authority of their village officers, the *lam-bardars*, as they would have done in the Punjab. Had they moved from one canal colony in the Punjab to another canal colony, no question would really arise as to the binding force of their customary law:

(1) 128 L R 104; 43 Ind. Cas. 306; A I R 1917 P C 181; 45 I A 10; 45 O 450; 16 A L J 17; 4 P L W 27; 34 M L J 48; 22 O W N 353; 23 M L T 117; 27 O L J 240; 1 P L R 1918; 20 Bom. L R 528 (P O).

Sardar Muhammad v. Satyapal Singh (2). It is unreasonable to suggest that they did not bring with them, when they came to Sind, their customary laws including the customary law of succession and that the customary law would not stand the strain of this short migration.

In *Parbati Kumari Debi v. Jagadis Chunder* (3), the Privy Council pointed out that the tenacity of customs regulating succession, even under the strain of migration, is repeatedly recognized by law. That the Punjabis bring with them, when they come to Sind, their customary law has already been recognized by this Court in *Santsingh v. Raribai* (4). That the parties to this suit are governed by customary law and that this law excludes females with rare exceptions in the presence of males is, I think, clearly proved from the evidence on record. The plaintiff herself admits that if she was in the Punjab, the daughters would be excluded by the son. She says (Ex. 30):

"My father is dead. He died about 20 years back. He left some land in the Punjab. He left one square. He left two sons and three daughters. We did not get a share. If we had filed a suit would have got it. In the Punjab the daughter is excluded by the son but not in Sind."

It is clear then that the plaintiff herself admits a customary law in the Punjab that would exclude daughters from succession in the presence of a son but she distinguishes between succession in Sind and succession in the Punjab. She seeks in effect to derogate from the customary law in favour of a special custom but this like a general custom must be proved to be invariable, ancient and well-established. In short, if it is to be proved that an old custom has fallen in desuetude and been replaced by a new custom, the new custom must be proved by evidence of conduct over a long period of years. I am not now considering the question of the special and particular force which may, under the *Shariat*, attach to a formal declaration, for it is not suggested that Sardar Muhammad sought to disavow the customary laws by any such declaration. This particular aspect of the question was not considered by the learned Judges in *Sardar Bibi v. Huq Nawaz Khan* (5), when Tekchand, J. in that case said: "It is not open to a man at

(2) A I R 1935 Lah. 298.

(3) 29 O 433; 29 I A 82; 6 O W N 490; 8 Sar. 205; 4 Bom. L R 365 (P O).

(4) A I R 1921 Sind 17; 76 Ind. Cas. 403; 17 S L R 206.

(5) 15 L 425; 149 Ind. Cas. 575; A I R 1934 Lah. 371; 35 P L R 760; 6 R L 708 (F B).

his pleasure to change the rule of succession to property by a mere declaration."

Now the parties have not produced the *riwaj-i-am* which set out the custom by which they were governed in the Punjab. It would greatly have facilitated the proof of their case if they had done so, but, it is not in the circumstances reasonable to expect them to have done so. They live in country districts and the best legal advice is not available to them. The manuals of customary law prepared from official sources of great authority. In *Vishno Ditti v. Rameshri* (6), Sir John Wallis delivering the judgment of the Board said (p. 299*):

"In these circumstances it has been rightly held in the Lahore Court in the case above-mentioned, *Daya Ram v. Sohel Singh* (7), that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and the Local Government has come to their assistance by establishing a *riwaj-i-am* or record of custom in the different parts of the Punjab, including the North-West Frontier Province which was formerly included in it. It has been held by this Board that the *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under Government rule; that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal; and that the statements therein may be accepted even if unsupported by instances: *Beg v. Allah Ditta* (8) and *Ahmad Khan v. Channi Bibi* (9). Further, manuals of customary law in accordance with *riwaj-i-am* have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the *riwaj-i-am* itself as evidence of custom. In these circumstances their Lordships are of opinion, that, even though there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the customary law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course, to rebuttal, and that it ought not to be held insufficient merely for want of instances."

Reference may also be made to *Beg v. Allah Ditta* (8) and *Fazal Hussain v. Tafazul Hussain* (10). But though we have in this case no *riwaj-i-am*, reference may be made to Rattigan's Digest of Customary

(6) A I R 1928 P O 294; 113 Ind. Cas. 1; 55 I A 407; 10 L 86; 29 P L R 654; 55 M L J 746; 28 L W 908; 49 O L J 38; (1929) M W N 1; Ind. Rul. (1929) P O 4 (P O).

(7) 110 P R 1906; 31 P L R 1907; 59 P W R 1907.

(8) 44 I A 89; 44 O 749; 38 Ind. Cas. 354; A I R 1916 P O 129; 45 P L R 1917; 12 P W R 1917; 21 M L T 310; 32 M L J 615; 19 Bom. L R 388; 15 A L J 525; 21 O W N 842; 26 O L J 175 (P O).

(9) 6 L 502; 91 Ind. Cas. 455; A I R 1925 P O 267; 52 I A 379; L R 6 A P O 190; 3 O W N 93; 30 O W N 506; 50 M L J 637 (P O).

(10) 13 L 410; 136 Ind. Cas. 545; A I R 1932 Lah 222; 33 P L R 105; Ind. Rul. (1932) Lah. 225.

*Page of A. I. R. 1921 P. O.—[Ed.]

Law and to the evidence of persons who can speak with authority as to the customs of their people, and whose evidence appears to be disinterested. (After stating certain evidence the judgment proceeded further.) Upon this evidence, I think the proper conclusion that is to be drawn is that these Punjabi settlers in Sind settled in Sind for less than 40 years maintaining their connection with their homeland, even in some cases their own speech, are governed by their customary laws and these may be taken as set out in Rattigan's Digest of Customary Law referred by the Privy Council with approval in *Beg v. Allah Ditta* (8), at p. 96*, and other cases. In this case paras. 6, 16, 21, 22, 23, 24 and 32 may be considered. Under para. 6, sons are first entitled to the inheritance and exclude daughters. Under para. 16 a widow in the presence of a son is entitled to maintenance; under para. 21 it is not dependent upon her residence with her husband's family, but she loses the right of maintenance on her re-marriage; she also loses her life interest in her husband's estate though not future rights of maintenance: paras. 22 and 32. Under para. 23 daughters are excluded by sons or by near male collaterals of the father but a daughter may exclude male collaterals if she marries a near male collateral descended from the same common ancestor as her father, and this explains the evidence of Begum Bibi, Ex. 30, the plaintiff herself, when she says that she can only give three cases of daughters taking a share in their father's estates in the presence of a son, for, in the first case, that of Sardar Bibi there was no such son; in the second case, Emna Bibi was married to a cousin, and about the third case, Daroo's daughter, no details are known.

We think, therefore, that we have here not a case, as the learned Appellate Judge says, where it must be shown that there was no single instance when women did lose the inheritance but a case where on the admission of the plaintiff herself and on the evidence of those in authority able to speak, the parties to this case in the Punjab would be governed by the customary law, whereby sons exclude daughters and the mother. The inference is irresistible that, this law of inheritance was brought from the Punjab to Sind by the colonists and that, if the plaintiff is to succeed, she must show by reason of the fact that the burden is

*Page of 44 I. A.—[Ed.]

shifted by the evidence of the defendants and indeed by her own evidence that her family is not governed by the customary law of the Punjab but by a special custom or that the existing law has fallen into desuetude in his family in Sind. This, I think, it is clear, she fails to do. The land records relating to this very land are against her, for, when reference was made to these in this Court, it was found that the land was in the name of Sardar Muhammad, Hakim-ul-din's son. This record is important. Sardar Muhammad died some 10 or 12 years after Hakim-ul-din, his father, but the plaintiff made no claim to the land in his son's lifetime.

Looking then at the evidence of the plaintiff in this light, it is impossible to say that she can show that the customary law of the Punjab in the matter of succession had been changed to the Sunni Muhammadan Law in the case of her own family. (After stating certain evidence the judgment proceeded further). It appears to me that it is clearly proved by the evidence that the parties being Punjabi agriculturists are governed by the customary law of the Punjab to an extent, at least, that is sufficient for the decision of this suit and must lead to its dismissal, that is to say, it is proved that Sardar Muhammad excludes from inheritance in his father's agricultural land both his sisters and that his mother forfeited her right of maintenance by her re-marriage. The plaintiffs claim through Hakim-ul-din as widow and daughters but if they had based their case on their relationship to Sardar Muhammad, the last male holder, that of mother and sisters, their case is no better: plaintiffs Nos. 2 and 3 are excluded as sisters; they will be excluded by the rule in para. 24 of Rattigan's Digest, by the widow's life interest (para. 11 *ibid*), and by the daughter (para. 23 *ibid*). Under para. 22 plaintiff No. 1 could not succeed to a life interest because she has re-married and Sardar Muhammad has left a widow. But we should limit our finding only to her case in the plaint, and that is the case of the widow and unmarried daughters seeking to succeed to the lands of the husband, and father Hakim-ul-din according to Sunni Muhammadan Law, and I think that in the presence of the son, Sardar Muhammad, the widow and daughters should be excluded by the ancient and invariable custom of the Punjab whereby the parties to the suit are governed and

that the widow is entitled to a life-estate to their exclusion.

I should perhaps remark that the Advocate for defendant No. 2 stated that after full consideration he has associated himself with the arguments of the Advocate for defendant No. 1 and supported his contentions, for, it is in the interests of the infant daughter that he should do so. As to what will happen on Aisha Bibi's death or remarriage, I am not now concerned to enquire or decide. The judgment of the trial Court should, in my opinion, be restored, and the appeal allowed with costs throughout accordingly. Order accordingly.

Tyabji, J.—This is an appeal against the judgment and decree passed by the Second Assistant Judge of Hyderabad, reversing the judgment and decree passed by the Sub-Judge of Mirpurkhas who had dismissed the suit filed by the plaintiffs, and decreeing in appeal the plaintiff's suit for partition of certain agricultural lands, in Deh No. 269, Taluka Jamesabad, on the basis that the plaintiffs under Muhammadan Law were entitled to the shares claimed by them in the lands.

The parties are Punjabi agriculturists, being members of a colony of *Jats*, who came from Gurdaspur District to Sind about 40 years ago. They claim through one Hakim-ul-din who died about 1918. He left him surviving his widow plaintiff No. 1, *Musammam* Begum Bibi and his daughters, plaintiffs Nos. 2 and 3, *Musammam* Hakima Bibi and *Musammam* Talia Bibi, and a son Sardar Muhammad. On the death of Hakim-ul-din, mutation of the lands was effected in favour of the only son Sardar Muhammad, who remained in possession until his death in 1934. Sardar Muhammad left him surviving a widow *Musammam* Aisha Bibi, defendant No. 1, and a minor daughter *Musammam* Ahmed Bibi, defendant No. 2. Shortly after the death of Sardar Muhammad, the plaintiffs filed this suit for partition and separate possession of their shares in the land. The plaintiffs claimed that on the death of Hakim-ul-din, they became entitled under Muhammadan Law, to their respective shares as the widow and daughters of Hakim-ul-din, along with the son Sardar Muhammad, and that on Sardar Muhammad's death plaintiff No. 1 again further became entitled to a mother's share out of the property left by Sardar Muhammad. In this way the plaintiffs together will be entitled to very nearly

two-thirds of the property, and the defendants to about a third.

As against this it is contended on behalf of the defendants that the parties are governed in matters of succession, not by the Muhammadan Law, but by the customary law; it is claimed that under the general custom which prevails among Punjabi agriculturists, and is also followed by the *Jats* of Gurdaspur District, the entire land on the death of Hakim-ul-din passed by succession to his only male child Sardar Muhammad to the exclusion of the daughters (plaintiffs Nos. 2 and 3) and the widow (plaintiff No. 1), that in any case plaintiff No. 1 who had admittedly re-married after the death of Hakim-ul-din, forfeited on that account any claim she might otherwise have in the property, and that on the death of Sardar Muhammad, his widow, defendant No. 1, became entitled to a life estate in the entire land to the exclusion of the mother (plaintiff No. 1) and the sisters (plaintiffs Nos. 2 and 3) of Sardar Muhammad. It has been admitted before us, although it was not so admitted at the trial, that the law applicable to the parties as *Jats* of the Gurdaspur District before they came to Sind was this customary law and not Muhammadan Law. The defendants claim that all these Punjabi agriculturists have brought their customary law with them and that they continue to be governed by that law, whereas the plaintiffs claim that on leaving the Punjab and settling down upon the soil of Sind, they left their customs behind, that they do not continue to be still bound by those customs, which have not in fact been followed in practice, and that the law applicable to them is their personal law, namely, Muhammadan Law.

The main issue in the case therefore was whether or not the parties were governed by customary law. A large number of witnesses were examined by both parties, and the Sub-Judge came to the conclusion that it had been established that the parties were governed by their customary law, and that by reason of the customs applicable, the plaintiffs were wholly excluded from any share in the property. He therefore dismissed their suit. He believed the oral evidence in the case regarding the prevalence of the custom among the Punjabi *Jats* of Gurdaspur, to which community the parties belonged, both in the Punjab as well as in Sind and he also relied upon judicial decisions of the Punjab Courts and such authorities as Rattigan's Digest of Customary Law for arriving at his conclu-

sions. The lower Appellate Court came to a contrary conclusion. It did not regard either the decisions cited or the authority of a work like Rattigan's Digest as sufficient to prove the existence of the customs alleged in the suit even in the Punjab, and on the view which he took of the oral evidence on the records, he concluded that no such customs as alleged had been proved to prevail either in the Punjab or among those Punjabi colonists in Sind.

In dealing with this question in this manner the learned Assistant Judge has clearly been in error and this error has entirely vitiated his conclusions. There cannot to-day be any question regarding the fact that so far as the agricultural communities of the Punjab are concerned, 'custom is the first rule of decision in all questions regarding succession, special property of females....&c.' (cf. Rattigan). Apart from the very large number of judicial decisions of the Punjab Courts on the point, and the ruling of this Court in *Santsingh v. Raribai* (4), it is only necessary to refer to such cases as *Beg v. Allah Ditta* (8) and *Vishno Ditti v. Rameshri* (6), to show that it is impossible to disregard the prevalence of custom among Punjabi agriculturists. It is therefore not at all necessary to insist upon a great deal of fresh evidence to prove the existence of each of such customs in detail, as if they were being alleged for the first time. Besides this, there is abundant evidence including that of the plaintiff herself to prove that the parties and their relations in the Punjab were governed by custom in the Punjab. Once this has been established, it becomes very much easier for the defendants to prove that they did not give up but retained their particular customs, and continued to follow them and to regard them as being of binding force even after they settled down in Sind.

Starting therefore with the established fact that the *Jat* agriculturists of Gurdaspur were governed by customary law before they left the Punjab, there is a very strong presumption that they carried their customs with them when they crossed the boundaries of the Punjab and settled in Sind, especially when they did so, not as stray individuals, but, as was admittedly the case here, in groups and colonies of considerable numbers, and though they belonged to different tribes and came from different parts of the Punjab, a large body of their customs was common to them all as Punjabi agriculturists. This presump-

tion is discussed in the Privy Council case in *Parbati Kumari Debi v. Jagadis Chunder* (3). In *Sanisingh v. Raribai* (4) it was held that the Sikh *Jats* on migration to Sind carried with them their personal law as to customs prevailing in the Punjab, and it has been held in numerous cases in the Punjab that when a family or a tribe of agriculturists migrates from one canal colony to another it continues to be governed by the provisions of customary law prevailing in the district from which it migrated: cf. *Sardar Muhammad v. Satyapal Singh* (2) at p. 300* and *Zenab Bibi v. Nasir Ullah Khan* (11) at p. 374.

It is true that apart from and in addition to the fact that these *Jats* from Gurdaspur were governed by custom while in the Punjab, and in addition to the presumption that they retained their customs as agriculturists when after migration they continued their occupation as agriculturists when they settled in Sind, sufficient evidence was necessary to establish the fact that at the time of the deaths of Hakim-ul-din and Sardar Muhammad, the customs alleged were prevailing in the community to which they belonged, and that they regarded themselves as bound by these customs, before the defendants could succeed on this issue. In the case of Muhammadans the rule of succession must be according to their personal law, that is Muhammadan Law, "the system of law which naturally follows from their religion," to use the words of Lord Haldane in *Abdurrahim v. Halimabai* (12) except in so far as this personal law is modified or is ousted by a valid and actually prevailing custom. As stated in *Abdur Rahim's Muhammadan Jurisprudence* (p. 137), a custom "has authority only so long as it prevails." What it is necessary to prove in cases where Muhammadans admittedly governed by a custom in one locality move to another locality, when the question arises whether the custom still continues to have binding authority over them, has been dealt with by the Privy Council in *Abdurrahim v. Halimabai* (12). In this case, the Board had to consider the question of succession on the death of a Memon from Cutch who with his family had settled in Mombasa for a long time. There were at least a hundred

Memon families in Mombasa, and the Memons in Cutch, the country of their origin, as is well-known, had never, in their history, been governed by the Muhammadan Law of Succession and followed in practice the Hindu Law. Hamilton, C. J., the trial Judge had taken the view that under the circumstances the burden lay on the plaintiff Halimabai who claimed a share under Muhammadan Law to prove that the custom governing Cutchi Memons in Cutch had been superseded by another long-standing custom in favour of Muhammadan Law. Reliance had been placed upon certain cases dealing with the presumption in similar cases of Hindus. Lord Haldane delivering judgment pointed out the difference between the cases of Hindus and Muhammadans. He said:

"Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments."

And "the question is simply one of the proper inference to be drawn from the circumstances," and

"there seems to be no sufficient reason in what has been brought before the Courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Muhammadans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion and so prevails among the Muhammadans at Mombasa."

It is true that the presumption in favour of the continued prevalence of a custom peculiar to agriculturists may be said to be much stronger in the case of agriculturists migrating from one province to another, than a similar presumption in the case of non-agriculturist Memons leaving India and settling in Africa, but one must remember the difference that exists between the cases of Hindus and Muhammadans, and the fact that among Muhammadans the system of law which naturally follows from their religion is Muhammadan Law, and that in every case where a custom at variance with Muhammadan Law is alleged to be prevailing, it must be shown that the body of persons claiming

(11) A I R 1935 Lah. 370 at p. 374.

(12) 43 I A 35; 32 Ind. Cas. 413; A I R 1915 P O 86; 30 M L J 227; 20 O W N 362; (1916) 1 M W N 178; 18 Bom. L R 635 (P O).

*Page of A I R 1935 Lah. [Ed].

to be bound by that custom did definitely claim to be outside the system of law governing their other co-religionists. The learned Counsel for the appellants cited to us the case in *Sardar Bibi v. Haq Nawaz Khan* (5) a Full Bench decision of the Lahore High Court, and argued that even if Hakim-ul-din or Sardar Muhammad or their family had desired to give up the customs by which they had been bound in the Punjab, and to adopt Muhammadan Law, they could not have done so, even by an express declaration, and that unless and until it could be proved that the customs by which they had been bound had lost their legal force by reason of having been abandoned and having fallen into desuetude for a long period, their existence and validity could not be challenged.

Now in the present case before us there is no allegation of any attempt by declaration or otherwise having been made by any one of these Punjabi agriculturists we are concerned with to free himself from the customs and adopt Muhammadan Law, nor is there any such evidence on the record from which we could conclude that the customs had even for a short time been abandoned, and the question of the application of this decision does not therefore really arise. The decision, however, does appear to me to be extremely difficult to reconcile, with some of the most fundamental principles of Muhammadan Law, which do not appear to have been at all considered by the learned Judges who decided the case. They appear to have applied certain principles to the case of Muhammadans, which may be applicable to Hindus under somewhat similar circumstances, but which, as pointed out by Lord Haldane in the case above referred to, would not be applicable to Muhammadans at all. They appear to have entirely ignored the fundamental fact that by the very act of professing the Muslim faith, a person embraces Islam, no matter whether he be a Christian or a Buddhist or of any other religion, and no matter what customs and practices or manner of living he may have been following up to that moment, and immediately becomes subject to Muhammadan Law. This is in no way affected by the fact that where it is proved as a matter of fact that a Muhammadan and his ancestors had for a very long period not adopted the practices enjoined by Islam, but had been governed by ancient and not invalid customs, the customs actually

practised and followed would be given effect to. The result of accepting this Lahore decision as correct would be that while, e. g. a Burmese [(cf. the case in *Abdul Razak v. Aga Muhammad Jaffar Bindeneed* (13)] on embracing the Muhammadan faith becomes subject to Muhammadan Law, the agriculturist Muhammadans of the Punjab are to be regarded as having been deprived, by their past subjection of custom, of the power to avail themselves whenever they so choose, of their true personal law, of that system of law which they may think to be the most perfect and which not only followed from their religion, but may be regarded as enjoined upon them by their very faith.

It also appears that *Abdurrahim v. Halimabai* (12) was not referred to at all, and that the learned Counsel who argued the case had conceded, it does not appear on what grounds, that it was not open to an individual whose family or tribe had for generations followed custom, suddenly to give up that custom and adopt Muhammadan Law by merely making a declaration to that effect. The declarations actually made by the parties in that case were inquired into by the learned Judges and found to lack that mature deliberation and genuine determination which if present would have induced the learned Judges to accept them. It was from a very different point of view that their Lordships of the Privy Council considered a question of conversion in *Abdul Razak v. Aga Muhammad Jaffar Bindeneed* (13) in which they deprecated an inquiry into the state of mind of the alleged convert, and held that no Court could test or gauge the sincerity of religious belief, and that if the alien in belief embraced the Muhammadan faith, profession, with or without conversion, was necessary and sufficient, and Mr. Ameer Ali in his *Muhammadan Law*, Vol. 2, p. 36, states:

"The Muhammadan Law applies to all Mussalmans whether they are so by birth or by conversion... Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Muhammad, is a Moslem and is subject to the Mussalman Law. So long as the individual pronounces the Kalma of Tauhid, the credo of Islam, it is not necessary for him or her to observe any of the rites and ceremonies, or to believe in particular doctrines which imply Iman or belief. This distinction has often been lost sight of by the British Indian Courts which have, in dealing with Muhammadan cases, assumed the position and function of Courts of conscience."

Every branch of Muhammadan Law testi-

(13) 21 I A 56; 21 O 666; 6 Sar. 389; 4 M L J 131 (P O).

fies to the fact that a Muslim may, except in the cases of a few well-defined prohibitions, affect his entire rights by making declarations, a power given equally to men as well as to women. This is an outstanding feature of Muslim jurisprudence. Any decision which would take away this power from these agriculturists professing the Muslim faith, and hold them bound even against their desire by customs which, whatever their value from other points of view, relegate women to an inferior position in law, strikes, in my opinion, at the very roots of Muslim jurisprudence. It was this inferior legal status of women against which the Prophet laboured and which the Quoran abolished. I am unable therefore as at present advised to accept this decision on this point as correct or to rely upon it for the purposes of this case.

Bearing in mind therefore the presumption referred to above, and following the course which is indicated by the case in *Abdurrahim v. Halimabai* (12), we have to examine the evidence in the case to find whether these Punjabi agriculturists after migrating from the Punjab and settling down in Sind had cut themselves off from their old environments and practices and settled down as a number of individual Muhammadans among a people of their own religion and adopted the law enjoined by their religion, or whether they as a body claimed to be and continued to remain outside the system of that law practised by the people of Sind amongst whom they settled. The evidence in the case has abundantly and unmistakably proved the latter to be the case. (After examining evidence the judgment proceeded further). That these colonists did not merge themselves among the local people among whom they settled is already sufficiently indicated by this evidence, and there is a great quantity of such evidence which we are satisfied is in the main true. A great deal of the evidence naturally deals with instances which go to show that customary law and not Muhammadan Law was followed. A sufficient number of such instances have been proved to show unmistakably the prevalence of the alleged customs. As stated before, there is not a single clearly established instance to the contrary effect. The learned Assistant Judge cited two instances which he thought proved that the custom had not been followed but a reference to the evidence shows that he either did not correctly follow what the rule of custom was, or overlooked the evidence

on the point. He said:

"It must also be shown that there were no instances in which woman did not take the inheritance. In the present case we have got the admission of the defendant's witnesses that K. B. Illahibuksh's daughters got the share and also Hamidali's sisters were shown in the mutation register as the sharers of the property."

Now, K. B. Illahibuksh did not leave any son and his daughters were married to his own nephews and under such circumstances even according to the customary law the daughters would be given their shares. Similarly, Hamidali's sisters got their shares because they were married in the family. In view of what has been stated above, I agree with the learned Judicial Commissioner that it has been clearly proved that the parties are governed by their customary law, that the respondents were excluded from any share in the lands left by Hakim-ul-din and Sardar Muhammad, that the decree of the Court of the Subordinate Judge must be restored and this appeal allowed with costs throughout.

D.

Appeal allowed.

CALCUTTA HIGH COURT

Appeal No. 1689 of 1936

December 1, 1938

R. O. MITTER and KHUNDKAR, JJ.

FAROK AHMED MEAH AND OTHERS—

APPELLANTS

versus

LALIT MOHAN CHOUDHURY AND OTHERS
—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Scope—Respondent wishing to maintain decree of lower Court—Whether can challenge finding, result of which would be to destroy part decree passed by lower Court in favour of appellant, without preferring appeal or filing cross-objection.—Deed—Construction—Document to be construed as whole.

Rule 33 of O. XLI, Civil Procedure Code, gives to the Appellate Court power to pass any decree and make any order which ought to have been passed or made, etc. This rule contemplates modification of the decree by the Appellate Court at the instance of the appellant. It has no scope where the respondents in effect want to maintain the decree of the lower Court or where the decree under appeal is not modified in appeal. Where the respondent says that he wants to maintain the decree of the lower Court and does not want it to be disturbed, he cannot challenge a finding, the result of which would be to destroy the foundation on which the part decree made by the lower Court in favour of the appellant rests, without preferring any appeal or filing a memorandum of cross-objection. *Gangadhar Muradi v. Banabashi Padihari* (1), relied on.

The document, according to the well-known principles of construction must be construed as a whole and it is not legitimate to pick out one or two paragraphs and rely upon them only and to discard the

rest of the document. The intention of the parties must be gathered from the whole of the document. [p. 98, col. 1.]

A. from the appellate decree of the Additional District Judge, Chittagong, dated February 10, 1936.

Messrs. *Chandra Sekhar Sen* and *Sudhir Kumar Acharya*, for the Appellants.

Messrs. *Narendra Kumar Das* and *Durgesh Prosad Das*, for the Respondents.

Mr. *Harideb Chatterjee* for Mr. *Ramendra Mohan Majumdar*, for the Deputy Registrar.

Judgment.—This appeal is on behalf of the plaintiffs and arises out of a suit which has been pending since the year 1922. The plaintiffs are the owners of a *taraf* known as *taraf Azim Mukim* and the defendants are the owners of another *taraf* named *taraf Mahamed Rafi Khansama*. Both these *tarafs* have lands in *mouza Fatika* in which there is a *hat* known as the *Hazari Hat*. The lands of the two *tarafs* are inter-mixed at this place so that the *Hazari Hat* is held on portions of land which appertain to *taraf Azim Mukim* and on portions which appertain to the other *taraf Mahamed Rafi Khansama*. There were disputes between the owners of the aforesaid two *tarafs* which were settled by an agreement executed on *Poush 12, 1236 M. E.* corresponding to a date in the year 1874. This is a very important document in the case and has been marked as *Ex. 3*. Even after this agreement, the terms of which we will hereafter examine in detail, disputes between the parties with regard to the realizations from the *hat* did not end, for in 1890, the parties fell out and again in 1894. It is not necessary for us in this appeal to consider the nature of the disputes between the parties in 1890 and 1894.

The parties again fell out in the year 1917 and in that year proceedings under s. 145, Criminal Procedure Code, were started and on April 18, 1917, 41 plots out of 42 plots which constituted the *hat* were attached by the Magistrate under the provisions of s. 146, Criminal Procedure Code, and the said attachment is still in force. The profits of the *hat* derived from the plots so attached, are being realized by the Collector and they are in deposit with him. On January 9, 1922, the plaintiffs filed the suit. In the suit as originally filed the subject-matter was only 40 plots. The plaintiffs prayed for a declaration of their

title to some of these 40 plots which they described in *Sch. (1)* to their plaint, as appertaining to their *taraf Azim Mukim*. They also prayed for a declaration that these plots should be released from attachment made by the Collector. They further prayed for an injunction to restrain the defendants from interfering with their possession in respect of these plots. The third prayer in the plaint is a prayer which is material for us in this appeal. Therein the plaintiffs prayed for a declaration that they were entitled to half of the moneys which were then lying with the Collector and which would in future be realized by the Collector from the *hat* till the attachment was withdrawn. In this plaint the plaintiffs did not include another plot which was attached by the Collector, that is plot No. 2 of the *Chitta* of the *Maghi Survey*. They did not include also another plot which had not been attached by the Collector but which was included in the *hat*, namely plot No. 1 of the said *Chitta* and of which plot the plaintiffs were in possession. The defendants had not at any time challenged the plaintiffs' title to *taraf Azim Mukim* and they have never disputed that the plots claimed by the plaintiffs as appertaining to the said *taraf* did not really belong to them. The dispute between the parties was with regard to the plaintiffs' claim to the money which was actually lying with the Collector, or which would come to his hands during the time the attachment would be there.

The Court of first instance granted the plaintiffs a decree for eight annas share of the same, overruling the defence that that claim could not be maintained unless and until the plaintiffs include in their suit all the plots of the *hat*, namely plot No. 1 of the *Maghi Survey Chitta* of which they were in possession and also plot No. 2 of the said *Chitta* which had in fact been attached by the Collector but which had not been included in the original plaint. On appeal, the lower Appellate Court took the view that by reason of the aforesaid defects raised in the defence of the contesting defendants, the suit was not maintainable. Against the decree so passed by the lower Appellate Court, the plaintiffs preferred an appeal to this Court, being appeal from Appellate Decree No. 565 of 1926. A Division Bench of this Court allowed the appeal being of opinion that the suit ought not to have been dismissed on the aforesaid defects but that the plaintiffs should be allowed an oppor-

tunity to amend the plaint by including in their suit the said two plots so left out by them. The case was accordingly remanded to the Court of first instance in order that the plaintiffs might amend their plaint. On an amendment of the plaint being made, this Court directed a *de novo* trial. After the records arrived in the Court of first instance, the plaintiffs amended their plaint by including therein both these plots, namely plots Nos. 1 and 2 of the Maghi Survey Chitta. In the amended plaint they also stated that they were entitled to a moiety share of the moneys lying with the Collector or which may thereafter come into the hands of the Collector, on the basis of the aforesaid agreement, Ex. 3.

The defendants raised the following defences which are not relevant: (1) that the agreement, Ex. 3 is not a binding agreement inasmuch as some of the then owners of *taraf* Mahamed Rafi Khansama had not joined. The persons who did not join, according to the defence, were Maniram, Rajballav and Fakir whose names appear in the genealogical tree printed at p. 20 of the paper-book; (2) that if the plaintiffs were to proceed upon the agreement, Ex. 3 they cannot get any relief unless they bring into account the profits which they have received and are receiving since the date of the Collector's attachment from plot No. 1 of the Maghi Survey Chitta; (3) that inasmuch as $2\frac{1}{2}$ kanis of land appertaining to the plaintiffs' *taraf* Azim Mukim had been acquired by the Government out of plot No. 1 of the Maghi Survey Chitta before 1917, a portion which is a part of the *hat*, the plaintiffs are not entitled to rely upon the terms of Ex. 3 and claim on the basis thereof a half share of the aforesaid moneys.

The last-mentioned defence, however, had taken different shapes at different times. We have stated above the nature of the defence as it appears in the written statement, but when the matter was argued before the trial Court after remand, the defendants seem to have taken the position that they were entitled to claim a half share of the compensation money awarded by the Collector for the acquisition of the said $2\frac{1}{2}$ kanis and that was the position which they originally intended to maintain before the lower Appellate Court in which they were the appellants. But at the time of the argument of the appeal before the lower Appellate Court, the defendants gave up their claim to a share of the compensation money and took up the position that by

the reason of the said compulsory acquisition, the plaintiffs were not entitled to claim a moiety share in the moneys claimed by them but to a lesser share to be determined in proportion to the areas of the respective *tarafs* which were still left in the *hat* after the compulsory acquisition. The lower Appellate Court has given effect to that contention of the defendants, and in this appeal, we are mainly concerned with the point as to whether the lower Appellate Court was right in doing what it has done.

Apart from the question which has been raised by the respondents' learned Advocate with regard to the validity of the agreement, no other question of a substantial nature has been raised before us. The appellants, however, pointed out to us that the ordering portion of the learned Judge's judgment is defective and those defects ought to be removed. The learned Advocate for the respondents concurs in the prayer made to us by the learned Advocate for the appellants in this respect. In any event, therefore, whether the appeal succeeds or not, the ordering portion of the judgment will have to be made more definite.

The learned District Judge held that the plaintiffs must account for the profits in respect of plot No. 1 of the Maghi Survey Chitta; but he has not given clear directions in his judgment as to the period for which the accounting is to be made. Both the learned Advocates are agreed that the account must be from the date of the attachment, namely April 18, 1917, till the other 41 plots of land are released by the Collector. With regard to plot No. 2 of Sch. (II) he has not directed any separate accounting; and at one stage of the appeal before us it was contended by Mr. Sen appearing on behalf of the appellants that that plot being in the possession of the defendants, should also enter into accounts. But on an examination of the record we find that that is one of the plots which had been attached by the Collector and therefore the rents and profits realized in respect of that plot are included in the sum of money which is in the hands of the Collector and the sum of money which the Collector will realize till the attachment is levied. We do not consider that there is any defect either in the judgment or in the ordering portion of the judgment in this respect. One point must be made clear, however, that in taking the accounts in respect of plot No. 1 of the Maghi

Survey. Chitta, the liability to render accounts is on the plaintiffs, because admittedly the plaintiffs are in possession of that plot which has not been attached by the Collector; and in taking these accounts the question as to whether the plaintiffs have at their own cost improved the lands, will have also to be taken into consideration; if any improvements have been made at their costs by reason of which the profits therefrom have been enhanced, the plaintiffs will be entitled to get credit for the amount so spent by them in its improvements.

The learned District Judge has, however, held that inasmuch as $2\frac{1}{2}$ kanis out of the plaintiffs' *taraf* Azim Mukim has been withdrawn from the *hat* by reason of the land acquisition proceedings, the plaintiffs would be entitled to have a declaration that they are entitled not to a half share but to $2\frac{1}{2}$ ths share of the profits of the *hat*. This share has been determined on the basis of the areas of the respective *tarafs* which are still in the *hat* after the acquisition of $2\frac{1}{2}$ kanis of land as aforesaid. Against this decree, the plaintiffs have preferred this appeal; but there is no appeal or memorandum of cross-objection preferred by the defendants-respondents. The foundation on which the judgment of the learned District Judge rests is the agreement of the year 1874, namely Ex. 3. He recorded a finding in the following manner: that, that agreement was not executed by some of the owners of *taraf* Mahamed Rafi Khansama, namely Raj Chandra, defendant No. 1, Maniram, Rajballav and Fakir. With regard to defendant No. 1, Raj Chandra, he recorded a finding that he had accepted the agreement later on. After recording the aforesaid finding he remarked that the evidence was not very satisfactory on the point as to whether the defendants-appellants' predecessors-in-interest who had not executed the agreement had accepted it later on, but the onus was on the said defendants-appellants to prove that they had not subsequently accepted the agreement and that onus has not been satisfactorily discharged. Then he stated that the admission of defendant No. 1 that he was bound by the agreement, though he is not a signatory was a relevant fact and that it would not be an unreasonable inference from that fact to say that all the owners of *taraf* Rafi Khansama including those who are not signatories to it had accepted the same.

Mr. Das who appears for the respondents challenges this finding. He says that the onus has been misplaced and the finding therefore is a finding which is open for revision in second appeal. If it had been open to Mr. Das to argue this point, it would have carried great force; but there is a legal bar in his way. As we have stated before, he has not filed any appeal or memorandum of cross-objection against the decree. As a respondent he can support the decree as made without filing any cross-objection by challenging even the findings or some of the findings recorded against him by the lower Appellate Court. But in our judgment he cannot urge a point which, if accepted, would totally or in part destroy the decree made in favour of the appellants. If this finding is reversed, the plaintiffs' claim to the money for which they have got a part decree will have to be discharged. Feeling this difficulty, Mr. Das invokes the provisions of O. XLI, r. 33, Civil Procedure Code, and says that we have power to make any order which ought to have been made in the lower Court, even if his clients have not preferred any appeal or filed a memorandum of cross-objection and so it is open to him to challenge this finding and so destroy in effect the foundation on which the part decree as made by the learned District Judge rests. In our judgment, r. 33, O. XLI of the Code, though couched in very broad language, does not contemplate a case of this description. That rule gives to the Appellate Court power to pass any decree and make any order which ought to have been passed or made, etc. This rule contemplates modification of the decree by the Appellate Court at the instance of the appellant. It has no scope where the respondents in effect want to maintain the decree of the lower Court or where the decree under appeal is not modified in appeal. Mr. Das made his position clear. He says that he wanted to maintain the decree of the lower Court and did not want it to be disturbed; but still he wanted to attack the finding on which the decree of the lower Appellate Court in respect of the money claim entirely rests.

The scope of O. XLI, r. 33, Civil Procedure Code, has been considered in many cases by this Court. Sir Lawrence Jenkins, O. J. pointed out in *Gangadhar Murari v. Banabashi Padihari* (1) that the power contained in that rule should be

(1) 22 O.L.J. 390; 24 Ind. Cas. 208; A.I.R. 1914 Oal.

limited to those cases where, as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. We hold accordingly that it is not open to the respondents, in view of the fact that they have not preferred any memorandum of cross-objections or any appeal, to attack the finding of the learned District Judge that the agreement Ex. 3 is binding on the parties to this suit. This leads us to the only substantial question raised in the appeal by the appellants, namely whether the share of the plaintiffs in the profits of the *hat* is to be since April 18, 1917, half or 2-5ths. This depends solely upon the construction of the agreement, Ex. 3 and so the lower Appellate Court was justified in allowing the defendants to raise the question of shares for the first time before it. The document, according to the well-known principles of construction, must be construed as a whole and it is not legitimate to pick out one or two paragraphs and rely upon them only and to discard the rest of the document. The intention of the parties must be gathered from the whole of the document.

In the first portion of the document it is recited that there is an old *hat* named the Hazari Hat in existence for more than 100 years within *Mauza Fatika* on 1 *drone*, 9 *kanis*, 3 *gandas* and 1 *kara* of land which consists of 12 *kanis* and 11 *gandas* of land which appertain to *taraf* Mahamed Rafi Khansama and which has been described in Sch. (I) of that document, and of 12 *kanis*, 12 *gandas*, 1 *kara* of land which appertain to *taraf* Azim Mukim and which lands have been described in detail in Sch. (II) attached to the document. The document further proceeds to say that the lands of two *tarafs* are so mixed up that in front of the stall raised on the land of one *taraf* there are lands of the other *taraf* and by reason of that fact various disputes and litigations have been going on between the parties in respect of realization of the profits. From the recital it appears that almost equal areas of land appertaining to the two *tarafs*, Mahamed Rafi Khansama and Azim Mukim were included in the *hat*. Clauses (2) and (4) of the document are of importance. Clause (2) runs as follows:

"In reference to all the lands of all the plots (meaning all the plots included in Schs. I and II of said document) without taking into consideration

the ownership of the *dag* in which any land is situated in the aforesaid *hat* whether it appertains to your (the owners of *taraf* Azim Mukim) *maliki* or mine (the owners of *taraf* Mahamed Rafi Khansama) out of all sorts of dues such as rent, etc., which are payable in respect of all the shops situated in the *hat* you (the owners of *taraf* Azim Mukim) shall take and receive 8 annas of the entire 16 annas and we Brindaban Choudhury and Jugal Kishore Choudhury and Padmalochan Choudhury shall get and take the remaining 8 annas share."

Clause (4) provides for equal division of the *selami* or fees that would be realized on account of the shops or temporary stalls, etc. There is no provision in this document as to what is to happen if some of the lands which were then known as the *hat* lands had been acquired either under land acquisition proceedings or were not available for the purpose of the *hat*. The parties to the document failed to make specific provisions with regard to the same. In our judgment, the preamble to the document furnishes the indication as to why the shares in the profits were divided half and half. It is because the lands of the two *tarafs* which were in the *hat* were almost of equal area, the difference in areas being about a *ganda*, that is to say, the lands of *taraf* Mahamed Rafi Khansama in the *hat* were less than the lands in the other *taraf* in the *hat* by a fraction of 1-300. Clauses (2) and (4) of the agreement clearly indicate that the profits are to be divided equally between the owners of the two *tarafs* irrespective of the question as to where the shops or stalls were; if most of the shops or stalls were on the land of Sch. (II) of the document and few of them were on Sch. (I) and the rest of Sch. (I) were vacant, still that would entitle the owners of the lands of Sch. (I) to claim half of the rents and profits and half of the *selami*. The division therefore into half and half was to be irrespective of the amount of profits actually realized from the different parcels of land included in the *hat*.

As we have already stated the intention of the parties is quite clear as to why their shares were fixed in that proportion. It is because the lands of each of the *tarafs* within the *hat* were equal; inasmuch as $2\frac{1}{4}$ *kanis* of land appertaining to *taraf* Azim Mukim has gone out of the *hat*, according to the governing intention as can be gathered from the document which we have noticed above, the parties can only have shares in proportion to the areas of land left in the *hat*. This construction which we have put upon the document accords with the justice of the case, for, it would be unreasonable

to hold that the plaintiffs would be entitled to the whole of the compensation money awarded in respect of $2\frac{1}{2}$ kanis of land acquired and would still be entitled to claim half share of the profits accruing from the entire hat after the acquisition. We accordingly hold that the shares of the plaintiffs and the defendants in the profits of the hat ought to be in proportion of the respective areas of the two tarafs, the plaintiffs' taraf and the defendants' taraf, which are in the hat after acquisition. We accordingly affirm the judgment of the lower Appellate Court that the plaintiffs are entitled to only 2-5ths share and the defendants to the remaining 3-5ths share in the profits of the hat and a declaration to that effect must be made.

The result therefore is that the appeal fails and must be dismissed. But as we have already stated the order must be made more specific. The decree therefore would be in these terms: The plaintiffs' title is declared to those lands of the Hazari Hat as are covered by the M. S. and O. S. plots in schedule as have been found by the Commissioner. It is further declared that the plaintiffs have their alleged right to enjoy all the rights in the hat as have been conferred on them by the *sammatinama*, Ex. 3, in respect of the lands of Schedule Ka to Oha subject to the modification that they would be entitled to 2-5ths share instead of half share, that the plaintiffs may get the attachment order passed under s. 146, Criminal Procedure Code, vacated on producing a copy of the judgment and decree; that the plaintiffs must render accounts of the rents and profits in respect of plot No. 1 of the Maghi Survey Chitta from April 18, 1917 till the attachment by the Collector is withdrawn. In taking the accounts, the question as to whether the plaintiffs have made any improvements and what costs they had incurred for the same, must be taken into account.

After the said amount is ascertained, the plaintiffs' share in the same should be taken to be 2-5ths and the defendants' $\frac{3}{5}$ ths, and on the basis thereof, the amount which the plaintiffs have taken in excess of their said share from out of the profits of plot No. 1 of the Maghi Survey Chitta must be ascertained; and deducting the said excess amount which the plaintiffs have appropriated from the 2-5ths of the money that may be in the hands of the Collector, the balance would be the amount to which the plaintiffs would be entitled. Subject to the above modi-

fications and directions, the appeal is dismissed. Each party will bear his own costs in this appeal.

B.

Appeal dismissed.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 375 of 1937

May 8, 1939

IQBAL AHMAD AND COLLIESTER, JJ.

NANDLAL BHANDARI MILLS, LTD.,
CAWNPORE—APPLICANT

versus

COMMISSIONER OF INCOME-TAX,
CENTRAL AND UNITED PROVINCES—
OPPOSITE PARTY.

Income Tax Act (XI of 1922), ss. 42, 43—Nandlal Bhandari & Sons, Indore, managing agents of a company Nandlal Bhandari Mills, Ltd., Indore, opening on behalf of latter, branch at Cawnpore under their own control under name Nandlal Bhandari Mills, Ltd., Cawnpore—Managing agents supplying goods to branch and receiving commission on sales effected there—Commission paid annually—Nandlal Bhandari Mills, Ltd., Cawnpore, held, agents of Nandlal Bhandari and Sons, Indore, within meaning of ss. 42 and 43.

It is manifest from the language of s. 43, Income Tax Act, that a person may be fictionally deemed to be an agent for the purposes of the Act who might not be an agent as that term is ordinarily understood at law. In order to show that a non-resident has a business connection with a resident of British India, it must be established that the two persons have some sort of association in a business, that is to say in a profit-making occupation or activity in British India, and when this is established, it will have to be determined whether the other conditions of ss. 42 and 43 are satisfied. [p. 101, col. 1.]

Nandlal Bhandari & Sons of Indore were the managing agents of Nandlal Bhandari Mills, Ltd., Indore, a company engaged in manufacture of textiles on whose behalf they had opened a branch at Cawnpore under their own control known as Nandlal Bhandari Mills, Ltd., Cawnpore. Nandlal Bhandari & Sons supplied goods to the branch at Cawnpore, which were sold in British India, and they received a commission on the sales so effected. By way of remuneration it was agreed that Nandlal Bhandari & Sons should have a fixed allowance and should also be entitled to commission on the net profits of the company and to commission on the gross sale proceeds. The commission was to be paid annually when the accounts of the company were made up.

Held, that Nandlal Bhandari Mills, Ltd., Cawnpore, were and could be treated as the agents of the non-resident firm, i. e., Nandlal Bhandari & Sons, Indore, under ss. 42 and 43 of the Income Tax Act. Even if it be held that Nandlal Bhandari & Sons are only entitled to receive their commission when the annual accounts of the company were made up, the fact remained that their right to this commission accrued upon the sales effected at Cawnpore. This being the position, the commission was in the nature of profits or gains accruing or arising to the non-resident through or from a business connection in British India within the meaning of s. 42, and must therefore be deemed to be income accruing or arising in British India; and since there was a "business connection"

between the branch at Cawnpore, representing in British India the company at Indore, and the non-resident firm of Nandlal Bhandari & Sons, the resident branch at Cawnpore must be deemed to be the agents of the non-resident firm within the meaning of s. 43, and the profits accruing in British India to the non-resident firm were chargeable in the name of their fictional agents in British India.

[Case-law discussed.]

Misc. C. from the reference submitted by the Commissioner of Income-tax, Central and United Provinces.

Sir Tej Bahadur Sapru and Mr. S. N. Katju, for the Applicant.

Mr. N. P. Asthana, for the Opposite Party.

Collister, J.—This is a reference by the Commissioner of Income-tax, Central and United Provinces, under s. 66 (2), Income Tax Act. There is a company at Indore known as the Nandlal Bhandari Mills, Ltd., Indore—hereinafter called the company—which is engaged in the manufacture of textiles. On February 27, 1922, a deed of agreement was executed whereby a firm known as Nandlal Bhandari & Sons were appointed secretaries, treasurers and agents of the company; para. 5 of that instrument provides as follows:—

"The said firm shall, at any time hereafter, upon the request in writing of the directors for the time being of the said company, but at the sole cost and charges of the said company, open and maintain in Indore or/and Bombay or/and elsewhere a shop suitable for the sale by retail of the cloth and yarn manufactured at the said company's mills, and shall from time to time out of the cloth and yarn manufactured at the said company's mills, supply the said shop with so much cloth and yarn as there shall be a demand for. The said firm shall with the assistance of the directors, have the general management of the said shop and of the business transacted therein and the engagement and discharge of all clerks and servants required in the said shop. The salaries of such clerks and servants shall be paid by the said company."

By way of remuneration it was agreed that Nandlal Bhandari & Sons should have a fixed allowance and should also be entitled to commission at 16 per cent. of the net profits of the company and to commission at Re. 1-9-0 per cent. of the gross sale proceeds. The commission was to be paid annually when the accounts of the company were made up. The instrument was in fact a contract of managing agency. In accordance with the powers which were conferred upon them, Nandlal Bhandari & Sons opened a branch of the company at Cawnpore, known as Nandlal Bhandari Mills, Ltd., Cawnpore; and for the years 1934-35 and 1935-36 the Income tax Officer served a notice on the Cawnpore branch to

show cause why it should not be treated as the agent of the non-resident firm, i. e., Nandlal Bhandari & Sons, Indore, under s. 43 of the Act. Cause was shown on various grounds, but the contentions which were advanced did not find favour with the Income-tax Officer, who on March 3, 1936, declared the branch at Cawnpore to be agents of the non-resident firm, i. e., Nandlal Bhandari & Sons, Indore, and assessment was made accordingly. There was an appeal to the Assistant Commissioner of Income-tax, but it was dismissed; and thereafter an application for review under s. 33 was preferred to the Commissioner of Income-tax and also an application under s. 66 (2) requiring the Commissioner to refer certain questions of law to the High Court. The application for review was disallowed, but the Commissioner has referred the following question for the decision of this Court:

"Whether on the facts proved or admitted, Messrs. Nandlal Bhandari Mills, Ltd., Cawnpore, were and could be treated as agents of the non-residents Messrs. Nandlal Bhandari and Sons, within the meaning of ss. 42 and 43, Income Tax Act."

Section 42 (1) of the Act provides:

"In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent or any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax: Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time, come within British India."

Section 43 enacts:

"Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains, upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent: Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability."

Sir Tej Bahadur Sapru on behalf of the company contends that the branch at Cawnpore cannot be regarded as agents of Nandlal Bhandari & Sons for the reason that the latter are the duly appointed agents of the company at Indore, of which the firm Nandlal Bhandari Mills, Ltd., Cawnpore, is a branch. He also pleads that there is no business connection between the company through its branch at Cawnpore—and Nandlal Bhandari & Sons, as required by ss. 42 and 43 of the Act. He contends that

the term "business connection" signifies dealings of a commercial nature between the parties concerned and necessitates the buying and selling of commodities and the relationship of creditor and debtor. The decision of the question referred to us will depend on the interpretation to be placed on ss. 42 and 43 of the Act. It is manifest from the language of s. 43 that a person may be fictionally deemed to be an agent for the purposes of the Act who might not be an agent as that term is ordinarily understood at law; and the fact that Nandlal Bhandari & Sons are the duly constituted agents of the Company at Indore will not, in our opinion, preclude the Income-tax Authorities from treating the branch at Cawnpore as agents of the non-resident firm of Nandlal Bhandari & Sons, if the condition of ss. 42 and 43 are otherwise satisfied.

In para. 6 (c) of the agreement of agency, it is provided that Nandlal Bhandari & Sons shall receive commission at the rate of Re. 1-9-0 (per cent.) on the gross sale proceeds of all sales of yarn and cloth of the company "as the selling agents." Nandlal Bhandari & Sons have authority to open branches and appoint and discharge employees, and if they manage the business of each branch as selling agents, some argument might be advanced as regards residence and non-residence of the respective parties *quoad* the branch at Cawnpore; but it was assumed by the Income-tax Authorities and has been assumed in argument before us by learned Counsel for the company that the company is resident at Cawnpore through its branch, i. e., through Nandlal Bhandari Mills, Ltd., Cawnpore, and that Nandlal Bhandari & Sons are non-residents; and we will proceed to answer the reference on this same assumption. Learned Counsel for the company pleads that the element of "business" is wanting in the connection which exists between the branch at Cawnpore and the non-resident firm. He contends that ss. 42 and 43 are not charging sections, but machinery section: and he argues that, unless the income of Nandlal Bhandari & Sons can be expressly brought within the terms of the statute, it is not liable to be taxed. "Business" in the term "business connection" cannot, says learned Counsel, have a wider significance than "business" as used in s. 6, which is the charging section; and we have already shown what meaning he asks us to attach to the expression. Finally he contends that, according to the deed of agreement, the

commission is to be paid to Nandlal Bhandari & Sons at Indore after the accounts of the company have been made up, and therefore, it cannot be said that this is an income which "accrues or arises" to them in British India.

Learned Counsel for the company and learned Counsel for the defendants have referred us to various authorities which we will proceed to discuss. None of these cases is on all fours with the facts of the present case with the possible exception of one from Bombay which, if not identical, is very nearly so, as we shall presently show.

The first of these authorities is the English case in *Greenwood v. F. L. Smidth & Co.* (1). In that case the respondents were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery, which they exported all over the world. They had an office in London in charge of a qualified engineer, who was their whole-time servant. He received inquiries for machinery such as the respondents could supply, sent to Denmark particulars of the work which the machinery was required to do including samples of materials to be dealt with, and when the machinery was supplied, he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the respondents and their customers were made in Copenhagen and the goods were shipped *f. o. b.* Copenhagen. The respondents were assessed to income-tax in respect of the profits derived from dealings in machinery with purchasers in the United Kingdom, but it was held by the House of Lords that they did not exercise a trade within the United Kingdom within the meaning of Sch. D, s. 2, Income Tax Act, 1853, and were therefore not assessable to income-tax either under that Schedule or under s. 31, sub-s. 2, Finance (No. 2) Act, 1915. That decision rested on the terms of the English statutes, and the basis of decision was that the respondents did not exercise a trade within the United Kingdom. There is no such expression as "exercising a trade" in the Indian Income Tax Act, as in Sch. D, s. 2 of the English Act of 1853. What we have to do is to interpret the relevant sections of the Indian Income Tax Act according to the language which the Legislature has thought fit to employ, and we do not think that we can

(1) (1922) 1 A. C. 417; 91 L. J. K. B. 349; 127 L. T. 68; 8 Tax. Cas. 193; 66 S. J. 349; 38 T. L. R. 421.

safely apply to the Indian statute the analogy of English decisions based on the language of the Acts in force in that country.

The next case in chronological order is *Board of Revenue v. Madras Export Co.*, (2). A French firm had a branch in Madras whose sole duty was to buy leather goods in India and ship them to France. The French firm was a firm of commission agents and they made their profits by being paid commission at a defined rate on the value of the goods shipped to them. It was held by a Bench of the Madras High Court that, as the profits accrued solely in France, they were not taxable in British India. It was further held that s. 33 (1) of the Indian Income Tax Act (equivalent to s. 42 (1) of the Act now in force) did not create a new category of income which could be charged under the Act in addition to the incomes mentioned under s. 5 (equivalent to s. 6 of the present Act) as chargeable under the Act, but that s. 33 (1) merely provided a machinery by which non-resident foreigners trading in British India or having a business connection in British India could be taxed on income derived by them in British India. At p. 367* Wallace, J. observed:

"The term 'business connection' has not been defined in the Act. That perhaps is not surprising in an Act which does not even define the source of gain which it sets out to tax; but when it is contended that 'business connection' was designed to mean something different from and wider than the business itself which *ex hypothesi* takes place outside British India, and thus to cast wider the net of the income-tax gatherer, it behoves us to be cautious and not to accept the contention, unless we find it justified by the legal maxim enunciated by Lord Stenford, M. R. in *Smidh & Co. v. Greenwood* (3) at p. 588 that the well-known canon of construction of taxing Acts is that no one is to be taxed except by express words."

At p. 368* this learned Judge says:

"The condition precedent to assessability is business in British India and not merely a business connection in British India, and it is not laid down in that Act that the two phrases are identical in meaning. The test, I take it, is: Is the non-resident firm by its agency out here in British India making profits in British India which pass to it through the hands of its agent? If it is, then s. 33 (1) applies. If not, not. I am therefore unable to hold, in the absence of more clear and express words, that s. 33 (1) was intended in any way to enlarge the scope of s. 5 or to bring into the net any income accruing outside British India, but not derived from business within British India, merely because that income was received through or from a business connection in British India."

Section 33 (1) then is governed and controlled by s. 5 and really applies, and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India, which are transmittable and are transmitted to it through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and, in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connection in British India which are taxable through the agent.

In the present case the non-resident firm in India is merely buying raw material for shipment and sale abroad, and the profits realized from the sale are realized in Paris. There is clear authority in the leading case in *Sulley v. Attorney-General* (4) which is an exactly parallel case, for holding that the firm does not thereby carry on trade or business in British India."

The view taken by the High Court of Madras was dissented from by a Full Bench of the Calcutta High Court in *Rogers Pratt Shellac Co. v. Secretary of State* (5). The Rogers Pratt Shellac Co. was incorporated in the United States of America with its headquarters in the city of New York. The company had a branch office in Calcutta to buy gum, shellac and other Indian products and a factory at Wyndhamganj in the United Provinces. No sales were conducted in India by the company. Their transactions were limited to the purchase of shellac and other goods, some of which were purchased on account of a certain gramophone company, which paid the company a fixed percentage on the purchases plus expenses, while the balance was sold in the open market. It was held that income-tax was leviable in India under s. 33 (1) of the Act. At p. 15* Chatterjee, J. distinguished the English authorities on the ground that under Chap. XXXIV, (2), Sch. D of the Act of 1853, it was necessary to show that the non-resident was exercising a trade in the United Kingdom and that there was no provision in the English Act to the effect that profits or gains accruing or arising to a non-resident, whether directly or indirectly, thorough or from any business connection in the United Kingdom should be deemed to be income accruing or arising within the United Kingdom. It will be observed that in neither of the above two cases was there any sale of goods in British India; all that the "agents"

(2) 46 M 360; 71 Ind. Cas. 756; A I R 1923 Mad. 122; 44 M L J 290; 1 L W 181; 32 M L T 37.

(3) (1921) 3 K B 583 at p. 588; 37 T L R 949.

*Pages of 46 M.—[Ed.]

(4) (1860) 5 H & N 711; 39 L J Ex. 484; 6 Jur. (N.S.) 1018; 8 W R 422; 2 L T (N.S.) 439; 120 R R 793.

(5) 52 C I; 83 Ind. Cas. 273; A I R 1925 Cal. 34; 40 C L J 110; 28 O W N 1074.

*Page of 52 C.—[Ed.]

in British India did was to purchase raw materials in British India and export them to the non-resident firm.

In the Full Bench case in *Jiwan Das v. Income-tax Commissioner, Lahore* (6) a person residing and carrying on business in British India purchased goods in British India and sent them for sale to his shop in Kashmir, and it was held by a Bench of five learned Judges of the Lahore High Court that such a person was not liable to be assessed to income-tax on any part of the profits derived by sale in a foreign country of the goods purchased by him in British India, when the profits had neither been received in, nor brought into British India. The view expressed by the Madras High Court in *Board of Revenue v. Malras Export Co.* (2) was approved and relied upon. In *Commissioner of Income-tax, Bombay v. Bombay Trust Corporation, Ltd.* (7) a company incorporated and carrying on business at Hongkong lent large sums on deposit to a Bombay Company at 5½ per cent. interest and the company at Bombay remitted the interest to the Hongkong Company; and it was held by their Lordships of the Privy Council that the interest was a profit or gain accruing or arising to the Hongkong Company from a business connection in British India so as to be chargeable to income-tax under s. 42 (1), Indian Income Tax Act, 1922; and that the tax could be levied on the Bombay company, because under s. 43, they were to be deemed the agents of the Hongkong Company for all purposes of the Act and so by s. 42 (1) the tax was chargeable in their names and they were to be deemed the assessee, which by s. 2 (2) is meant the person by whom the tax was payable. Learned Counsel for the company distinguishes the last-mentioned case from the case with which we are now dealing on the ground that there was a relationship of creditor and thus a business connection between the company in Hongkong and the company in Bombay.

The next case is *Commissioner of Income-tax, Bombay v. Sarupchand Hukamchand* (8). The facts of that case were as follows :

The assessee, acted as the secretaries, (6) 10 L 657; 117 Ind. Cas. 657; A I R 1929 Lah. 609; 30 P L R 489; Ind. Rul. (1929) Lah. 673 (F B).

(7) 54 B 316; 131 Ind. Cas. 532; A I R 1930 P O 54; 57 I A 49; Ind. Rul. (1930) P O 68; (1930) A L J 73; 34 O W N 230; 32 Bom. L R 361; 58 M L J 197; 31 L W 582; (1930) M W N 564 (P O).

(8) 55 B 231; 132 Ind. Cas. 505; A I R 1931 Bom. 236; 33 Bom. L R 382; Ind. Rul. (1931) Bom. 345.

treasurers and agents of a company named Hukamchand Mill, Ltd., which had its registered office at Indore, and as such, they were entitled to certain remuneration. The terms of the agreement between the assessee and the company provided that a further commission at a certain percentage on the gross sale proceeds of cloth produced by the mill be paid to the assessee for their services as selling agents of the company. The company opened a shop at Bombay for the sale of cloth produced by the company's mill at Indore and it was managed by the assessee. It will thus be observed that the facts were very similar indeed to the facts of the case which is now before us. It was held by the Bombay High Court that, having regard to the terms of the agreement, the income, being a commission upon sales made in Bombay, accrued or arose in British India and was liable to be taxed in Bombay, though as a matter of practice between the parties it was paid at Indore. The only respect in which learned Counsel for the company attempts to distinguish that case is that, according to the interpretation which Beaumont, O. J., placed on cl. 16 of the agreement in that case, the assessee were competent, if they so wished, to deduct their commission at Bombay before handing over to the company the proceeds of the sale of cloth at that shop. Clause 16 was more or less similar in its terms to cl. 12 of the agreement in the case with which we are now dealing; but in cl. 7 of the agreement in the present case it is provided that the commission shall become due and shall be paid to Nandlal Bhandari & Sons annually as soon as the accounts of the company have been made up. Whether any such provision found place in the agreement in the Bombay case we do not know. Section 4 (1) of the Act, is discussed in the separate judgments of Beaumont, O. J. and Barlee, J., but there is no discussion of ss. 42 and 43.

The last authority which need be mentioned is *Commissioner of Income-tax v. Remington Typewriter Co., Ltd.* (9). A company incorporated in the United States of America carried on business in New York and there manufactured and sold typewriter machines. The respondent company had been incorporated under the Indian Companies Act, 1913, and had pur-

(9) 55 B 243; 130 Ind. Cas. 679; A I R 1931 P O 42; 58 I A 42; 35 O W N 349; 33 L W 301; (1931) M W N 248; 8 O W N 559; Ind. Rul. (1931) P O 87; 60 M L J 609; 33 Bom. L R 413; 53 O L J 135 (P O).

chased from the American company for shares the goodwill of that company in the Bombay Presidency and adjoining territory; the American company held all the shares except three issued to that company's nominees. No other companies had been incorporated in India, each being in substance in the same position towards the American Company as the Bombay Company; their respective business territory covered the rest of India. It was held by their Lordships of the Privy Council that there was a business connection within the meaning of s. 43 and s. 42 (1) of the Indian Income Tax Act, between the American Company and each of the Indian companies, and consequently, the respondent company could be deemed, for the purposes of the Act, to be the agent of the American company, and as its agent, could be charged to tax under s. 42 (1) in respect to (a) profits made by the American company upon machines exported to British India, and (b) dividends paid to the American Company by the three Indian companies. As we have already said, our reply to the reference must depend on our interpretation of the relevant provisions of the Indian Income Tax Act. Section 4 (1) of that Act provides:

"Save as hereinafter provided, this Act shall apply to all income, profits or gains as described or comprised in s. 8, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

We have already quoted ss. 42 (1) and 43 in an earlier part of this judgment, and it is unnecessary to repeat them. The expression "business connection" has not been defined in the Act. Section 6, is the charging section, and in it income, profits and gains from "business" is shown as a separate head of income, the other heads being salaries, interest on securities, property, professional earnings and "other sources." Section 2 (4) defines "business" in the following terms:

"Business" includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

This definition is obviously not exhaustive, as its language shows. Now, in order to show that a non-resident has a business connection with a resident of British India it must, we conceive, be established that the two persons have some sort of association in a business, that is to say in a profit-making occupation or activity in British India; and when this is established, it will have to be determined whether the other

conditions of ss. 42 and 43 are satisfied. We must therefore consider what is the position in the present case. Nandlal Bhandari & Sons of Indore are the managing agents of Nandlal Bhandari Mills, Ltd., Indore, on whose behalf they have opened a branch at Cawnpore under their own control. Nandlal Bhandari & Sons supply goods to the branch at Cawnpore, which are sold in British India, and they receive a commission on the sales so effected. It is true that according to cl. 7 of the agreement the commission does not become payable until the annual accounts of the company have been taken, but their claim to the commission is dependent upon the sale of goods in British India. Clause 12 of the agreement even suggests that they might be competent to retain their commission before transferring the profits to the company, and this is the view which was taken by the Assistant Commissioner of Income-tax; but even if it be held having regard to the provisions of cl. 7, that Nandlal Bhandari & Sons are only entitled to receive their commission when the annual accounts of the company are made up, the fact remains that their right to this commission accrues upon the sales effected at Cawnpore.

This being the position, we think it must be held that this commission is in the nature of profits or gains accruing or arising to the non-resident through or from a business connection in British India within the meaning of s. 42, and must therefore be deemed to be income accruing or arising in British India; and since there is a "business connection" between the branch at Cawnpore, representing in British India the Company at Indore, and the non-resident firm of Nandlal Bhandari & Sons, the resident branch at Cawnpore must be deemed to be the agents of the non-resident firm within the meaning of s. 43, and the profits accruing in British India to the non-resident firm will be chargeable in the name of their fictional agents in British India. For the reasons given above our answer to the question referred to us is in the affirmative. Let a copy of this judgment be sent to the Commissioner of Income-tax under the seal of the Court. We assess the fee of Counsel for the Department at Rs. 200.

S.

Answer accordingly.

ODUH CHIEF COURT

Second Civil Appeal No. 289 of 1937

October 11, 1939

ZIA-UL HASAN AND RADHA KRISHNA, JJ.
CHANDRIKA PRASAD AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

BHAGWAN DAS—DEFENDANT—
RESPONDENT

Hindu Law—Alienation—Widow—Mortgage by widow to redeem previous mortgage by husband—Subsequent mortgage by her to pay off time-barred claim under previous mortgage, whether binding on reversioners.

The payment of a husband's debt, though barred, is a pious duty on the part of the widow. The Hindu Law does not recognise any bar of limitation. According to the Hindu Law leaving a debt unpaid is a sin, the consequences of which follow the debtor into the next world. Therefore, an alienation by a widow of property of her husband in order to pay off the debt of her husband even though barred by statute, is an alienation, which is binding upon the reversioners. [p. 107, col. 1.]

A Hindu widow executed a mortgage in 1913 in order to redeem a mortgage executed by her deceased husband in 1893. The widow again in 1916 executed mortgage to redeem the mortgage of 1913 and in 1934 she executed a mortgage to pay off a claim under the mortgage of 1916 which had become barred by time:

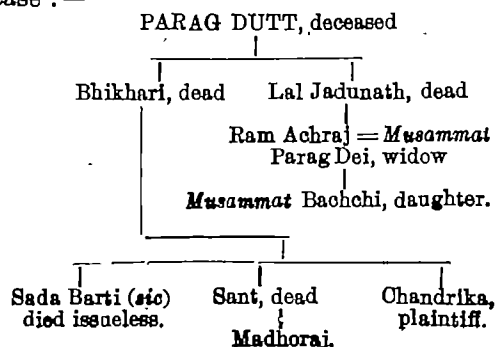
Held, that the effect of the transaction of 1913 was that the debt of 1893 was paid off and ceased to exist. The debt of 1913 was a debt due from the widow or the estate inherited by her and hypothecated in lieu of that debt. The debt made payable by the deed of 1916, was, therefore, the debt not of the deceased husband but of the widow and, therefore, the consideration of the mortgage of 1934 was the time-barred debt of her own and not that of her husband. The mortgage of 1934 was not therefore binding on the reversioners. [p. 107, col. 2.]

S. C. A. against the order of the District Judge of Gonda, dated May 18, 1937.

Mr. Mahabir Prasad Srivastava, for the Appellants.

Mr. Hyder Husain, for the Respondent.

Judgment.—This is the plaintiffs appeal. The following pedigree will be helpful in appreciating the facts of the case:—



Parag Dutt shown in the pedigree was owner of sixteen annas share in village Charera and six annas share in village Chain. On his death his two sons, Bhikhari and Jadunath, succeeded to the property in equal shares. Later the two brothers separated from each other and Jadunath and his son Ram Achraj died one after the other and Musammat Parag Dei, the widow of Ram Achraj, succeeded to the eight annas share in village Charera and three annas share in village Chain as a Hindu widow.

Jadunath in his lifetime with his brother Bhikhari had executed a mortgage deed with possession for a consideration of Rs. 9,85-11-1½ in favour of one Tirbhuwan Datt in respect of the entire sixteen annas share of village Charera (*vide* Ex. A-16).

On August 4, 1913, i. e. after the death of Jadunath and Ram Achraj and Bhikhari, Musammat Parag Dei and the sons of Bhikhari executed a simple deed of mortgage for a sum of Rs. 5,000 in favour of Bhagwan Das Pande in respect of eight annas share of Charera (*vide* Ex. A-17).

It appears that this mortgage was executed by Musammat Parag Dei in respect of her eight annas share in village Charera in order to redeem the share mortgaged by her husband in 1893, and the sons of Bhikhari, who were the nearest male collaterals seem to have joined the execution of the deed merely to signify their assent to the transfer. It is admitted that the eight annas share was redeemed and came into the possession of Musammat Parag Dei. The interest stipulated in this deed was one per cent. per mensem compoundable yearly.

On August 11, 1916, Musammat Parag Dei, the widow, and the sons of Bhikhari again executed another mortgage deed (Ex. A-18) in respect of four annas share out of the eight annas share with possession for a sum of Rs. 6,000. This mortgage was executed in favour of Bhagwan Das, the defendant-respondent in this case. Out of the consideration of Rs. 6,000, a sum of Rs. 5,421 was left with the mortgagee for redeeming the earlier mortgage dated August 4, 1913. The mortgagee was put in possession of the share mortgaged. It is admitted that the defendant-respondent Bhagwan Das ultimately deposited a sum of Rs. 7,341 and succeeded in redeeming the mortgage of 1913 on December 9, 1916.

From the above narration it would appear that the defendant-respondent paid a sum of Rs. 1,920 in excess of the amount left with him for redemption.

On March 15, 1934, Musammat Parag

Dei alone executed a mortgage deed with possession in respect of the remaining four annas share of village Charera, redeemed from Bhagwan Das Pande, and three annas share of village Chain to the defendant-respondent for a sum of Rs. 12,000. This amount of Rs. 12,000 consists of the excess amount of Rs. 1,920 paid by the respondent for redemption and Rs. 10,080 interest thereon from December 1916, up to the date of the mortgage. It must be noticed that at the date of this mortgage, a claim to Rs. 1,920 and interest thereon had become barred by time.

The widow died in July, 1934, and the plaintiff filed the present suit for possession of the four annas share of Charera and the three annas share of Chain mortgaged by the deed of 1934 by the widow on the allegation that the mortgage was neither justified by legal necessity nor was executed for the benefit of the estate.

The defendant contested the suit. His defence was that the plaintiff No. 1 was not the reversionary heir of the husband of *Musammatt Parag Dei* and was not entitled to sue in the presence of *Musammatt Bachchi*, the daughter of Ram Achraj. It was further pleaded that under a family custom *Musammatt Parag Dei* was entitled to an absolute estate in the property of her husband and that the mortgage was made for legal necessity.

The trial Court impleaded *Musammatt Bachchi* as a necessary party to the suit and later as a result of the compromise between her and the plaintiff she was made a co-plaintiff as plaintiff No. 2 in the suit in consequence of which all controversy as to the plaintiff being the nearest heir disappeared. The trial Court held on other issues in favour of the plaintiffs and decreed the suit.

In appeal the lower Appellate Court maintained the finding of the trial Court to the effect that the custom relied upon by the defendant was not established. On the question of legal necessity, however, it disagreed with the finding of the trial Court and held that the mortgage was for the benefit of the estate and for legal necessity, and on that view, dismissed the suit.

In second appeal before this Court the learned Counsel for the appellants has argued that the finding of the Court below that the mortgage of 1934 was for the benefit of the estate and legal necessity is on the facts of the case wrong in law. The respondent's Counsel, while supporting the judgment of the lower Appellate Court on

the question of the binding nature of the deed of mortgage, argued further that on a correct interpretation of the *wajib-ul-arza*, the custom set up by the defendant was established. We proceed to give our decision on the above two points argued before us.

The lower Appellate Court has held that the transaction of mortgage entered into with the defendant-respondent was more advantageous both to *Musammatt Parag Dei* and the reversioners on the ground that the defendant who had to pay Rs. 1,920 in excess of what was left with him had become entitled to recover that amount with interest at 12 per cent. per annum compoundable yearly from *Musammatt Parag Dei* and the sons of Bhikhari, who had executed the mortgage-deed in his favour. The view of the Court below that the defendant-respondent could recover the amount from *Musammatt Parag Dei* and the sons of Bhikhari is based upon an assumption that the claim to it was still within time. This assumption was clearly wrong as admitted before us by the learned Counsel for the respondent. Neither the widow nor the sons of Bhikhari were liable in law for the amount. The mortgage of 1916 by which money was left with the defendant-respondent for redemption of the earlier mortgage did not make any provision about any excess which the defendant-respondent had to pay for redeeming the earlier mortgage. The claim to recover the excess amount arose in 1916 at the time of its payment. Even supposing that the defendant-respondent *qua* the excess amount was subrogated to the rights of Bhagwan Das Pande, the mortgagee of the mortgage-deed redeemed, still the claim had become barred.

We find that by the year 1934 the claim on the basis of that deed had become barred by time. The period fixed for payment in this deed was three years, and any suit on the basis of this deed was barred at the latest after 15 years from the date thereof. It, therefore, follows that the defendant-respondent could not claim that money either from *Musammatt Parag Dei* or the sons of Bhikhari personally or from the properties in suit. The learned Counsel appearing for the respondent has not supported the judgment of the lower Appellate Court on the ground that the execution of the mortgage was for the benefit of the estate. There can be no doubt that a widow has got power to alienate the property inherited by her from her husband in case of need or for

the benefit of the estate. On the facts mentioned above, there was no obligation of any kind whatsoever either upon *Musammât Parag Dei* or the estate in her possession to pay off the defendant-respondent and no necessity in the nature of any pressure on the estate. We are, therefore, of opinion, that the alienation on the ground that it was for the benefit of the estate cannot be sustained.

The other ground on which the lower Appellate Court has maintained the alienation as binding upon the plaintiff-appellant is that it was the debt of her (*Musammât Parag Dei*'s) husband and the payment thereof, even though barred by time, was her religious and moral duty, and as the alienation was to discharge a debt of her husband, it was binding upon the reversioners. It has been held that the payment of a husband's debt, though barred, is a pious duty on the part of the widow. The Hindu Law does not recognise any bar of limitation. According to the Hindu Law leaving a debt unpaid is a sin, the consequences of which follow the debtor into the next world. Therefore, an alienation of property of her husband in order to pay off the debt of her husband even though barred by statute, is an alienation, which is binding upon the reversioners. (*Vide Mulla's Hindu Law*, 8th Edition, p. 182 and *Mayne's Hindu Law*, 10th Edition, p. 782). The question in this case is whether the debt for the payment of which the mortgage-deed of 1934 was executed was a debt of the husband. On the facts it would appear that *Jadunath* along with *Bhikhari* had incurred a debt of Rs. 9,825-11-1½ in 1893 by mortgaging sixteen annas share in village *Charera*. The share of *Jadunath* in the property mortgaged was half and the extent of his liability was also presumably to the extent of half. On the death of *Jadunath* the liability for this debt descended upon his son, *Ram Achraj*, the husband of *Musammât Parag Dei*, and it was *Ram Achraj*'s debt at the time of his death. The share of *Jadunath*, and after him of *Ram Achraj* in this debt amounting to Rs. 5,000 roughly was paid off by the mortgage of 1913 executed by *Musammât Parag Dei* and the sons of *Bhikhari* in respect of eight annas share only which belonged to *Ram Achraj* alone in favour of *Bhagwan Das Pande*. It is clear that thereafter the debt of *Ram Achraj*, created under the deed of 1893, ceased to exist and was replaced by the liability of *Musammât Parag Dei* under the mortgage of 1913.

The learned Counsel for the respondent has argued that although by the transaction of 1913 there was a change in the creditor, yet the original debt of 1893 continued to subsist. The argument is ingenious but without force.

The contention of the learned Counsel for the respondent really comes to this that no payment of the debt of an ancestor can be made unless it is made in cash because when the son or the widow pays off the debt by raising money on the security of the property inherited by him or her, then according to this argument there is no payment but only a change of the creditor. In our opinion in such a case there is not only a change of the creditor but a change of the debtor also which is more important for the consideration of the question whether the original debt has been extinguished or not. In our view the effect of the transaction of 1913 was that the debt of 1893 was paid off and ceased to exist. The debt of 1913 was a debt due from *Musammât Parag Dei* or the estate was inherited by her and hypothecated in lieu of that debt. The debt made payable by the deed of 1916, was, therefore, the debt not of *Ram Achraj* but of *Musammât Parag Dei*, and, therefore, the consideration of the mortgage of 1934 was the time barred debt of her own and not that of her husband. On these facts the view of the lower Court that the mortgage of 1934 was executed for the payment of time-barred debt of the executant's husband is wholly incorrect. It is, therefore, not binding upon the plaintiff.

Lastly, it was argued that on a proper interpretation of the *wajib-ul-arzes* (Exs. A-12 and A-4) the Court below should have held that the custom relied upon by the respondent was proved and that *Musammât Parag Dei* had an absolute interest in the estate of her husband. We have read the two *wajib-ul-arzes*. The words *malikana qabiz rahegi* and *intiqal ka bhi haq akhthar rakhti hai* used therein having regard to the context in which those words have been used, are, in our opinion, quite consistent with a Hindu widow's estate. Power of adoption outside the family is denied to a widow in this family and it is further provided that on the death of a childless widow the property goes to the nearest collaterals. In our opinion, these provisions indicate an unmistakable intention to keep the property within the family. The cases reported in *Durga v. Lal Bahadur and*

others, 5 O. W. N., 992 (1) and *Sant Bakhsh Singh and another v. Bhagwan Bakhsh Singh*, 7 O. W. N., 1082 (2) are fully applicable and we overrule this contention on behalf of the respondent.

We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the trial Court, with costs throughout.

S. *Appeal allowed.*

(1) 5 O W N 992; 112 Ind. Cas. 387; A I R 1928 Oudh 509.

(2) 7 O W N 1082; 129 Ind. Cas. 328; A I R 1931 Oudh 25; Ind. Rul. (1931) Oudh 104.

NAGPUR HIGH COURT

Second Civil Appeal No. 214 of 1936

October 19, 1938

NIYOGI, J.

PANNALAL AND OTHERS—DEFENDANTS
—APPELLANTS

versus

SUMRANLAL—RESPONDENT

Adverse possession—Widow—Adverse possession against widow, whether affects reversioner's rights—Hindu Law—Widow—Remarriage—Effect on rights of widow to hold property.

The adverse possession, howsoever long held, cannot impair the right of a person who was not, during the continuance of that adverse possession, entitled to possession. The right of the reversioner is *spes successionis* and his reversionary estate falls into possession only on the death of the intermediate owner, namely, the widow. Consequently the adverse possession against the widow can hardly be recorded as hostile to the reversioners whose right was until the widow's death only an expectancy. [p. 111, col. 1.]

[Case-law discussed.]

Obiter.—Re-marriage according to the accepted view of the Court of the Judicial Commissioner, C. P. results in the forfeiture of the widow's right to hold possession of the property that devolves on her from her husband or from his lineal heir.

S. C. A. from the appellate decree of the Court of the District Judge, Jubbulpore, dated March 16, 1936, in Civil Appeal No. 8-A of 1935, reversing the decree of the Court of the Subordinate Judge, Second Class, Mandla, dated February 25, 1935, in Civil Suit No. 192 of 1933.

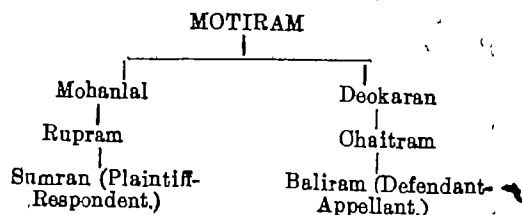
Rao Bahadur M. B Kinkhede, with Mr. V. R. Dhoke, for the Appellants.

Mr. J. R. Mudholker, for the Respondent.

Judgment.—This is a defendant's appeal from a reversing judgment of the District Judge, Jubbulpore, delivered on March 16, 1936, in Civil Appeal No. 8-A of 1935.

The appellant and the respondent are

related in the way that will appear from the undermentioned genealogy :



The respondent filed the suit out of which this appeal arises for possession of the property in suit in his capacity as reversioner to Chaitram who died as far back as 1884. The plaintiff dated the cause of action for the suit on the death of *Musammatt Chukho*, the widow of Chaitram which occurred on November 15, 1926. The question that arose in the suit was whether the defendant Baliram who was in possession of the property in suit continuously from 1884 to the exclusion of and adverse to *Musammatt Chukho* acquired such a prescriptive title in respect of the property as to extinguish the plaintiff's reversionary right.

I need only refer to the material facts to elucidate the issue of law that arises in the case. Rupram's widow *Musammatt Premabai* was living with Chaitram as his mistress and she bore him a son by name Baliram, who was the defendant in the suit but is now represented by his son, the appellant. Some time after Chaitram's death his widow Chukho left her husband's house and lived with one Sheoram of *Mouza Barela* as his mistress. She died as already stated above on November 15, 1926. When Chaitram died in 1884 the mutation proceedings were started in which the mother and step-mother of Chaitram by name respectively *Musammatt Dulia* and *Musammatt Chukho* and Chaitram's widow *Musammatt Chukho* and his illegitimate son Baliram figured in those proceedings. The mutation officer remarked that although Baliram was an illegitimate son, there was no difference made in point of legal rights between illegitimate and legitimate sons in the family of Chaitram and he, therefore, recorded the whole property in the name of Baliram with *lambardari* right and provided at the same time that 2 annas share in the property would be recorded in *pattidari* against the names of each of the three widows above named.

The suit was contested on several grounds out of which those that are material are two : (1) that *Musammatt Chukho* had left her husband's house after she became

a widow and began to live openly with Sheoram of Barela as his mistress, and (2) the effect of adverse possession on the part of Baliram as against the widow Musammam Chukho on the reversionary right of the plaintiff Sumran.

On behalf of the appellant it is urged that it ought to have been held that Musammam Chukho had contracted re-marriage with Sheoram and that she was not his mistress as was found by the original Court. I do not see my way to enter into this question for the reason that this question which was one of pure fact was not agitated in the lower Appellate Court as it ought to have been done. It may be conceded that if Musammam Chukho had been re-married, then a question would arise whether the plaintiff Sumran would be entitled to claim possession on the date of the re-marriage, as re-marriage according to the accepted view of the Court of the Judicial Commissioner, O. P. results in the forfeiture of the widow's right to hold possession of the property that devolves on her from her husband or from his lineal heir, but obviously the appellants are not entitled to raise this question of law unless they are in a position to displace the original Court's clear finding against them that Musammam Chukho was Sheoram's mistress. This point should have been canvassed in the lower Appellate Court. It is true that the appellants in this Court were respondents in the lower Appellate Court but even as they were entitled under O. XXI, r. 22, Civil Procedure Code, to support the trial Court's decree in their favour on any points which were decided against them. As it was open to them to take that opportunity in the lower Appellate Court and they failed to avail themselves of that opportunity, they cannot now ask the Court in second appeal to go into the evidence bearing on that issue. As however I have perused the pleadings as well as the evidence, I may briefly state that the respondent's pleadings are devoid of any averment to show that Musammam Chukho had re-married Sheoram. There is no express allegation made as to the re-marriage, nor is the date of re-marriage suggested in any place. There was no issue on the point and whatever evidence there is on the records tends to discount the story of re-marriage. The first contention therefore must be overruled.

The second contention no doubt involves an important question of law. Baliram was admittedly the illegitimate son of

Chaitram. He was not entitled to possession yet the mutation order was made in his favour in 1884 and he continued to be in possession all along up to the date of the suit. His possession was admittedly adverse to Musammam Chukho who died on November 15, 1926. The question is whether that adverse possession would bar the reversioner's right. That has been answered in the negative by the lower Appellate Court. It is that finding which is being challenged here. Reliance is placed on *Vaithialinga Mudaliar v. Srirangath Anni* (1) for the proposition contended for. It is not necessary for me to deal, at any great length with this contention as their Lordships of the Privy Council themselves have explained the scope and the effect of the decision reported in that case in *Jaggo Bai v. Utsava Lal* (2). Reading the decision in *Vaithialinga Mudaliar v. Srirangath Anni* (1) correctly, I do not understand it as laying down the rule, as contended that the principle of the *Shivaganga* case [*Katama Natchiar v. Raja of Sivaganga*] (3) should be extended to the case of adverse possession against the widow. On the particular facts of that case, their Lordships no doubt had to deal with both the questions, namely, the effect of a decree obtained against a widow and the adverse possession against her. It was in relation to the first point that their Lordships of the Privy Council referred to *Shivaganga* case (3) and other cases, but they treated the question of limitation on quite a different footing unconnected with any considerations of *Shivaganga* case (3) as is clear from the discussion of that point at p. 904*. Their Lordships took the view that they did for the reason that under Art. 129 of the second schedule of Act IX of 1871, it was incumbent on the reversioner to sue not only for a declaration as to the invalidity of an adoption but also for possession. That article ran in these terms: for a suit to set aside an adoption the period of limitation is 12 years from the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father. The

(1) 48 M 883; 92 Ind. Cas. 85; A I R 1925 P C 249; L R 6 A (P O) 189; 49 M L J 769; 42 O L J 563; 30 C W N 313; 28 Bom. L R 173; (1926) M W N 11; 52 I A 322 (P O).

(2) 51 A 439; 117 Ind. Cas. 498; A I R 1929 P C 166; 56 I A 267; 33 C W N 809; 10 P L T 527; (1929) A L J 716; 30 L W 60; 31 Bom. L R 891; 57 M L J 160; 50 O L J 52; 6 O W N 589; (1929) M W N 762; Ind. Rul. (1929) P C 266 (P O).

(3) 9 M I A 539; 2 W R 31; 2 Sar. 25 (P O).

*Page of 48 M—[Ed.]

question naturally arose whether that Article applied also to a suit for possession, and in *Jagadamba Chaudhrani v. Dakshina Mohan Roy Chaudhury* (4) their Lordships of the Privy Council held that if the plaintiff could not succeed without displacing an apparent adoption by virtue of which the opposite party was in possession, a suit by the plaintiff for possession fell under that Article. That case was followed in *Mohesh Narain Munshi v. Taruck Nath Moitra* (5) and the view taken in *Vaithialinga Mudaliar v. Srirangath Anni* (1) was quite in accordance with the current of the old rulings bearing on the effect of Art. 129 of the Act IX of 1871. It was because the reversioners in that suit had failed to file a suit not only to set aside the adoption which took place in 1862 but also to claim possession for more than 12 years before the Act of 1877 was passed, that it was held that Art. 141 of the Act of 1877 had no application as the adverse possession against the widow as well as the reversioners was completed before the new Act came into force. It is therefore clear that the considerations which were applied in *Vaithialinga Mudaliar v. Srirangath Anni* (1) cannot be extended to a suit which is filed in terms of Art. 141 of the Act of 1877. That this is so is made clear by their Lordships themselves, in certain cases which arose after the Act of 1877, where their Lordships held that Art. 118 of the Act of 1877, which now supersedes Art. 129 of the Act of 1871, refers only to a suit for bare declaration and not to suit for possession of property, even though it may be necessary in such suits to decide that a given adoption is invalid: see *Tribhuvan v. Rameswar* (6), *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan* (7) and *Kalyandappa v. Chanbasappa* (8).

In *Aurabinda Nath Tagore v. Manorama*

(4) 13 O 308; 13 I A 84; 4 Sar. 715; 10 Ind. Jur. 307 (P O).

(5) 20 O 487; 20 I A 30; 6 Sar. 261; 17 Ind. Jur. 164 (P O).

(6) 28 A 727; 33 I A 156; 9 O O 377; 10 O W N 1065; 8 Bom. L R 722; 16 M L J 440; 3 A L J 695; 4 O L J 403; 1 M L T 265 (P O).

(7) 39 O 418; 13 Ind. Cas. 344; 39 I A 19; 15 O L J 172; 16 O W N 468; 126 P R 1912; 6 P W R 1913; (1912) M W N 77; 11 M L T 76; 9 A L J 137; 12 P L R 1912; 22 M L J 240; 14 Bom. L R 182; 16 O W N 458 (P O).

(8) 48 B 411; 79 Ind. Cas. 971; A I R 1924 P O 137; 51 I A 220; 22 A L J 508; 46 M L J 598; 28 O W N 666; 26 Bom. L R 509; (1924) M W N 414; 34 M L T 111; 20 L W 109; 11 O L J 181; 10 O & A L R 1114; L R 5 A (P O) 97; 1 O W N 553 (P O).

Debi (9) the observations made in *Vaithialinga Mudaliar v. Srirangath Anni* (1) were obviously misunderstood and it was thought that the question of adverse possession against the widow fell to be decided by the same considerations as would apply to a case of a decree fairly and honestly obtained against widow, namely by the principle of the *Shivaganga case* (3). That was a decision by a Single Judge of that Court and the erroneous view taken in that case was pointed out in *Abinashchandra Ghosh v. Narhari Methar* (10) but the authority which clinches the issue is the decision reported in *Jaggo Bai v. Utsava Lal* (2) where their Lordships of the Privy Council explained the scope of the decision in *Hari Nath v. Mothurmohan* (11) and *Vaithialinga Mudaliar v. Srirangath Anni* (1) and pointed out that those cases illustrate the application of the rule in *Shivaganga case* (3) where a decree found against a widow had been obtained against her in her lifetime and that they do not lay down that adverse possession against a widow *per se* would extinguish the reversioner's right. Their Lordships referred to the case *Runchordas v. Parvatibai* (12). That was a case in which the trustees had been in adverse possession against the widow and it was held that their adverse possession was not a bar to the reversioners' right to sue in terms of Art. 141 of the Act of 1877. The case in *Jaggo Bai v. Utsava Lal* (2) was not a case in which a decree had been obtained against a widow but a case of mere adverse possession against the widow and their Lordships pointed out that the case was governed by the dictum that was laid down in *Runchordas v. Parvatibai* (12). That there is a well-defined difference between a case of a decree obtained against a widow and a case of adverse possession against a widow is made amply clear in the observations made by their Lordships at p. 452* of *Jaggo Bai v. Utsava Lal* (2). They are as follows:

"It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime, the reversionary heir is barred and does not get the benefit of Art. 141. The question raised by the

(9) 55 O 303; 112 Ind. Cas. 496, A I R 1928 Cal 670, 32 O W N 913.

(10) 57 O 265; 123 Ind. Cas. 444; A I R 1930 Cal. 163; 50 O L J 260; Ind. Rul. (1930) Cal. 332.

(11) 21 O 8; 20 I A 183; 6 Sar. 334; 17 Ind. Jur. 481 (P O).

(12) 23 B 725; 26 I A 71; 1 Bom. L R 607; 7 Sar. 543 (P O).

present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger had been in adverse possession for 12 years or more."

Their Lordships pronounced their opinion in these terms:

"In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time. To hold otherwise would, in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the Article to ignore the express words of the Article."

It appears to me that this case conclusively disposed of the question now raised that the appellants' adverse possession against *Musammat Chukho* operated to extinguish the reversionary right of the respondent. I may in passing refer to some cases decided by the High Courts in India which sustain the view that I have taken: see *Abinash-chandra Ghosh v. Narhari Methar* (10), *Hemendranath Roy v. Jnanendraprasanna Bhaduri* (13), *Bai Manchha v. Tribhawan* (14).

The general principle, it appears to me, is indisputable that the adverse possession, howsoever long held, cannot impair the right of a person who was not, during the continuance of that adverse possession, entitled to possession. The right of the reversioner as is well-known is *spes successionis* and his reversionary estate falls into possession only on the death of the intermediate owner, namely, the widow. Consequently the adverse possession against the widow can hardly be recorded as hostile to the reversioners whose right was until the widow's death only an expectancy.

For the foregoing reasons, I agree with the lower Appellate Court and dismiss this appeal with costs. Counsel's fees Rs. 50.

D. Appeal dismissed.

(13) 63 O 155; 159 Ind. Cas. 1101; A I R 1935 Cal. 702; 40 O W N 115; 62 O L J 49; 8 R O 368.

(14) A I R 1932 Bom. 434; 139 Ind. Cas. 28; 34 Bom. L R 385; Ind. Rul. (1932) Bom. 459.

ODDH CHIEF COURT

Miscellaneous Appeal No. 54 of 1937

October 18, 1939

HAMILTON AND RADHA KRISHNA, JJ.

RAM SARUP SINGH—DEFENDANT

—APPELLANT

versus

SARJU AHIR—PLAINTIFF

—RESPONDENT

Oudh Rent Act (XXII of 1886), ss. 108 (10), 4 (11)—Ejectment under s. 108 (10), whether means ejectment by whole body of co-sharer landlords to whom rent is payable by landlord—Suit by tenant against one of co-sharer landlords for possession of plot—Maintainability in Civil Court.

The ejectment of a tenant contemplated by s. 108 (10), *Oudh Rent Act*, means the ejectment by the landlord, i. e., by the whole body of co-sharers where the tenant holds his tenancy from all of them. The landlord of the tenant is the person or persons to whom the rent is payable by the tenant. Hence a suit by a tenant in Civil Court against one of the co-sharer landlords for possession of a plot does not fall within exceptions to the general jurisdiction of the Civil Courts contained in s. 108 (10) and is maintainable. *Ukheda v. Achhu Singh* (1), relied on.

Misc. A. against the order of the Civil Judge, Sultanpur, dated May 6, 1937.

Mr. *Hyder Husain*, for the Appellant.

Mr. *Rameshwar Dayal*, for the Respondent.

Judgment.—This is a defendant's appeal against an order of remand passed by the learned Civil Judge of Sultanpur, and the sole question involved in it is whether the suit was maintainable in the Civil Courts or should have been filed under the provisions of s. 108 (10) of the *Oudh Rent Act* in the Rent Court.

The following facts are now admitted between the parties.

The plaintiff is a tenant of *khata khewat* No. 1 of *Patti Nageshwar Singh* and *khata khewat* No. 2 of *Patti Mahesh Singh* in village *Tawakkalpur*. The rent of the lands in dispute was realised by *Baldeo Pande* and the defendant-appellant among others in the past.

The plaintiff filed the present suit for possession against the defendant on the allegation that he was dispossessed of the plots in dispute partly in 1341 *Fasli* and partly in 1342 *Fasli* by the defendant.

The defence of the defendant was that the plaintiff had relinquished the land and further that the suit was not maintainable in the Civil Court.

A preliminary issue on the question, whether the suit was maintainable in the Civil Court or not, was framed and the learned

Munsif held against the plaintiff and dismissed the suit. It should be noted that on the finding that the Civil Court had no jurisdiction to try the suit, the proper course for the trial Court was to return the plaint for presentation to the proper Court.

In appeal from the decree of dismissal by the trial Court the lower Appellate Court disagreed with the view of the trial Court and held that the suit was maintainable in the Civil Court. The appeal was allowed and the suit was remanded for a fresh trial.

The defendant has now come up in appeal against the order of remand passed by the lower Appellate Court. The question is whether the suit is maintainable in the Civil Court or not. The opening words of s. 108 of the Oudh Rent Act, are as follows:

"Except in the way of appeal as hereinafter provided, Courts other than Courts of Revenue shall not take cognizance of the following descriptions of suits, and those suits shall be heard and determined in Courts of Revenue in the manner provided in this Act, and not otherwise:—"

If the suit of the plaintiff does not fall within any of the descriptions of suits given in s. 108, then it is clear that the Civil Court will have jurisdiction to try the present suit. On behalf of the defendant it was contended that the suit fell within cl. (10) of the section, which runs as follows:

"(10) for the recovery of the occupancy of any land which has been treated by a landlord as abandoned or from which an under-proprietor or tenant has been illegally ejected by the landlord or for possession by a person in whose favour an ex-proprietary tenancy arises under s. 7-A."

In this case there is no dispute that the status of the plaintiff is that of a tenant but the question is whether the word "landlord" used in this clause would cover the defendant who is not the sole landlord of the plaintiff but is one of the persons to whom the plaintiff is liable to pay rent. The word "landlord" is defined in s. 3, cl. (11) of the Oudh Rent Act and means any person to whom an under-proprietor or a tenant is liable to pay rent. The lower Appellate Court has taken the view that where the tenant has wrongfully been dispossessed by one of the proprietors only, then it cannot be said that the dispossession has been caused by the landlord inasmuch as the tenant is not liable to pay rent to him alone but to the entire body of proprietors.

The learned Counsel for the appellant has argued that the word "landlord" as defined in the Oudh Rent Act is applicable

to the entire body of proprietors to whom the rent is payable by the tenant as well as to each of those proprietors. It is further argued that the decisions of the Allahabad High Court, which were given under the Agra Tenancy Act of 1901, are not applicable to a case under the Oudh Rent Act.

In our opinion the view taken by the lower Appellate Court is correct and the appeal has no force. If we were to accept the contention of the appellant then certain anomalies of a serious nature will arise. Section 108, cl. (4) provides for "suits by a landlord for the ejectment of a tenant". If the word "landlord" is applicable to each proprietor of a co-parcenary body in a village, then a tenant liable to pay rent to that entire body would be liable to ejectment at the suit of such proprietor only in spite of the fact that the other proprietors may be averse to the ejectment of the tenant. On the definition of the word "landlord" as given in s. 4 (11) of the Oudh Rent Act we are of opinion that the ejectment of a tenant contemplated by s. 108 (10) means the ejectment by the landlord, i. e. by the whole body of co-sharers where the plaintiff tenant holds his tenancy from all of them. The landlord of the tenant is the person or persons to whom the rent is payable by the tenant. We have closely read the language of s. 79 of the Agra Tenancy Act (II of 1901). The word used in that section is "landholder" which is defined in s. 4, cl. (5) of that Act and means the person to whom rent is, or but for a contract, express or implied, would be payable. The distinction between this definition and the definition of a landlord in the Oudh Rent Act is merely in words but not in substance, and we think that the Court below was justified in relying upon the decisions of the Allahabad High Court given on the identical question arising under s. 79 of the Agra Tenancy Act, e. g. *Chheda v. Achhu Singh*, I. L. R. 46, All. 690 (1). In our opinion s. 108 of the Oudh Rent Act provides exceptions to the general jurisdiction of the Civil Courts and this case does not fall within the exception contained in s. 108 (10) of the Oudh Rent Act.

We hold that the view of law taken by the lower Appellate Court is correct.

The appeal fails and is dismissed with costs.

B.

Appeal dismissed.

(1) 46 A 690; 84 Ind. Cas. 117; 22 A L J 570; AIR 1924 All. 572; L R 5 A 265 Rev.

ALLAHABAD HIGH COURT

Special Bench

Letters Patent Appeal No. 48 of 1937

September 18, 1939

THOM, C. J., ALLSOP AND GANGA NATH, JJ.
SHIBBA MAL AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

GULAB RAI—PLAINTIFF—RESPONDENT
Partnership Act (IX of 1932), s. 69—Suit for
dissolution by partner of unregistered firm—His
right to decree for accounts, if affected—Accounting
contemplated by s. 69.

If a partner of an unregistered firm sues for the dissolution of partnership, he is entitled to the ordinary decree which the Court passes in such a suit. Provision is made for this decree in O. XX, r. 15, Civil Procedure Code. The right of a partner therefore of an unregistered firm to a decree for accounts in a suit for dissolution remains unaffected by the provisions of s. 69, Partnership Act, in view of the proviso contained in sub-s. (3) thereof. A partner of unregistered firm has a right in a suit for dissolution of partnership to include a claim for accounts also and he need not bring two separate suits for them. *Magan Behari Lal v. Ram Pratap Singh* (1), Overruled.

The only accounting contemplated by s. 69 is the accounting which would be directed in a suit by a plaintiff who is the partner of a registered firm.

L. P. A. from the judgment of Iqbal Ahmad, J., reported in 171 Ind. Cas. 545.

Messrs. B. Malik and S. N. Misra, for the Appellants.

Messrs. A. P. Pandey and J. C. Mukerji, for the Respondent.

Thom, C. J.—This is a defendants' appeal arising out of a suit for dissolution of partnership and rendition of accounts. The appeal is against the order of a learned Single Judge of this Court who disposed of the case in second appeal. In August, 1931, the plaintiff, defendant No. 1, and one Lachman Das entered into a partnership. In November of the same year, Lachman Das left the partnership and one Nanak Ohand came in; in June 1932, Nanak Ohand left the partnership and defendant No. 2 became a partner. Differences arose between defendants Nos. 1 and 2 and the plaintiff, and in consequence the plaintiff filed the present suit for dissolution of the partnership and for accounts. The main defence to the suit was that inasmuch as the partnership was not registered in accordance with law, the plaintiff was not entitled to a decree for accounts in view of the provisions of s. 69, Partnership Act. The suit was decreed by the learned Munsif. In appeal, however, it was dismissed in the lower Appellate Court. The learned Single Judge who heard the

second appeal has restored the decree of the trial Court.

Before us in appeal it was maintained for the defendants that the suit as framed was incompetent inasmuch as in view of the provisions of s. 69 (1), Partnership Act, no suit for accounts by one partner against the other lies where the partnership was not dissolved. Section 69 imposes certain disabilities upon unregistered firms. An unregistered firm cannot in view of the provisions of s. 69 sue a third party on a contract. The section, however, in a proviso makes provision for suits for dissolution of a partnership and for accounts. The proviso is in the following terms:

"(3) The provisions of sub-ss. (1) and (2) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract, but shall not affect

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realize the property of a dissolved firm."

It would appear that the Legislature intended that no disability should be attached to any partner in regard to winding up and accounting as between the partners on dissolution. For the appellants it was maintained, however, that, so far as accounting was concerned, a suit would lie only where the partnership had already been dissolved. If the partnership were not dissolved, it was contended, a suit for dissolution which included a relief for accounts was incompetent at least so far as the claim for accounts was concerned. In support of this proposition, reliance was placed upon the decision in *Magan Behari Lal v. Ram Pratap Singh* (1). A Bench of this Court held in that case that a decree for rendition of accounts could not be granted where the partnership was unregistered because the decree to be granted under O. XX, r. 15, Civil Procedure Code, fell to be modified in view of the provisions of s. 69, Partnership Act. We are unable to agree. In our judgment, the Legislature intended to leave the right of a partner to sue for dissolution and accounts unaffected by the disabilities created by the provisions of s. 69, Partnership Act. It is not disputed that a partner of an unregistered firm in virtue of the above proviso to s. 69 may sue for dissolution of partnership. The proviso in so many words enjoins that the right to sue for dissolution shall remain unaffected. If a partner therefore of an unregistered firm sues for the dissolution of partnership he is entitled to the ordinary

(1) (1939) A L J 405; 181 Ind. Cas. 160; A I R 1939 All. 535; 1 L R (1939) All. 563; 12 R A 183.

decree which the Court passes in such a suit. Provision is made for this decree in O. XX, r. 15, Civil Procedure Code. Rule 15 is in the following terms, viz :

"Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the pay on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken and other acts to be done, as it thinks fit."

We observe from the terms of this provision that it is unnecessary for a partner who seeks dissolution to include a prayer for accounts in his plaint. If the Court grants a preliminary decree for dissolution of partnership then it may in view of the provisions of O. XX, r. 15, Civil Procedure Code, proceed to order the taking of accounts. The right of a partner therefore of an unregistered firm to a decree for accounts in a suit for dissolution remains unaffected by the provisions of s. 69, Partnership Act, in view of the proviso contained in sub-s. (3) thereof. It was maintained for the appellants that the Legislature intended to impose a restriction on partners of unregistered firms who sue for dissolution and that the restriction was the denial of the right to include a claim for accounts in a suit for dissolution. It was admitted that under the terms of the section a partner could file a suit for dissolution and a second suit for accounts. The disability therefore which, it was contended for the appellants, the Legislature intended to place upon the partners of an unregistered firm in regard to their rights to decree for dissolution and rendition of accounts was that instead of bringing one suit they should bring two. We have no hesitation in rejecting this contention. We are satisfied that the Legislature intended nothing so unreasonable. Such a provision would lead simply to a multiplicity of suits and would not operate any real restriction or disability.

In our judgment the intention of the Legislature is plain. It intended that the rights of the partners of an unregistered firm in regard to dissolution of the partnership and accounting were to remain unaffected by the provisions of sub ss. (1) and (2) of s. 69, Partnership Act. It would appear from the judgment of the Bench in the case already referred to, viz. *Magan Behari Lal v. Ram Partap Singh* (1) that the learned Judges who constituted this Bench took the view that in the case of an

unregistered firm the partner who was seeking dissolution and accounts was entitled to a more limited form of accounting than was a partner of a registered firm who had sued for dissolution and accounts under the provisions of O. XX, r. 15, Civil Procedure Code. We are unable to agree with this view which, in our judgment, finds no support in s. 69 or in any other section of the Partnership Act. The only accounting contemplated by s. 69 is the accounting which would be directed in a suit by a plaintiff who is the partner of a registered firm. To that the plaintiff in the present suit is entitled. In the result, the appeal is dismissed with costs.

S.

Appeal dismissed.

ODDH CHIEF COURT

Miscellaneous Appeal No. 24 of 1937

October 11, 1939

THOMAS, C. J. AND RADHA KRISHNA, J.

KISHEN GOPAL—DEFENDANT—

APPELLANT

versus

ABDUL LATIF KHAN AND OTHERS—

PLAINTIFFS AND OTHERS—DEFENDANTS—

RESPONDENTS

Mortgage—Redemption—Difference between redemption by payment in cash and by transfer of mortgaged property—Several co-mortgagors—Entire equity of redemption transferred by some of mortgagors to mortgagee—Effect of—Suit by other mortgagors is one for redemption and governed by Art. 148, Limitation Act (IX of 1908).

There is a material difference between a case where cash is paid in satisfaction of the mortgage debt and where property is transferred in satisfaction thereof. In cases where cash is paid, the moment the money is appropriated, redemption takes place in fact, but where property is transferred, the redemption depends upon whether the title in the property sold in law has passed to the mortgagee or not. Where the satisfaction of a mortgage debt is brought about by transfer of property mortgaged, the mortgage debt is extinguished to the extent to which the transfer is valid. [p. 117, cols. 1 & 2.]

Where there are several co-mortgagors and the entire equity of redemption in the mortgage is transferred to the mortgagee by some only of the co-mortgagors, the possession of the mortgagee as regards other co-mortgagors remains only that of a mortgagee. It therefore follows that a suit by such co-mortgagors would be a suit for redemption and not a suit for possession on payment and would be governed by Art. 148 of the Limitation Act. [p. 119, cols. 1 & 2.]

[Case-law referred to].

The mortgagee who comes into possession of land as a mortgagee is not in a position to deny the rights of any of his mortgagors to redeem the mortgage so long as the equity of redemption or any part of it subsists. [p. 119, col. 2.]

Misc. O. A. against an order of the District Judge of Lucknow, dated March 9, 1937.

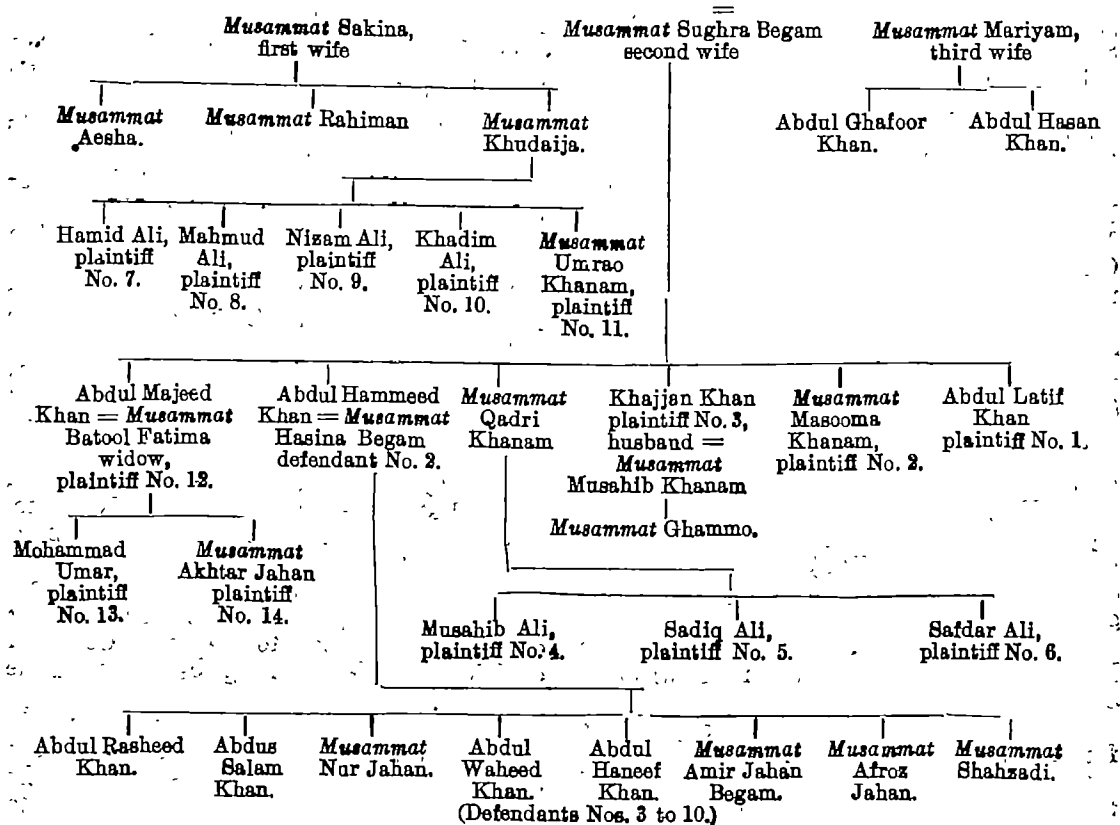
Messrs. P. L. Banerji, H. Husain and Naziruddin, for the Appellant.

Mr. A. Rauf, for Respondents Nos. 1 and 2.

Messrs. M. Wasim, Ali Hasan and A. P. Nigam, for Respondent No. 4.

Judgment—This is an appeal against an order of remand passed by the learned District Judge of Lucknow. In order to appreciate the facts of the case leading up to the present appeal, it is necessary to set forth the following pedigree :

DR. ABDUR RAHMAN KHAN



Dr. Abdur Rahman Khan, mentioned in the above pedigree, was the owner of the property in dispute and two other houses which are not in dispute, in all consisting of three houses, and two shops situated at Aminabad in the city of Lucknow. He mortgaged with possession on September 8, 1884, the entire property belonging to himself to one Shaikh Pir Bakhsh for Rs. 2,500. The names of Abdul Ghafoor Khan, Abdul Majeed Khan, Abdul Hameed Khan and Abdul Hasan Khan, the sons of Dr. Abdur Rahman Khan, under his guardianship, were also added as the executants of the deed. As regards interest, it was agreed that the mortgagor should execute a *sarkhat* in favour of the mortgagee for Rs. 25 per mensem by way of rent and should continue to pay that rent every month. The mortgagor failed to pay the rent stipulated in the *sarkhat*, whereupon the mortgagee with the consent of the mortgagee sold to one

Mangal two houses out of the property mortgaged and the money received as consideration was paid to the mortgagee in respect of the rent that had accumulated and was due to him.

Subsequently on April 13, 1893, the mortgagee assigned his mortgage rights in the property in suit for a sum of Rs. 1,700 in favour of Ram Karan, the predecessor-in-interest of the defendant-appellant.

On December 7, 1894, Abdul Majeed Khan, Abdul Hameed Khan, Sughra Begum on her own behalf and as guardian of Musahib Khanam, Abdul Latif Khan and Masooma Khanam sold the entire property under mortgage to the mortgagee for an ostensible consideration of Rs. 2,850 (*vide* Ex. A-3). Rupees 350 out of the consideration were paid in cash and the rest, i. e. Rs. 2,500 are recited to have been left with the mortgagee as due on the mortgage. Later by a deed of August 12, 1895, (Ex. A-4) Abdul Hasan

and his mother *Musammat Mariyam* in lieu of a sum of Rs. 150 ratified the sale deed of 1894 (Ex. A-3).

The plaintiffs, who are some of the representatives of the original mortgagor, Dr. Abdur Rahman Khan, have brought the present suit for recovery of the property in suit by redemption of the mortgage dated September 8, 1884.

It may be noted here that the plaintiffs Nos. 1 and 2 are Abdul Latif Khan and *Musammat Masooma Khanam* themselves. Plaintiff No. 3 is the representative of *Musammat Musahib Khanam*; plaintiffs Nos. 4 to 11 are the representatives of *Musammat Khudaija Begam* and *Musammat Qadri Khanam*; plaintiffs Nos. 12 to 14 are the representatives of Abdul Majeed Khan and defendants Nos. 2 to 10 are the representatives of Abdul Hameed Khan. Thus all the representatives of the original mortgagor are parties in the suit.

The defendant contested the suit on the ground among others that by the sale deeds dated December 7, 1894, and August 12, 1895 (Exs. A-3 and A-4) he purchased the equity of redemption from all the persons interested as mortgagors and had become the absolute owner of the property mortgaged.

The trial Court framed the following Issues from which other defences will also appear.

1. Is the pedigree given in the plaint so far as it is denied genuine?

2. (a) Was the equity of redemption sold to the defendant No. 1 as alleged in para. 16 of the written statement?

(b) Is the sale binding on plaintiffs as alleged in para. 17 of the written statement?

Was Musahib Khanam a minor at the date of the sale?

3. Is the defendant No. 1 owner of the property in suit by adverse possession?

4. Is the suit barred by limitation?

5. Have the plaintiffs a right of accounting under the deed in suit?

6. Is the shape F. E. X. Y. Z also included in the mortgage in suit?

7. To what relief are the plaintiffs entitled?

On Issues Nos. 1 and 2 the trial Court held that the pedigree was correct and that *Musammat Khudaija Begum* and *Musammat Qadri Khanam*, the two daughters of Dr. Abdur Rahman Khan, who had survived him, were no parties to the deed of 1894 and that *Musammat Masooma Khanam* and Abdul Latif Khan were minors. *Musammat Sughra Begam* purported to sell the pro-

perty as their guardian and, therefore, the sale in view of the decision of their Lordships of the Privy Council in *Imam Bandi v. Mutsaddi* (I. L. R. 45 Cal. 878) (1), was void. As to Musahib Khanam the trial Court held that she was a major and in existence but as she did not join the sale deed it was ineffective against her interest.

On Issues Nos. 3 and 4 it held that the defendant No. 1 and his predecessor had been holding the property adversely for about 40 years and hence the suit was barred by limitation.

On Issue No. 5 it was held that the plaintiffs were not entitled to any accounting.

Issue No. 6 was decided in favour of the defendants.

As a result of the findings on Issues Nos. 3 and 4, the trial Court dismissed the suit.

In appeal the lower Appellate Court agreed with the trial Court in holding that the sale deed of 1894 was not effective against the shares of *Musammat Khudaija Begam*, *Qadri Khanam*, *Masooma Khanam*, *Abdul Latif Khan* and *Musahib Khanam*, but on the question of limitation it held that the suit was governed by Art. 148 of the Indian Limitation Act and was not barred. The appeal was allowed and the case was sent back to the trial Court for decision after determining the shares of the plaintiffs.

The defendant No. 1 has come up in appeal to this Court against the said order and the sole point argued is that on the facts of the case the Article applicable to the suit is Art. 144 and Art. 148 of the Indian Limitation Act. The contention of the learned Counsel for the appellant is that the effect of the sale deed of 1894 was the redemption of the mortgage of 1884 in its entirety even though the sale of the property to the mortgagee may not be effective to its entire extent, that after the sale of 1894 there was a change in the nature of the possession of the mortgage and his possession thereafter was adverse and the Article applicable to the present suit was Art. 144. On the other hand, the case of the respondents is that the effect of the sale of 1894 was a transfer of a portion of the equity of redemption to the mortgagee and the mortgage subsisted in respect of the shares of Abdul Latif Khan and Masooma Khanam, plaintiffs Nos. 1 and 2 and *Musammat*

(1) 45 O 878; 47 Ind. Cas. 513; 35 M L J 422; 16 A L J 800; 24 M L T 330; 28 O L J 403; 23 O W N 50; 5 P L W 278; 20 Bom. L R 1022, (1919) M W N 91; 9 L W 518; 45 I A 73; A I R 1918 P O 11 (P O).

Khundaija Begum and *Musammât Qadri Khanam* and *Musammât Musahib Khanam*, the predecessors-in-interest of the plaintiffs Nos. 3 to 11 and no redemption of the mortgage as a whole took place.

On the nature and scope of the transaction of sale of 1894 (Ex. A-3) it was argued by the Counsel for the appellant that on a proper interpretation of it the transaction was not a sale of mere equity of redemption and that it consisted of two separate transactions, one the redemption of mortgage on payment of Rs. 2,500 and the other the sale of the mortgaged property. We may note at once that this is a new case and was not put forward on behalf of the defendant in his written statement (*vide* paras. 16 and 17 of the written statement). A perusal of these paragraphs will show that it was not the case of the defendant that any redemption of the mortgage had taken place in fact or was contemplated as a transaction precedent to the sale. The case put forward was that as the ownership in property also vested in the mortgagee by virtue of the sale of 1894 he became the absolute owner of it. It would be too much to allow the appellant to set up a new case now outside the pleadings.

The learned District Judge observed in his judgment as regards this argument as follows:

"The theory of redemption in the case before me is only a fiction. Full ownership of the property was by the mortgage divided into two parts: the equity of redemption and the rights of the mortgagee. What the vendors did in fact (it makes no difference what were the terms of the sale deed since these terms did not come to the knowledge of the appellants) was to transfer the whole equity of redemption to the mortgagee though it did not belong to them."

We agree with his view that what the vendors did in fact was to transfer the equity of redemption. We have ourselves read the deed very carefully. In our view the ostensible consideration of the deed was fixed at Rs. 2,850 only for the purposes of fixing the value of the equity of redemption and Rs. 2,500 shown as left with the mortgagee was not intended to bring about a redemption in fact. This sum of Rs. 2,500 was not paid in cash by the vendors. There is a material difference between a case where cash is paid in satisfaction of the mortgage debt and where property is transferred in satisfaction thereof. In cases where cash is paid, the moment the money is appropriated, redemption takes place in fact, but where property is transferred, the redemption depends upon whether the title in the pro-

perty sold in law has passed to the mortgagee or not. In our view where the satisfaction of a mortgage debt is brought about by transfer of property mortgaged, the mortgage debt is extinguished to the extent to which the transfer is valid. In the present case the transfer was not valid to the extent of the share of the plaintiffs Nos. 1 and 2 and the predecessors-in-interest of the plaintiffs Nos. 3 to 11 and to the extent of their shares the mortgage was not satisfied.

On the main question of law, several cases were cited by the learned Counsel for the appellant and we proceed to consider them.

Among the cases cited on behalf of the appellant in support of his contention, there were cases where the transfer of the equity of redemption by the sole mortgagor, or where there were more mortgagors than one by all the mortgagors, was invalid in law and inoperative. In such cases although the transfer of the equity of redemption failed, yet it was held that there was a change in the character of the possession of the mortgagee who after that held under a claim of full proprietorship. These cases may be dismissed from consideration as their decision may be justified on the ground that it is open to the mortgagee and all the mortgagors concerned acting together, to agree among themselves as to what the character of possession held by the mortgagee would be in future.

The cases *Karnam Kandasami Pillai v. Chinnabba alias Subbaroya Pillai* (L. L. R. 44 Madras, 253) (2), *Mahendra Bahadur Singh v. Chandrapal Singh* (24 O. C. 155) (3) and *Sheo Nath and another v. Babu Tulsipat Ram* (A. I. R. 1925 Oudh 385), (4), cited by the appellant's Counsel belong to this category and need not be considered. In the present case the plaintiffs Nos. 1 and 2 or the predecessors-in-interest of the plaintiffs Nos. 3 to 11 were no parties to the sale and it is admitted that their interests did not pass by it. There is no evidence to indicate that the plaintiffs or their predecessors-in-interest ever exhibited any acquiescence on their part amounting to a release of their interest in the equity of redemption or any consent, express or implied, to the change in the mortgagee's possession from a mere mortgagee to a full owner.

(2) 44 M 253; 62 Ind. Cas. 603; 40 M L J 105; (1921) M W N 1; 29 M L T 187; 13 L W 423.

(3) 24 O C 155; 63 Ind. Cas. 284; 8 O L J 622.

(4) A I R 1925 Oudh 385; 87 Ind. Cas. 188; 12 O L J 139.

In *Makhdam Khan v. Musammam Jadi and others* (9 Oudh Cases 91) (5), it was held that when one of several co-mortgagors redeems the entire property, it cannot be said that he has the same rights and stands exactly in the same position as the mortgagee with regard to the share of his co-mortgagors. The debt in the case of such a payment is entirely discharged and the mortgage is redeemed; and the redeeming co-mortgagor has no right in the shares of his co-mortgagors other than that of a charge on those shares for the money paid for redemption and the proper costs incurred in so redeeming. This view is no longer law in view of s. 92 of the Transfer of Property Act as amended in 1929. This section is new and was inserted by the Amending Act XX of 1929. The effect of this section read with s. 91 is that although a co-mortgagor alone has a right to redeem the entire mortgage, yet on redemption he comes to occupy the position of a mortgagee as regards the share of the non-redeeming co-mortgagor.

So far as this Court is concerned, it has been finally held that the present s. 92 of the Transfer of Property Act has retrospective effect and that the redeeming co-mortgagor stands in the position of a mortgagee to the non-redeeming mortgagor *qua* his share and has as regards redemption foreclosure or sale of such property, the same rights as the mortgagee had against the mortgagors.

Great reliance was placed on two cases particularly, i. e. *Mata Din v. Sheikh Ahmad Ali*, L. R. 39 I. A., p. 49 at 55 = 15 O. C. 49 (6) and *Janki Shah and others v. S. Mohammad Abbas and others*, (25 O. C. 245) (7). We shall consider these cases at some length.

Mata Din v. Sheikh Ahmad Ali, L. R. 39 I. A. p. 49 (6).

The facts of this case were that a mortgage deed with possession of the property in dispute was executed in 1885. In this mortgage deed the important thing to note is that there was a condition by which redemption was not allowed within ten years. Two years after, the mortgagor died leaving as his heirs four grandsons, one of whom was a minor and three majors. The three major grandsons acting for

themselves and as guardian of their minor brother sold the mortgaged property to the mortgagee in 1889. A suit was instituted by the fourth grandson, who was minor at the time of the sale deed, for redemption in 1905 in disregard of the sale deed. Their Lordships of the Privy Council held that the right of redemption did not accrue till 1885, i. e. ten years calculated from 1885, and the suit was well within limitation. Their Lordships observed that the possession of the mortgagee had not become adverse to the plaintiff. It would be observed that on the view taken by their Lordships no question of the application of Art. 144, as distinguished from Art. 148, arose. The point arising in the present case did not arise directly before their Lordships of the Privy Council and they did not hold that possession of the mortgagee in the circumstances of the case had become adverse from the date of the sale. Their Lordships probably were merely dealing with the argument raised on behalf of the plaintiff in that case that at the most the possession of the mortgagee could become adverse after the expiry of the period fixed for redemption and not earlier.

Janki Shah and others v. S. Mohammad Abbas and others, 25 Oudh Cases 245 (7).

The facts of this case were that two brothers, Mohammad Abbas and Mohammad Husain, mortgaged certain property by way of conditional sale to one Ghasite in 1880. In 1882 Mohammad Husain alone sold the entire property to Ghasite, the mortgagee, claiming that he alone was the owner of the property. In 1895 the heirs of Ghasite mortgagee, other than his widow, sold a 14 annas 3 pie share in the property mortgaged to Samsam Ali with a declaration that they were the full owners of the share of the property transferred by the deed. The plaintiff Mohammad Abbas, and his transferee brought a suit in 1917 to redeem half the mortgaged property and the main question raised in defence was that the suit was barred by the provisions of Art. 134 of the Indian Limitation Act because it was brought more than 12 years after 1895 when Ghasite's heirs transferred the property to Samsam Ali as full owners. In second appeal arising out of that case the late Court of the Judicial Commissioner of Oudh set aside the decrees passed by the two lower Courts and remanded the case for a decision whether Samsam Ali had purchased in good faith without notice of

(5) 9 O C 91.

(6) 39 I A 49 at p 55; 13 Ind. Cas. 976; 15 O C 49; 16 O W N 338; 11 M L T 145; (1912) M W N 183; 9 A L J 215; 15 C L J 270; 14 Bom. L R 192; 34 A 213; 23 M L J 6 (P. O.).

(7) 25 O C 245; 70 Ind. Cas. 983; A I R 1923 Oudh 50.

the mortgage of 1880. This was done apparently on the finding that Art. 134 applied to the case. After remand the Court of first instance held in favour of the defendants and dismissed the suit. On appeal the first Appellate Court held that Samsam Ali had constructive notice of the mortgage and if he had acted with proper care and caution, he would have discovered that Ghasite was only a mortgagee of half the property and not full owner. The plaintiff's suit for redemption was decreed.

In second appeal, the late Court of the Judicial Commissioner of Oudh in view of the previous order of remand held that it was not open to the appellants to raise again the question of the interpretation of Art. 134 which was decided against them by that order. On this view the appeal was liable to be dismissed but the learned Judicial Commissioners went on further to consider the alternative case that Art. 144 barred the suit inasmuch to Ghasite, the original mortgagee, held the property adversely from the year 1882, that is the sale in his favour by one of the two mortgagors. They held that from the time of that sale deed Ghasite was holding adversely to Mohammad Abbas, the plaintiff on the ground that by virtue of that sale deed the mortgage had become extinct. A perusal of this judgment shows that the alternative point raised before the learned Judicial Commissioners was not properly argued. There is no adequate discussion of this point. The decision is based really upon an assumption that the effect of the sale deed was to extinguish the mortgage in its entirety. No case-law was cited. The point arose only incidentally, the decision of which was not required for the purposes of the case. In our view this case stands by itself and no other case has been cited before us which supports the view taken in this case. We consider that this decision on the point under discussion does not lay down correct law.

In our opinion the correct law is that where there are several co-mortgagors and the entire equity of redemption in the mortgage is transferred to the mortgagee by some only of the co-mortgagors, the possession of the mortgagee as regards other co-mortgagors remains only that of a mortgagee. If this view of ours is correct, then it follows that a suit by such co-mortgagors would be a suit for redemption and not a suit for possession on pay-

ment as urged by the appellant's Counsel and would be governed by Art. 148 of the Indian Limitation Act.

In our opinion the sale of 1894, although purporting to be in respect of the entire equity of redemption as against the plaintiffs Nos. 1 and 2 and predecessors of the plaintiffs Nos. 3 to 11, who were no parties to it, was a nullity and did not affect their share in it at all. The effect of the sale deed was to bring about a sale of the share in the equity of redemption only of those mortgagors who were properly parties to it and to that extent the mortgagee became full owner of the property, but as regards the shares of the plaintiffs Nos. 1 and 2 and predecessors of plaintiffs Nos. 3 to 11, his position as a mortgagee did not undergo any change. In this view we are amply supported by a decision of their Lordships of the Privy Council in *Khairajmal and others v. Daim and others* (L. R. 32 I. A. p. 23) (8) and a Bench decision of this Court in *Mst. Gujrati Kunwar and others v. Bhagwatidin Singh and others* (A. I. R. 1930 Oudh, p. 17) (9). In our opinion the mortgagee who comes into possession of land as a mortgagee is not in a position to deny the rights of any of his mortgagors to redeem the mortgage so long as the equity of redemption or any part of it subsists. The share in the equity of redemption of the plaintiffs Nos. 1 and 2 and predecessors-in-interest of the plaintiffs Nos. 3 to 11 subsisted in spite of the sale of 1894.

We are, therefore, of opinion that the judgment of the learned District Judge is correct. The trial Court will proceed to dispose of the suit after determining the shares of the plaintiffs, who have been found entitled to redeem their shares.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(8) 32 I A 23; 32 C 296; 9 C W N 201; 2 A L J 71; 7 Bom. L R 1; 1 C L J 584; 8 Sar. 734 (P O).

(9) A I R 1930 Oudh 17; 118 Ind. Cas. 803; 13 R D 197; Ind. Rul. (1929) Oudh 472.

RANGOON HIGH COURT

Criminal Revisions Nos. 125-B and 126-B
of 1939

June 6, 1939

MYA BU, J.

MAUNG KAN—APPLICANT

versus

MAUNG PO TOK—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 145,

146.—Decree-holder obtaining symbolical possession in execution of decree upon delivery warrant—Judgment-debtor attempting forcible entry within two months—Application under s. 145 by decree-holder—Magistrate by order under s. 148 (1) referring back parties to Civil Court—Propriety of—Civil Procedure Code (Act V of 1908), O XXI, r. 35—Delivery of possession of land includes crops standing thereon.

Where in execution of a decree the Court orders delivery of possession of judgment-debtor's property to the decree-holder and the Officer of Court executing the delivery warrant gives effect to the order and since then the decree-holder is in possession both in fact and in law of the property in question but the judgment-debtor within two months of the execution of such warrant attempts forcible entry upon the land whereupon the decree-holder files a petition in Criminal Court under s. 145, Criminal Procedure Code, the Magistrate cannot go behind the decision of the Civil Court in the matter and cannot ignore the decree even though the Court passing the decree had no jurisdiction over the land. It is immaterial that the delivery of possession is symbolical only. In the enquiry under s. 145, there is only one conclusion possible for the Magistrate to arrive at with reference to the land, that is, that it was in the possession of the applicant on the date of the order passed under sub-s. (1) of s. 145. Even assuming that the applicant (decree-holder) had been forcibly dispossessed at any time after the execution of the delivery order, the first proviso to sub-s. (4) will operate in favour of the applicant. Consequently, when in such circumstances the Magistrate passes an order under s. 148 (1) referring the parties back to Civil Court for the determination of their rights, the order is highly improper and opposed to all principles of justice. *Akhoy Mondal v. Basu Rai* (1) and *Atul Hazrah v. Uma Charan* (3), relied on.

Where the decree-holder is put in possession of land, such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land. *Aung Baw v. Tun Gawn* (2) and *Atul Hazrah v. Uma Charan* (3), relied on.

Or. Rs. for review of order of the Sub-Divisional Special Power Magistrate, Paungde, dated January 17, 1939.

Order.—This is an application for revision of certain orders passed by the Sub-Divisional Magistrate of Paungde purporting to act under ss. 145 and 146, Criminal Procedure Code. The proceedings before the Sub-Divisional Magistrate were initiated by a petition filed by the applicant against the respondent and five others who are described as the respondent's men. The facts that led to the filing of the petition were as follows: In Civil Regular No. 7 of 1938 of the Sub-Divisional Court of Paungde, the applicant and his wife obtained a decree against the respondent and his wife for recovery of possession of a piece of paddy land, being holding No. 109 of Mogyobyit Kwin, Paungde

Township, measuring 10·53 acres. That decree was passed on September 19, 1938. In execution of the decree the Sub-Divisional Court on October 19, 1938, passed an order for delivery of possession to the applicant and his wife. Effect was given to this order by the process-server of the Court executing the delivery warrant on October 26, 1938, by affixing a copy of the same on the land and by proclamation by beat of gong in the locality concerned. On November 24, however, the respondent and his men attempted to effect forcible entry upon the land in question, with the result that two days later, the applicant filed his petition in the Court of the Sub-Divisional Magistrate for action under s. 145, Criminal Procedure Code. The bases of the application were that since the execution of the delivery warrant issued by the Sub-Divisional Court, the petitioner had been in possession both in fact and in law of the land in question, and that on November 24, the respondent and his men attempted to effect forcible entry for the purpose of reaping the crops standing on the land, in consequence of which there was a likelihood of a breach of the peace concerning the land in question. On the day of the filing of the petition, the Sub-Divisional Magistrate passed a preliminary order directing the issue of a prohibitory order to both parties and of notices to the respondent and his men to appear before him on November 29, and to put in written statements of their claims as respects the fact of actual possession of the land. The prohibitory order was ignored by the respondent and his men, who, in execution of their threat, went on reaping the standing crops on the land, and it appears that by November 29, all the crops had been reaped.

When the matter came before the Sub-Divisional Magistrate on November 29, arrangement was made to keep the produce in the hands of the headman and a villager of Leusu village on their signing a bond for the production of 550 baskets of paddy when required. The enquiry then proceeded in the course of which each party contested the claim of the other as to the factum of actual possession and also as to who is entitled to reap the crops. In the end, however, the learned Sub-Divisional Magistrate found it, in the circumstances of the case, impossible for him to come to any "rational decision as to which party were in actual possession of the crops and the land." He, therefore, decided to proceed

to act under s. 146 and appointed the Bailiff of his Court "to take charge of the properties and to credit to the Court all the moneys or proceeds of the lands." Having passed that order, the learned Sub-Divisional Magistrate also instructed the Bailiff "to deduct incidental expenses regarding cultivation, reaping, etc., from the sum realized." The Bailiff not only carried out this instruction, but in his report of his having taken custody of the paddy and of his having sold the same, mentioned that he had paid to various persons to whom various sums were due for such incidental expenses. It is quite clear that the payments so made were unauthorized. It is also clear that the Magistrate's instruction to the Bailiff to deduct incidental expenses regarding cultivation, reaping, etc., from the sum realized is quite improper, because although it appears to be common ground that the crops on the land had been raised by the respondent, the question as to who is entitled to the crops or to the possession of the crops could not arise separately from or independently of the main bone of contention between the parties, *viz.*, who is entitled to the possession of the land. While the Sub-Divisional Magistrate admitted that he was not able to decide the question concerning the crops he obviously had no right to determine which of the parties was liable to defray the expenses of cultivation.

In the face of the decree of the Civil Court in favour of the applicant and his wife, the order of the Sub-Divisional Magistrate referring the parties to the Civil Court for the determination of their rights under s. 146 (1) is highly improper. So far as the land is concerned, it is absurd to think that the parties should again fight out in a Civil Court the question as to who is entitled to the possession of the land which the Civil Court had not only decreed in favour of the applicant and his wife but which the Civil Court had already enforced by the execution of its delivery of warrant. When a decree is *inter partes*, it is immaterial whether the delivery of possession made under that decree is actual or merely symbolical: see *Akhoy Mondal v. Basu Rai* (1), in which it was laid down that in a proceeding between the parties to a civil decree under s. 145, Criminal Procedure Code, the Magistrate could not go behind the decision of the Civil Court in the matter and could not ignore the decree even

though the Court passing the decree had no jurisdiction over the land and it was immaterial that the delivery of possession was symbolical only. Therefore in the enquiry under s. 145, there was only one conclusion possible for the learned Sub-Divisional Magistrate to arrive at with reference to the land, that is, that it was in the possession of the applicant on the date of the order passed under sub-s. (1). Even assuming that the applicant had been forcibly dispossessed at any time after the execution of the delivery order of the Sub-Divisional Court, the first proviso to sub-s. (4) will operate in favour of the applicant, as such dispossession must have taken place within two months next before the date of the order under sub-s. (1). I hold, therefore, that as regards the land the learned Sub-Divisional Magistrate's order is contrary to all principles of justice. My finding is the same as regards the crops or the produce also. Where the decree-holder is put in possession of land, such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land: see *Aung Baw v. Tun Gaung* (2). I respectfully adopt the observation of Chitty and Walmsley, JJ. in *Atul Hazrah v. Uma Charan* (3):

"It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession against him by a Civil Court and in a criminal proceeding, to assert that possession and by force of the order of the Magistrate, drive the decree-holder.....back to the Civil Court for a further declaration of his rights."

The order of the Sub-Divisional Magistrate of Paungde dated January 17, 1939, is set aside and in its stead it is ordered that the learned Sub-Divisional Magistrate declare that the applicant was at the date of the order under s. 145 (1), Criminal Procedure Code, in possession of the land, including the standing crops, and declaring the applicant to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding of all disturbance of such possession until such eviction. The Sub-Divisional Magistrate will take necessary steps to call into the custody of the Court the net sale proceeds of the paddy (*i. e.* sale proceeds less the Bailiff's commission) and to deliver the same to the applicant.

D.

Order accordingly.

(1) 3 L B R 129.

(2) 20 O W N 796; 33 Ind. Cas. 822; A I R 1916 Cal. 339; 17 Cr. L J 182; 23 O L J 555.

(3) 27 O W N 267; 73 Ind. Cas. 53; A I R 1923 Cal. 176; 37 O L J 256; 24 Cr. L J 517.

LAHORE HIGH COURT

Civil Revision Petition No. 192 of 1939

June 26, 1939

RAM LALL, J.

PREM PARKASH SHARMA—PLAINTIFF—
—PETITIONER

versus

FEDERAL INDIA ASSURANCE CO., LTD.,
DELHI—DEFENDANT—RESPONDENT*Contract—Contract of guarantee—Contract held not
one of guarantee.*

Relevant clauses in a contract between an insurance company and its employee were as follows:— that he should get Rs. 125 per mensem as salary. Subsequent increment was to be proportionate to the increase of business, the basis of calculation being one and half lacs. That he was expected to complete a business of Rupees one and half lacs during the first year which was to increase year by year with the expansion of organization:

Held, that this could not be construed as a contract of guarantee. The securing of business was not a condition precedent to the accrual of salary.

O. R. P. from the decree of the Judge, Small Cause Court, Lahore, dated January 11, 1939.

Mr. Mukand Lal Puri, for the Petitioner.

Messrs. Jogan Nath Aggarwal and A. N. Khanna, for the Respondent.

Order.—Prem Parkash Sharma brought a suit for the recovery of Rs. 428 on account of salary due and house rent against the Federal India Assurance Company, Limited, in the Court of the Small Cause Judge, Lahore. The allegation was that the plaintiff was appointed a Branch Secretary on a salary of Rs. 125 per mensem and that he was to get free residential quarters. He claimed that he worked with the defendant company from June 20, 1938, till September 30, 1938, for which Rs. 416 was due as salary and he also claimed Rs. 20 per mensem as house rent. After giving a credit for the sum of Rs. 55 received he claimed a sum of Rs. 428. The defence was that the plaintiff had been appointed a servant of the Company on a salary of Rs. 125 a month subject to the condition that he was to complete business of the value of Rs. 1,50,000 during the first year and that as the plaintiff did not secure any business for the Company, he is not entitled to the salary. So far as the claim of house rent is concerned, it was stated—and there is nothing to the contrary—that quarters were available in the offices of the Company and these the plaintiff could have used if he had chosen to. The Judge, Small Cause Court, held that the contract between the parties was that salary would only be paid

if business to the extent of Rs. 1,50,000 was secured during the first year and as this had not been done and as the claim for house rent was not admissible, the suit brought was dismissed with costs. A revision petition has been filed by Mr. Mukand Lal Puri and the main contention raised is that on a proper construction of the contract, there was no such condition precedent as has been assumed by the learned Judge. Small Cause Court before the salary became due. The expectation of the employer that an employee will secure business is not an essential part of the contract but is merely a hope and had this not been so, the contract would clearly have been expressed as a contract of guarantee. Relevant clauses in the contract are cls. (2) and (5) which are as follows:

"2. That he should get Rs. 125 per mensem as salary. Subsequent increment shall be proportionate to the increase of business, the basis of calculation being one and half lacs.

5. That he is expected to complete a business of Rupees one and half lacs during the first year which is to increase year by year with the expansion of organization."

It appears to me that there is considerable force in the contention of Mr. Mukand Lal Puri that this cannot be construed into a contract of guarantee. If it be so construed, no salary will be payable if the agent or servant secured business to any extent short of Rs. one and half lacs. Secondly, no salary could be found to be due till after the expiry of the first year because it could not be known till the end of the year what was the amount of business secured by this servant. Thirdly, the word used is that he is expected to complete a certain amount of business, not that he is required to do so. The securing of business for the Company would depend partly on the efforts of the employee and partly on the facilities that the Company made available to the employee. In these circumstances it is difficult to find that the word 'expected' makes this contract into one of guarantee. It is, in my opinion, reasonable to construe this clause to mean that this amount of business to be secured by him has reference to the overriding commission and the renewal commission that he was to get on the business secured by him, and in this aspect, it is more in the nature of inducement to the plaintiff to enter into the service of the Company.

Then it was urged that there was evidence which apparently (though not clearly) the trial Judge believed to the effect that the plaintiff had not done any work for

the Company. There is the statement of the plaintiff himself and of his father Charanjiv Lal, P. W. No. 1, that the plaintiff had been working for about two months in the Head Office at Lahore doing organization work. If a servant does not work or refuses to work it is obvious that he is not entitled to any salary but it appears to me to be clear that this was not the position that the Company ever took up. Exhibit D-1 is a receipt for a sum of Rs. 120 granted by the plaintiff to the Company as part payment of the salary for the months of June and July. This receipt is dated August 18, 1938, and it is clear that up to that date the Company was not taking up the position that the plaintiff was a servant who had refused to work and therefore was not entitled to any salary. After August 18, there is evidence that the plaintiff went to Ferozepore but apparently he was unsuccessful in securing any business for the Company. There is nothing to show that he was not working for the Company till September 30, 1938. In this view of the matter it appears to me that he is entitled to salary at the rate of Rs. 125 per mensem for three months and ten days or Rs. 416 in all. Out of this he has received Rs. 175 on account of salary, therefore a sum of Rs. 241 is still due to him. I am in agreement with the Court below that nothing is due to him on account of rent as free residential quarters were available to him and there is no evidence that he paid any rent. In these circumstances, I pass a decree for Rs. 241 in favour of the plaintiff and to that extent accept this petition for revision. In view of the partial success, I leave the parties to bear their own costs throughout.

D. *Petition partly allowed.*

PATNA HIGH COURT

Letters Patent Appeal No. 12 of 1939

September 12, 1939

HARRIES, C. J. AND FAZL ALI, J.

BULAK RAM AND ANOTHER—DEFENDANTS

—APPELLANTS

versus

GANGA BISHUN CHAUDHURI—

PLAINTIFF—RESPONDENT

Specific Relief Act (I of 1877), s. 39—Suit for declaration that document is void—Prayer for cancellation, if essential—Court, whether can order cancellation without such prayer.

A plaintiff may bring a suit for a declaration that a document is void without seeking its cancellation, and if he does so, it is open to the Court though there is no prayer for it, to order the

document to be delivered up and cancelled. The wording of s. 39, Specific Relief Act, suggests that the Court may order cancellation, though there is no specific prayer for it, *Kattiyā Pillai v. Ramaswami Pillai* (1) and *Kalu Ram v. Babu Lal* (2), relied on.

A suit for a declaration that a certain mortgage, purporting to have been executed by the plaintiff, was a forged document and of no legal effect, and also for an injunction restraining the defendants from ever enforcing their supposed rights under such document, can be treated as a suit for a declaration simpliciter under s. 39, Specific Relief Act, in spite of the prayer for an injunction and the Court can in its discretion order the document to be delivered up and cancelled.

L. P. A. from a decision of the Hon'ble Mr. Justice S. P. Varma, dated February 10, 1939.

Messrs. S. Mehdi Imam, Baldeva Sahay, and T. K. Prasad, for the Appellants.

Messrs. B. N. Mitter and Ajit Kumar Mitter, for the Respondent.

HARRIES, C. J.—This is a Letters Patent Appeal from a judgment of Varma, J., in a second appeal.

The plaintiff-respondent brought a suit in the Court of the Munsif for a declaration that a certain mortgage, purporting to have been executed by him, was a forged document and of no legal effect. He also prayed for an injunction restraining the defendant from ever enforcing their supposed rights under such document. The learned Munsif came to the conclusion that the mortgage was a genuine one and dismissed the suit; but on appeal, the lower Appellate Court held that the document was a forgery and granted the plaintiff the declaration sought for and the injunction. The defendants preferred a second appeal to this Court, but that appeal was dismissed with costs by Varma, J., hence this Letters Patent Appeal.

It has been strenuously argued on behalf of the defendant-appellants by Mr. Mehdi Imam that the decision of the learned Single Judge cannot be sustained. It is argued that the learned Single Judge treated this suit as one under s. 42 of the Specific Relief Act. It is said that it was not a suit falling within that section and consequently it should have been dismissed.

Stress has been laid upon the form of reliefs sought by the plaintiff, and it is necessary to set them out *in extenso*. The reliefs were:

(1) On determining the above fact it may be held by the Court that the fraudulent mortgage bond dated July 10, 1935, has never been executed

by the plaintiff and the aforesaid fraudulent deed forged, fraudulent, illegal and without exchange of equivalence and which is and cannot be binding upon the plaintiff and on his property.

(2) After determining the Relief No. 1 the defendants may be prohibited for ever by issuing an order or injunction to enforce the said fraudulent mortgage bond.

(3) The costs of this suit with interest till the date of realisation may be awarded to the plaintiff against the person and property of the defendants.

(4) Any other reliefs, besides the above to which, in the opinion of the Court, the plaintiff be deemed entitled, may be awarded to the plaintiff.

As pointed out by Varma, J., the translation of the reliefs is not very happily worded but there is no difficulty in understanding the nature of the reliefs sought.

The first relief is clearly for a declaration that a certain mortgage bond was a forged document creating no rights whatever in the property alleged to have been mortgaged. In short, it is a prayer for a declaration that the mortgage was null and void and not binding upon the plaintiff or his property.

It has been contended by Counsel for the appellants that such a declaration cannot be sought under s. 42 of the Specific Relief Act. That section provides that—

"Any person entitled to any legal character, or to any rights as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief..."

The argument for the appellants is that what the plaintiff was asking for in this suit was not a declaration that he was entitled to a legal character to any right in property but rather a declaration that a certain instrument was null and void. On behalf of the plaintiff-respondent it is said that what the plaintiff is really asking for is a declaration that he is the owner of the property alleged to have been mortgaged free of all encumbrance. In both the Courts below and before the learned Single Judge, the case seems to have been argued as a case under s. 42, Specific Relief Act. It is unnecessary to consider whether or not this declaration can properly be brought within s. 42 of the Specific Relief Act because clearly it can be a claim for a declaration falling within s. 39, Specific Relief Act. This latter section deals with suits for declaration that documents are void or voidable. Section 39 is in these terms:

"Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its dis-

cretion so adjudge it and order it to be delivered up and cancelled..."

The declaration prayed for in this suit is, as I have said, in effect a declaration that the mortgage bond is forged and fraudulent and void. It is, therefore, a declaration falling within the ambit of s. 39, Specific Relief Act. It has been argued, however, that the suit cannot be regarded as a suit seeking a declaration under s. 39 of the Act. because consequential relief for an injunction was sought and no consequential relief by way of a cancellation of the document is prayed for.

A plaintiff may bring a suit for a declaration that a document is void without seeking its cancellation, and if he does so, it is open to the Court though there is no prayer for it to order the document to be delivered up and cancelled. The wording of the section suggests that the Court may order cancellation, though there is no specific prayer for it. This has been expressly held in a Division Bench case, *Kattiya Pillai v. Ramaswamia Pillai* (1) and in a Full Bench case of five Judges, *Kalu Ram v. Babu Lal* (2). At p. 820 of this latter case, the learned Judge observed:—

"The illustrations to the section make it obvious that the relief is available even to persons other than parties to an instrument, and in respect of both void and voidable instruments. It is equally clear that a plaintiff need only ask for the instrument to be adjudged void or voidable and need not in express terms ask for it to be delivered up and cancelled. Even though no relief for cancellation is asked for, a Court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it merely adjudged void or voidable would not be adequate for his purpose."

In the present case there is in substance a prayer that this document be declared void. The consequential relief asks for, namely, an injunction is not a very appropriate and satisfactory relief, and in my view it is unnecessary to grant the plaintiff an injunction. Even if the plaintiff had only applied for a mere declaration, it would still have been open to the Court to order this document to be delivered up and cancelled. The suit can be treated as a suit for a declaration simpliciter under s. 39 and the Court can in its discretion order the document to be delivered up and cancelled.

(1) A.I.R. 1929 Mad. 306; 119 Ind. Cas. 35; (1929) M.W.N. 286; 29 L.W. 584; 56 M.L.J. 384; Ind. Rul. (1929) Mad. 667.

(2) 54 A. 812 at p. 820; 139 Ind. Cas. 37; (1933) A.L.J. 684; A.I.R. 1933 All. 485; Ind. Rul. (1933) All. 518 (F.B.).

The findings of the lower Appellate Court are clear, that this document is a forgery and is, therefore, void. It is still in the hands of the defendants and the plaintiff must have a fear that it may be used against him. In those circumstances, it appears to me that this is a case where the plaintiff should not only have his declaration but the defendants should also be ordered to deliver up the document for cancellation. The document was required by law to be registered, and accordingly notice must be sent to the Registrar of the cancellation of the document.

The result, therefore, is that this appeal substantially fails. It is true that the learned Single Judge upheld both the declaration and the injunction, and I am of opinion that the remedy by way of injunction is inappropriate. However, in the exercise of the discretion of the Court, I am of opinion that an order calling upon the defendants to deliver up this document for cancellation and that it should be cancelled upon delivery, should be substituted for the injunction. The form of declaration will remain and the order as to cancellation substituted for the injunction. With that variation this appeal is dismissed.

It was argued by Mr. Mehdi Imam that as the decree was being varied to some extent the appellants should not be made to pay the costs. There is no merit whatsoever in the appeal and as it has been held that the defendants are holding a forged document, I see no reason whatsoever for depriving the respondent, who has substantially succeeded of his costs in this Court. The respondent will, therefore, have the costs of this appeal.

Fazl Ali, J.—I agree.

S.

Decree varied.

LAHORE HIGH COURT

Civil Revision No. 393 of 1939

April 21, 1939

TEK CHAND AND ABDUL RASHID, JJ.

GANESH DATTA AND ANOTHER—

DEFENDANTS—PETITIONERS

versus

MODEL TOWN SOCIETY, LTD.—DECREE-HOLDER AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 144—Sale confirmed but subsequently set aside—Application by judgment-debtor for mesne profits whether costs under s. 144.

Section 144, Civil Procedure Code, contemplates restitution, where, and in so far as, a decree has

been varied or reversed. An order of the executing Court confirming the sale, which is subsequently set aside does not amount to a decree, and, therefore, an application for mesne profits payable in consequence of that order cannot be made under s. 144. *Ram Ratan Prasad v. Banarsi Lal* (1), relied on.

C. R. case referred by Tek Chand, J. in C. R. No. 106 of 1938, dated February 28, 1939.

Mr. Labh Singh, for the Petitioners.

Messrs. Manohar Lal Sachadeva, J. G. Sethi and Girdhari Lal, for the Respondents.

Tek Chand, J.—This is an appeal from the order of Mr. Joshua, Subordinate Judge, Lahore, dated August 30, 1938, passed in an application purporting to be under s. 151/144, Civil Procedure Code, presented by the sons of the deceased judgment-debtor, for mesne profits at Rs. 50 per mensem from July 3, 1936, to the date of the application (April 21, 1938) and such further date on which possession of the property in dispute is handed over to them. The relevant facts are that on March 22, 1933, the Model Town Society obtained a decree for Rs. 12,000 against *Rai Sahib Jinda Ram*, carrying future interest at 9 per cent. per annum. In execution of this decree, the judgment-debtor's house was sold by public auction to Mr. A. R. Davar on April 15, 1935. On May 22, 1936, the sale was confirmed by the executing Court and on June 8, 1936, the sum of Rs. 7,834-8-0 out of the purchase price was paid to the decree-holder (Model Town Society). The usual sale-certificate was issued in favour of the auction-purchaser (Mr. Davar) and he obtained possession of the house on July 3, 1936. In the meantime, the judgment-debtor had appealed to the High Court against the order of the executing Court confirming the sale. This appeal was accepted by Jai Lal, J. sitting in Single Bench, on December 8, 1936. He set aside the execution sale in favour of Mr. Davar and ordered that the house be re-sold. The auction-purchaser, Mr. Davar, preferred an appeal under cl. 10, Letters Patent, but the appeal was dismissed by us on May 21, 1937. On April 21, 1938, the sons of the judgment-debtor, who had died in the meantime, presented an application in the executing Court under s. 151/144, Civil Procedure Code, praying that the auction-purchaser be directed to pay them mesne profits at the rate of Rs. 50 per mensem from July 3, 1936, to the date of the applica-

tion and, till such further date on which possession was delivered to them. The executing Court has allowed the application in part and granted the applicants Rs. 120 only as mesne profits. It further ordered that the amount be not paid to them, till the final determination of the claim of the auction-purchaser against them for compensation for improvements, alleged to have been effected by him during the period that he was in possession of the house. From this order, the applicants have appealed praying that the amount of mesne profits allowed by the lower Court be enhanced.

A preliminary objection is raised on behalf of the contesting respondent, Mr. Davar, that this order of the lower Court is not appealable. In our opinion, this objection is well founded and must succeed. The application in the lower Court purported to be one under ss. 151/144, Civil Procedure Code. It is obvious, however, that s. 144, is inapplicable to the facts of this case, and the application could not have been made under it. That section contemplates restitution, where, and in so far as, a decree has been varied or reversed. Admittedly, the order of the executing Court confirming the sale, which was set aside by Jai Lal, J. did not amount to a decree, and, therefore, the application for mesne profits payable in consequence of that order could not possibly be made under s. 144; *Ram Ratan Prasad v. Banarsi Lal* (1). The application was one made under s. 151, Civil Procedure Code, and against an order passed under that section, no appeal lies under the Code. The preliminary objection must, therefore, be upheld. We, however, grant the prayer of Counsel for the petitioners and treat the memorandum of appeal as a petition for revision.

On the merits, the revision is without any substance. The applicants claim mesne profits from July 3, 1936, when Mr. Davar was put in possession of the house, till the date when he actually surrendered it. There is a dispute between the parties as to the latter date. But assuming that the applicants' contention was correct that Mr. Davar did not give up possession till June 1, 1938, when the house was re-sold to the Model Town Society, the total period for which mesne profits are payable would be nearly 23 months (July 3, 1936, to May 31, 1938). The lower Court has assessed the mesne profits at Rs. 40 per mensem, but

the petitioners claim at Rs. 50 per mensem. Even at this latter rate, the total amount due according to the applicants' own showing, comes to Rs. 1,150. But on June 8, 1936, the sum of Rs. 7,834-8-0, out of the purchase price paid by Mr. Davar, was received in the judgment-debtor's account by the decree-holder, Model Town Society, and this amount remained with the Society till December 23, 1937, i. e., for 18 and half months approximately. During this period, the judgment-debtor benefited by the cessation of interest at 9 per cent, on Rs. 7,834-8-0 as allowed in the decree. This benefit he is bound to restore to Mr. Davar. If to this is added the sum of Rs. 120, allowed by the lower Court, the judgment-debtor has received much more than the amount claimed by him as mesne profits. His sons, therefore, are not entitled to receive anything more from Mr. Davar. Indeed, if he had preferred a counter-petition for revision, we would have been constrained to reduce the amount allowed by the lower Court; but as no such petition has been preferred by him we would leave the order to stand. The petition for revision fails and is dismissed. In the circumstances, parties are left to bear their own costs.

D.

*Petition dismissed.***ALLAHABAD HIGH COURT**

Second Appeal No. 672 of 1937

January 31, 1939

MOHAMMAD ISMAIL, J.

HARI RAM—PLAINTIFF—APPELLANT*versus***MUNSHI SINGH—DEFENDANT AND ANOTHER
—PLAINTIFF—RESPONDENTS**

Transfer of Property Act (IV of 1882), s. 101—Suit on mortgage by subsequent mortgagee—Prior mortgagee who purchased equity of redemption and in possession of property made party—Subsequent mortgagee, if can sell property subject to prior encumbrances, without redeeming them—Prior mortgagee, whether can remain in possession until prior mortgages are redeemed

Where in a suit on mortgage by the subsequent mortgagee, the prior mortgagee who has purchased the equity of redemption and is in possession of the property, is also made a party, the subsequent mortgagee can sell the property mortgaged to him subject to the prior encumbrances under the earlier mortgages without redeeming them. The prior mortgagee is, however, entitled to remain in possession until the prior mortgages are redeemed irrespective of the question of limitation.

(Case-law discussed.)

S. A. from the decision of the Additional Civil Judge, Muzaffarnagar, dated January 27, 1937.

(1) 9 Pat. 685; 122 Ind. Cas. 589; AIR 1930 Pat. 280; 11 P. L. T. 156; Ind. Rul. (1930) Pat. 237.

Messrs. Panna Lal and Jagnandan Lal, for the Appellant.

Mr. N. C. Vaish, for the Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit brought for the enforcement of a mortgage dated November 29, 1930, executed by Bhartu in favour of the plaintiff. Munshi Singh was impleaded in the suit as a defendant as on May 20, 1932, he had purchased the mortgaged property in execution of a simple money decree No. 726 of 1930. The suit was resisted mainly by Munshi Singh who pleaded *inter alia* that the mortgaged property could not be sold without his mortgages being paid first. The trial Court decreed the suit. On appeal the learned Civil Judge modified the decree of the Court of first instance and directed that the plaintiff shall not be entitled to sell the mortgaged property in suit unless and until he pays the money due to Munshi Singh under the prior mortgages standing in favour of Munshi Singh. The plaintiff has preferred an appeal from the decree of the Court below. It is contended that the view of law taken by the Court below is erroneous and that the right to redeem enjoyed by a subsequent mortgagee is a right which can be exercised only at his option and at will. He cannot be forced to redeem against his will. It appears that there are three mortgages standing in favour of Munshi Singh. The first is a usufructuary mortgage dated May 3, 1909; the remaining two are simple mortgages dated July 22, 1925, and May 4, 1926. Munshi Singh by virtue of his possessory mortgage has been in possession of the property ever since 1909 and since he purchased the equity of redemption in execution of a simple money decree he has become full proprietor of the property subject to certain obligations under the mortgage dated November 29, 1930, in favour of the plaintiff.

A large number of authorities have been cited by the learned Counsel on behalf of the parties. Before examining the Case law I proceed to consider the statutory provisions on the subject. It is not disputed that the plaintiff is a subsequent mortgagee and his mortgage is the last in point of time. It is open to a subsequent mortgagee to redeem a prior mortgagee. It is also open to him to sue for foreclosure or for sale without making the prior mortgagee a party to the suit. Nor is it necessary for a puisne mortgagee to implead a prior mortgagee in a suit to redeem a subsequent

mortgagee : see O. XXXIV, r. 1; Explanation. In the present case, however, the prior mortgagee is a party and the question is whether it is permissible for the plaintiff to sell the property mortgaged to him subject to the prior incumbrances under the earlier mortgages without redeeming those mortgages. Section 101, Transfer of Property Act, provides :

"Any mortgagee of or person having a charge upon, immovable property, or any transferee from such mortgagee or charge holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of or person having a subsequent charge upon the same property and no such subsequent mortgagee or charge holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto."

It will be observed that under the first part of the section, the prior mortgagee, namely the respondent, can set up his prior mortgages as a shield against the subsequent mortgagee and the mere fact that the equity of redemption has been purchased by the respondent will not be deemed to extinguish the mortgages in his favour. Even if some of the mortgages are barred by limitation, the prior mortgagee can insist on their being paid by the subsequent mortgagee if the latter wants to dispossess him. The latter part of the section deals with the right of the subsequent mortgagee and the section provides that the subsequent mortgagee shall not be entitled to sell such property as is mentioned under the earlier part of the section without redeeming the prior mortgage or otherwise than subject thereto. It has been contended by the learned Counsel for the appellant that the law provides two alternatives for his client. The one alternative is to redeem the prior mortgages and the other is to sell the property subject to those prior mortgages. It is contended that the Court below has erred in limiting the right given to the subsequent mortgagee under the section by directing him to redeem the mortgages. Several cases have been cited by the learned Counsel in support of his contention. In *Chinnu Pillai v. Venkatasamy Chettiar* (1) it was held :

"Where a prior mortgagee sued for sale on his mortgage without making a puisne mortgagee a party to the suit and obtained a decree and in execution of the decree property was sold and purchased by a third person, the puisne mortgagee is entitled to sue for sale on his mortgage subject to

(1) 40 M 77; 34 Ind. Cas. 507; A I R 1917 Mad. 751; 30 M L J 347; (1916) 1 M W N 245; 19 M L T 217.

the prior mortgage after making the purchaser a party to the suit."

The principle laid down in this case helps the contention of learned Counsel for the appellant, but this ruling is prior to the Transfer of Property (Amendment) Act of 1929 when the present s. 101 of the Act was enacted. In *Sarju Kumar v. Dwarka Prasad* (2) it was held that the subsequent mortgagee on the foot of the mortgage of 1918 could sell the mortgage property subject to the mortgage of 1895, that the only right obtained by the prior mortgagee was a right to the security furnished by the mortgage of 1895, that he could not insist on being paid and that he must allow the property to be sold subject to the mortgage in his favour. In that case, like the present, the prior mortgagee insisted that his mortgages must be redeemed before the property mortgaged could be sold. This contention did not find favour with the Bench deciding that case. Here again s. 101 of the present Act was not considered as the suit was instituted prior to the passing of the Amendment Act. The facts in *Lachmi Narain Das v. Hirdey Narain* (3) are distinguishable and do not help the plaintiff. In that case the subsequent mortgagee purchased the mortgaged property in enforcement of his mortgage and obtained possession of it. The prior mortgagee brought a suit on the basis of his mortgage without impleading the subsequent mortgagee and obtained a decree thereon. Only formal possession by virtue of his purchase was given to the prior mortgagee. He thereupon brought a suit for possession against the defendant (subsequent mortgagee) offering the defendant an opportunity to redeem the plaintiff. The suit was dismissed on the ground that the mortgages in favour of the prior mortgagee were time-barred and that they could be set up as a shield only against the subsequent mortgagee for defensive purposes and could not be the basis of a suit after the expiry of the time allowed for the enforcement of the mortgage. That ruling, therefore, is no authority for the proposition advocated by the learned Counsel. In the Full Bench case in *Debendra Narain Roy v. Ramtaran Banerji* (4) it was held:

"A puisne mortgagee is entitled to a sale of the property secured by his mortgage subject of the rights of the first mortgagee even if the property has been sold in execution of a decree obtained by

(2) (1929) A L J 492; 119 Ind. Cas. 507; A I R 1929 All. 296; Ind. Kul. (1929) All. 1035.

(3) 24 A L J 661; 97 Ind. Cas. 4; A I R 1926 All. 420.

(4) 30 C 599; 7 C W N 766 (F.B.).

the first mortgagee in a suit to which the puisne mortgagee was not a party."

This case no doubt helps the plaintiff but this was also before the passing of the Amendment Act. In *Salig Ram v. Jangjit Bahadur Singh* (5), Srivastava and Zia-ul Hasan, JJ. had to interpret s. 101 of the present Act. The learned Judges held that "this section allowed two alternative courses to the subsequent mortgagee, namely either to redeem the prior mortgage, or to take the property subject to that mortgage. The words 'or otherwise than subject thereto' refer to the second eventuality mentioned in the section, namely that of the subsequent mortgagee trying to sell the property and not to that of his seeking foreclosure. No doubt a subsequent mortgagee who has obtained a decree for sale can avail himself of the two alternatives provided for in the second, namely he can either redeem the prior mortgage or sell the property subject to that mortgage."

This case goes the whole length in supporting the contention put forward by the learned Counsel for the appellant. The learned Counsel for the respondent has relied on several cases of this Court in support of the decree of the Court below. All of these cases were instituted before the Transfer of Property Amendment Act came into force; see *Manohar Lal v. Ram Babu* (6), *Sarda Prasad v. Kanhaiya Lal* (7) and *Phul Chand v. Surji* (8). It is possible to distinguish the facts of some of these cases, but it appears to me unnecessary to do so because the present s. 101, Transfer of Property Act, has prescribed the procedure to be followed by a subsequent mortgagee who brings a suit for the enforcement of his mortgage. There is no doubt that before the passing of the Act, there was considerable amount of conflict of judicial opinion on this point. The section apparently was enacted to clarify the law and to lay down the correct procedure to be followed in future. Under these circumstances, the earlier authorities do not furnish a true guide to the Courts. I am bound to interpret the law as it stands at present, and in my opinion, the plaintiff cannot be compelled to redeem the earlier mortgages as directed by the Court below. Learned Counsel for the respondent contends that his client is likely to suffer if the property is allowed to be sold subject to the earlier mortgages. He apprehends that the plaintiff will redeem only the usufructuary mortgage and will not redeem the subsequent mortgages which have become

(5) A I R 1935 Oudh 411; 155 Ind. Cas. 498; (1935) O W N 684; 11 Luck. 270; 7 R O 595.

(6) 34 A 323; 14 Ind. Cas. 674; 9 A L J 323.

(7) (1933) A L J 934; 145 Ind. Cas. 301; A I R 1933 All. 412; 6 R A 53.

(8) A I R 1923 All. 457; 74 Ind. Cas. 684.

time-barred. This apprehension, in my opinion, is not well-founded. It is settled law that a prior mortgagee who has purchased the equity of redemption is entitled to remain in possession of the property until the subsequent mortgagee has redeemed the prior mortgages irrespective of the question of limitation. In *Ram Sarup v. Ram Lal* (9) at p. 662 Lindsay and Kanhaiya Lal, JJ. observed:

"The shield of a subsequent mortgagee who acquires the right of a prior mortgagee is essentially different in character from the shield of a mortgagee who acquires the rights of a mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsists. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor, or remain in suspense, as it were, till they are needed for purposes of defence. So long as he represents the rights of the mortgagor, he is not affected by any question of limitation for, as pointed out in *Lazman Ganesh v. Mathurabai* (10) at p. 372 he cannot be required to sue for the recovery of the money due on his mortgage from his own property. Indeed, being both the mortgagee and the mortgagor, he cannot have any cause of action against him."

There are several other authorities to the same effect. It is manifest therefore that the respondent has nothing to lose if the properties in suit are allowed to be sold subject to the prior mortgages. The prior mortgagee will not be disturbed in his possession unless all the prior encumbrances have been fully satisfied by the plaintiff, the subsequent mortgagee, or his representative. The procedure which, in my opinion, should be followed as adopted in the Full Bench case reported in *Tota Ram v. Ram Lal* (11). In that case a third mortgagee kept in his own hand a part of the mortgage money in order to pay off the first and second mortgages but paid only the first mortgage. The second mortgagee brought a suit to enforce his mortgage. It was held that the third mortgagee was subrogated to the position of the first mortgagee and he was allowed to sell the property subject to the charge created in favour of the prior mortgagee. It is not possible to dispose of this appeal finally because the Court below has not determined the amount due under the mortgages of May 3, 1909, July 22, 1925, and May 4, 1926. I therefore remit the following issues to the lower Appellate Court: What is the exact sum due under the mortgages dated May 3, 1909, July 22, 1925 and May 4, 1926, for which the pro-

perty in suit is liable. The interest should be calculated up to the date of delivery of possession under the auction sale in favour of Munshi Singh. The parties shall be allowed to produce fresh evidence. The finding should be returned within two months. The usual ten days shall be allowed for objection.

s.

Issue remitted.

PATNA HIGH COURT

Appeal No. 345 of 1938

August 10, 1939

HARRIES, C. J. AND FAZL ALI, J.

BISHUN SINGH—JUDGMENT-DEBTOR

—APPELLANT

versus

PALAKDHARI SINGH AND ANOTHER—

DECREE-HOLDERS—RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 13—Application under s. 16, Bihar Money-lenders Act (III of 1938) rejected—During pendency of appeal to High Court, Amending Act coming into force—S. 13 of Amending Act applies—Practice—Precedent—Federal Court.

Where during the pendency of an appeal to the High Court against an order rejecting an application under s. 16, Bihar Money-lenders Act of 1938, the Amending Act of 1939 has come into force, s. 13 of the Amending Act applies to the application. The fact that after rejection of application under s. 16 no stay was ordered and sale took place makes no difference and does not affect rights of parties in appeal. *Shyama Kant Lal v. Rambhajan Singh* (2), applied.

High Court is bound to follow the Federal Court decision and to give effect to it.

A. from the original order of the Sub-Judge, Muzaffarpur, dated November 21, 1938.

Mr. T. N. Sahi, for the Appellant.

Mr. A. N. Lal, for the Respondents.

Harries, C. J.—This is a judgment-debtor's appeal from an order of the learned Subordinate Judge of Muzaffarpur allowing in part the judgment-debtor's application. In his application, the judgment-debtor prayed that the Court should convert the decree into a decree for instalments under s. 15, Bihar Money-lenders Act, 1938, and value the judgment-debtor's property under s. 16 of that Act. The learned Subordinate Judge was prepared to grant instalments provided the judgment-debtor paid a sum of Rs 3,000 within a week. The learned Subordinate Judge, however, did not indicate what the further instalments would be if this sum of Rs. 3,000 was paid. With regard to such part of the application

(9) 44 A 659 at p. 662; 75 Ind. Cas. 472; A I R 1922 All. 394; 20 A L J 596.

(10) 38 B 369 at p. 372; 23 Ind. Cas. 121; A I R 1914 Bom. 25; 16 Bom. L R 26.

(11) (1932), A L J 627; 139 Ind. Cas. 107; A I R 1932 All. 489; 54 A 897; Ind. Rul. (1932) All. 524 (F B).

as was concerned with s. 16, Bihar Money-lenders Act, 1938, the learned Subordinate Judge was of opinion that this section was repugnant to the general law, and accordingly could not be enforced. The learned Subordinate Judge was in fact following a decision of this Court, namely *Vishwanath Narayan Singh v. Harihar Gir* (1). The judgment-debtor failed to pay the sum of Rs. 3,000 within the stipulated time, and accordingly the whole of the property was put up for sale and was purchased in the main by third parties though a small portion was purchased by the decree-holders. Against the order of the learned Subordinate Judge dismissing the application in so far as it was concerned with s. 16, Bihar Money-lenders Act, 1938, the judgment-debtor has appealed to this Court. The only point for consideration is whether or not s. 13, Bihar Money-lenders (Regulation of Transactions) Act, 1939, has any application to the case. Section 16, Bihar Money-lenders Act, 1938, is in these terms:

"(1) When an application is made for the execution of a decree passed in respect of a loan or the interest on a loan by the sale of the judgment-debtor's property, the Court executing the decree shall, notwithstanding anything to the contrary contained in any other law or in anything having the force of law, hear the parties to the decree and estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree:

Provided that the Court may order the whole property of the judgment-debtor to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably and conveniently be sold in part;

(2) Any person aggrieved by an order passed under sub-s. (1) may appeal to the Court to which appeals from the Court executing the decree ordinarily lie."

Section 17, which followed, directed that only so much property should be included in the proclamation of the intended sale as the Court considered the proceeds to be sufficient to satisfy the decree. The application, as it originally stood, was under s. 16 of the 1938 Act and was rejected. While this appeal was pending in this Court, the Amending Act of 1939 was passed, and ss. 16 and 17 were repealed and were replaced by ss. 13 and 14 of the Amending Act. Section 13 (1) of the Amending Act in terms applies to applications made before or after the commencement of the Act, and it has been held by the Federal Court in

Shyamakant Lal v. Rambhajan Singh (2) that s. 13 of the Amending Act of 1939 is retrospective in the sense that it applies to proceedings pending at the time when the Act came into force.

It has been argued by Counsel on behalf of the appellant that s. 13 of the Amending Act must be given effect to by this Court. He has argued that this section applies to pending applications, and his application, which was rejected by the learned Subordinate Judge, is still pending in this Court. We are bound to hold that the application of the judgment-debtor is pending, and accordingly it must now be decided in the light of the provisions of the Amending Act of 1939. In my view this case cannot be distinguished from the case in *Shyamakant Lal v. Rambhajan Singh* (2) to which I have already referred. In that case an application under s. 16, Bihar Money-lenders Act, 1938, had been dismissed by the learned Subordinate Judge. On appeal this Court had upheld the decision of the learned Subordinate Judge upon the ground that this section being repugnant to the general law was null and void. During the pendency of the appeal to the Federal Court, the Amending Act of 1939 came into force, and the Federal Court unanimously held that the provisions of s. 13 of the Amending Act applied to the application, and their order is based upon this view. In my judgment this Court is bound to follow the Federal Court decision and to give effect in the present appeal to the provisions of s. 13 of the Amending Act.

It has been argued that there is one very material difference between the present case and the case in *Shyamakant Lal v. Rambhajan Singh* (2) decided by the Federal Court. In the present case after the rejection of the judgment-debtor's application the properties were put up to sale and purchased and possession given. In the proceedings which terminated in the Federal Court case the property was apparently not put up for sale because of a stay order, presumably, given by this Court during the pendency of the appeal. In my view there is no difference in principle between the two cases. In the present case, if we hold that the learned Judge was wrong in not valuing this property as directed by s. 16, Bihar Money-lenders

(1) (1938) P W N 765; 178 Ind. Cas. 279; 19 P L T 760; 11 R P 231; 5 B R 73; A I R 1939 Pat. 90; 17 Pat. 714.

(2) 20 P L T 473; 182 Ind. Cas. 161; A I R 1939 F C 74; 1939 O L R 399; 12 R F C 1; 5 B R 756; (1939) M W N 674; (1939) F O R 193; 43 C W N F O 68 (F O).

Act, 1938, and s. 13 of the Amending Act, 1939, then the whole of the proceedings taken thereafter are liable to be set aside when the order of the learned Subordinate Judge is reversed. The sale took place subject to the result of this appeal, and the fact that no stay was granted and that the sale took place cannot affect the rights of the parties in this Court. In my judgment, the order of the learned Subordinate Judge cannot now be sustained and must be set aside. The case must be sent back to the learned Subordinate Judge to be decided according to law. He will bear in mind that ss 13 and 14 of the Amending Act now apply. We make no order as to costs of this appeal.

Fazi Ali, J.—I agree.

s.

Case remanded.

CALCUTTA HIGH COURT

Civil Rule No. 583 of 1939

June 2, 1939

B. K. MUKHERJEA AND ROXBURGH, JJ.

TARAK NATH KUNDU—

JUDGMENT-DEBTOR—PETITIONER

versus

PANCHANON DUTT—DECREE-HOLDER

—OPPOSITE-PARTY

Bengal Agricultural Debtors Act (VII of 1938), ss. 2 (8), 34—Debt payable under decree of original side of High Court, whether debt within meaning of Act—Proceedings in respect of such debt, if can be stayed under s. 34.

The expression "Civil Court" as used in the various sections of the Bengal Agricultural Debtors Act means a Court of civil jurisdiction separate from and subordinate to the High Court and does not include High Court. The expression "or otherwise", in s. 2 (8) means debt not founded on a decree, and even if it includes decretal debts, they would be decrees passed by other Courts, e. g., the Revenue Court, but not by the High Court. Hence, a debt payable under the decree of the original side of the High Court would not be a debt within the meaning of the Agricultural Debtors Act. It would not be within the competence of the Debt Settlement Board constituted under the Act to settle such debts, and no proceeding in respect of the same could be stayed by a notice under s. 34. Much the same result would be produced even if the view that the expression "Civil Court" includes the High Court is accepted. The assumption of jurisdiction by the Debt Settlement Board over debts payable under decrees of the High Court, is *ultra vires* and it was outside the competence of the Legislature to include a liability based upon a decree of the High Court within the definition of a debt as given in s. 2 (8), Agricultural Debtors Act. *Narsing Das v. Chogemull* (1), relied on. [p. 133, col. 1]

O. Rule directed against an order of the Munsif, First Court, Howrah, dated April 19, 1939.

Mr. Chandra Sekhar Sen, for the Petitioner.

Mr. Gopendra Nath Das, for the Opposite Party.

B. K. Mukherjea, J.—This Rule is directed against an order of the Munsif, First Court, Howrah, dated April 19, 1939, by which he refused to stay certain proceedings in execution of a decree in spite of a notice sent to him by the Jagadishpur Debt Settlement Board under s. 34, Bengal Agricultural Debtors Act. The decree was one for a sum of Rs. 1,200 only, obtained by the opposite party against the petitioner, on the basis of a promissory note in the original side of this Court. On the application of the decree-holder it was transmitted for execution to the Court of the Munsif, First Court, Howrah, and the decree-holder applied for attachment and sale of certain immovable properties, belonging to the judgment-debtor which were situated within the jurisdiction of that Court. The judgment-debtor thereupon presented an application under s. 8, Bengal Agricultural Debtors Act, to the Jagadishpur Debt Settlement Board for settlement of his debts, and the latter issued a notice under s. 34 of the Act, requesting the executing Court to stay further proceedings in execution of the decree. The Munsif has refused to stay the proceedings on the ground that the decree being passed by the High Court, s. 34, Agricultural Debtors Act, did not apply, and he has relied upon the Special Bench decision of this Court in *Narsing Das v. Chogemull* (1). The propriety of this view has been challenged by Mr. Chandra Sekhar Sen who appears in support of the rule and his contention is that the Special Bench decision has no application to the facts of the present case where the proceedings sought to be stayed are not before the High Court but before a Civil Court which is subordinate to this Court. In the Special Bench case undoubtedly the proceedings in execution were pending in the original side of this Court in respect of a decree passed by itself, and as according to the opinion expressed by the majority of the Judges who composed the Bench, the expression "Civil Court", as used in the Agricultural Debtors Act, was held not to include the High Court, the operation of s. 34 of the Act was necessarily excluded. In the opinion of

(1) 43 O W N 613; 183 Ind. Cas 113; A I R 1939 Cal. 435; 69 O L J 458; 18 R O 128; I L R (1939) 2 Cal. 93 (S B).

the other two Judges who did not accept this view, the expression "Civil Court" did include the High Court, but the provisions of s. 34 of the Act, so far as they related to proceedings of the High Court in its original side, were *ultra vires* and hence inoperative. The Special Bench decision, therefore, does not directly touch the present case, where the proceedings are not before the High Court itself.

I think, however, that if the expression "Civil Court" as used in the various sections of the Agricultural Debtors' Act be taken to mean a Court of civil jurisdiction separate from and subordinate to the High Court, as held by the majority of the Judges in the Special Bench case, the conclusion would be irresistible that a debt payable under the decree of the original side of this Court would not be a debt within the meaning of the Agricultural Debtors Act. It would not be within the competence of the Debt Settlement Board constituted under the Act to settle such debts, and no proceeding in respect of the same could be stayed by a notice under s. 34. In no other way I think we can consistently explain the various sections of the Act, and find out a rational basis for the scheme which underlies it. Agreesably with the view taken by the majority of the Judges in the Special Bench case, we must assume that the Legislature when it passed this enactment was aware of its own limitations, that it did not intend to trench upon the jurisdiction of the High Court derived from Parliament and that in all the sections where the words "Civil Court" were used, it intended to exclude the High Court. If this is the correct position, the Legislature, in my opinion, never intended that a debt which was payable under a decree of the original side of the High Court would come within the purview of the Agricultural Debtors Act at all. I will first of all examine the definition of 'debt' as given in s. 2 (8) of the Act. 'Debt' as defined in that subsection includes all liabilities of a debtor in cash or in kind, secured or unsecured, whether payable under a decree or order of a Civil Court or otherwise, and whether payable presently or in future. Then follow certain exceptions which we need not mention at this stage. If a debt is payable under a decree, then to come within this definition it must be under a decree or order of a Civil Court and a decree passed by the High Court must, in my opinion, be deemed to have been excluded

The expression "or otherwise", I think would mean debt not founded on a decree, and even if it includes decretal debt, they would be decrees passed by other Courts, *e. g.*, the Revenue Court, but not by the High Court. This view is fortified by the provision of s. 18 (1) which provides that a decree of a Civil Court relating to a debt shall be conclusive evidence as to the existence and amount of the debt as between the parties to the decree. It might sound absurd that a decree passed by an inferior Court would be held final by the Debt Settlement Board, whereas no value need be attached to a decree of the High Court. But this incongruity will disappear if we hold that a decree of the High Court being outside the Act, the Debt Settlement Board would have no jurisdiction to consider it at all or appraise its value.

This interpretation would not be in any way inconsistent with the object of the Act as explained in the Preamble. The object was undoubtedly to give relief to certain classes of debtors, but not certainly in respect of all their liabilities. There are exceptions stated in the section itself, *e. g.*, public demands and debts due to a Scheduled Bank. Other debts must also be deemed to be excluded which were beyond the competence of the Legislature to deal with, if the Legislature acted with full sense of its limitation and wanted to avoid anything which would be in excess of its powers. This conclusion would be irresistible if we come to the provisions of ss. 25 (3), 33, 35 and 36 of the Act, which are aimed at ousting the jurisdiction of the Civil Courts in cases where the Debt Settlement Board can deal with the matters exclusively under the provisions of the Act. The result of the Special Bench decision is that the High Court would have jurisdiction in spite of s. 33 of the Act to entertain a suit or proceeding in respect of a debt, even though it is included in an application under s. 8 of the Act. A decree passed by the High Court could be executed though the matter is before the Debt Settlement Board, and such decree would be operative and binding even if it is against the decision of the Debt Settlement Board. An award under s. 25 would not prevail over a decision of the High Court and nothing but confusion and anomaly would result if both the award of the Board and the decree of the High Court are deemed to be valid and binding. I hold therefore that the Legislature defi-

nately intended to exclude a debt founded on a decree of the High Court from the scheme of the Act, and s. 2 (8) should be interpreted in such a way as would give effect to this intention of the Legislature. This would prevent anomalies and place all the provisions of this Act on a consistent and logical basis. In this view of the case, s. 34 of the Act would have no application inasmuch as there is no proceeding in respect of a debt, even though the Court is a Civil Court within the meaning of the Special Bench decision. The object of s. 34 is to stay proceedings in Civil Courts pending settlement of debt by the Debt Settlement Board. It helps to avoid conflicts which would otherwise result from the operation of ss. 35 and 36. But if these other sections are not applicable, there can be no sense in applying s. 34 which is merely ancillary to the other provisions. I hold therefore that s. 34 would not apply to this case and the Munsif could not be called upon to stay the proceedings.

I think that much the same result would be produced even if we proceed on the view adopted by the minority of the Judges who composed the Special Bench. Their view is that the expression "Civil Court" includes the High Court and those provisions in the Act which affect the jurisdiction of the High Court and the validity of its decrees are *ultra vires*. We cannot say that the only offending provisions are those contained in s. 25 (3) or ss. 32 to 36. These are provisions intended to enable the Debt Settlement Board to carry on its work of settling debts, without any interference from the Civil Courts whose decrees and orders are made nugatory when they come into conflict with the decisions of the Board. They are all parts of and interwoven with the scheme which enables the Debt Settlement Board to settle debts founded upon decrees of the High Court, and as I have shown above, this scheme would fail altogether if these sections are made inapplicable. What is *ultra vires* therefore is the assumption of jurisdiction by the Debt Settlement Board over debts payable under decrees of the High Court and it must be said that it was outside the competence of the Legislature to include a liability based upon a decree of the High Court within the definition of a debt as given in s. 2 (8), Agricultural Debtors Act. It is, however, not necessary in the present case to discuss

this matter in further details. For the reasons given above I hold that the Rule must be discharged with costs, hearing fee being assessed at two gold mohurs.

Roxburgh, J.—This Rule has been issued on the ground that the Munsif of the First Court, Howrah, on receipt of a notice under s. 34, Bengal Agricultural Debtors Act, 1936, has refused to stay proceedings in execution of a decree passed on the original side of this Court, and transferred to the Howrah Court for execution. The learned Munsif has based his decision on the recent case in *Narsing Das v Chogemull* (1), decided by a Special Bench of this Court. Mr. Sen arguing the case for the petitioner, has contended that the Special Bench decision has no application to the present which is a case of execution under ss. 39 and 42, Civil Procedure Code : and further that the present proceeding is before a "Civil Court" even on the restricted view of the meaning of those words as found by the majority of the learned Judges who decided the Special Bench case. Similarly, if the view of the minority of the Judges is followed, namely, that the words "Civil Court" include the High Court, that the latter is not involved in the present matter as the proceeding stayed is not that of the High Court, and that in any event the powers given under ss. 39 to 42 to the High Court are not conferred by Act of Parliament, but by Act of the Indian Legislature. Mr. Das, appearing for the decree-holder opposite party, urges that ss. 32 to 36, Bengal Agricultural Debtors Act, provide a complete scheme for excluding the Civil Courts by staying and rendering infructuous any of their proceedings in respect of a debt, and he contends that the definition of "debt" in sub-s. 8 of s. 2 of the Act is to be read as excluding a debt based upon a decree of the High Court. He endeavoured to found his argument on the restricted interpretation of "Civil Court" taken by the majority of the Judges in the Special Bench case and contended that the words "all liabilities... whether payable under a decree or order of a Civil Court," must exclude a liability payable under a decree of the High Court. Mr. Sen, of course, has retorted by the contention that the latter debt is included in the phrase "or otherwise" appearing in the definition. It must be conceded that the interpretation that "Civil Court" in s. 34 and other sections of the Act does not include "High Court" is alone not sufficient to support the order challenged here;

but it would appear that the reasons for that view will suffice to justify the interpretation of "debt" contended for by Mr. Das. It seems also that if we treat the matter on the ground of *ultra vires*, the result will be the same. To understand this it is necessary to consider the general scheme and real purpose of the Act.

The scheme of the Act which has been framed for the purpose of giving relief to agricultural debtors, is first to divide his debts into two classes, those which can be dealt with by Debt Settlement Boards, and those which cannot be so dealt with. The important exclusions which shall not be subject to the operations of the Boards are amounts recoverable as public demands, and debts due to scheduled banks : [s. 2 (8) (iv) and (vi)]. Broadly speaking the scheme was to leave the recovery of these to the ordinary law, while other debts were to come under the jurisdiction of the Boards. The scheme then provides for bringing before the Board intimation of all debts subject to its jurisdiction (ss. 8 to 13). An important provision is included in s. 13 (2) by which a Board may pass an order that no debt of which the creditor has failed to submit a statement to the Board other than a debt which the debtor has included in his statement of debt shall be payable, and that such order shall not be questioned in any Civil Court or in any manner other than that provided in the Act. The Board is then to attempt amicable settlement of the debts (s. 15) and if it is a Board so empowered it can compel the remaining creditors to accept an amicable settlement on terms equivalent to those agreed to by creditors to whom not less than 40 per cent. of the total debt is owing [s. 19 (1) (b)]. The "total debt" means the total of the debts of which the Board has cognizance and excludes, for example, debts to scheduled banks of amounts recoverable as public demands. A creditor who refused to accept the terms offered may take a certificate and wait in accordance with the terms of s. 21, for the recovery of his dues. When the debts have been determined and settlement has been made fixing how payments are to be made, the whole culminates in the award under s. 25 and this is to be binding on the debtor and his creditors in supersession of all previous decisions of a Civil Court. It is contemplated that payment will be made by instalments, and if the full amounts due under the award are paid, the debtor will be duly discharged of all the debts dealt with by it.

There is a special "insolvency procedure" provided in s. 22, under which in certain circumstances the Board can compulsorily reduce the debts of the debtor to such amount as it considers he can pay within a period not exceeding 20 years, or else it may order his property (with some exceptions) to be sold. When the amounts have been paid or the property has been sold, the debtor will receive under s. 22 (5) a certificate of discharge which will release him from all debts which were or might have been included in the application under s. 8. Provision for the enforcement of an ordinary award under s. 25 is made in ss. 28 and 29. If any amount payable under the award is not paid in time or in the extended time allowed by the Certificate Officer, he is to proceed to sell the property of the debtor and to distribute the proceeds according to the order of priority laid down in s. 29. Amounts due under Civil Court decrees are to be paid in full if there are assets available [s. 29 (2) (a)]; mortgaged properties may be sold subject to mortgage, unless there is a decree of a "Civil Court" for the recovery of the debt outstanding in which case the property will be sold, and the mortgage debt as decreed will take priority [ss. 28 (6) and 29 (2) (a)]. Finally, if the Certificate Officer fails to recover as a public demand any amount payable under the award, the award shall cease to subsist and any amount payable under it shall be recoverable within three years from the date on which the award ceased to subsist as if a decree of the Civil Court had been passed for its payment on such date [s. 29 (5)]. Alternatively the Certificate Officer may put in force the insolvency procedure of s. 22.

The provisions then in ss. 32 to 36 relating to Civil Courts are merely ancillary to the above scheme in order that there shall not be two concurrent agencies at work for the determination and collection of a person's debts. It is an essential corollary to the jurisdiction of the Boards to deal with a debt that concurrent proceedings by the Civil Courts shall not take place or shall be of no effect if they do. If there are debts which the local legislature cannot deal with for lack of jurisdiction, they cannot give jurisdiction to the Boards in respect of those debts, or if they can and do so, the result will only be confusion. It is unnecessary to labour by giving numerous examples, it is perhaps sufficient to consider the effect on an award in s. 25 of the Act if it contains a debt due on a High Court decree. The amount is both recover-

able under the decree and at the same time under the award. Similarly, under s. 19 if the creditor to whom more than forty per cent. of the total debt were owing were a decree-holder of a decree of the High Court in its original jurisdiction, he would be able to impose his settlement on the remaining creditors, but would be under no restriction as to recovery of his full dues by execution proceedings. Examples of such anomalies could be multiplied.

If we assume then that the Act was drafted with the knowledge that provisions affecting the jurisdiction of the High Court in respect of decrees passed in its original jurisdiction would be *ultra vires*, and that it was drafted to avoid including any such *ultra vires* provisions, we must conclude that the intention was to exclude debts founded on such decrees. We must conclude therefore that it was intended to exclude such debts from the definition of "debt" in s. 2, sub-s. (8) of the Act: that is to say, the interpretation contended for by Mr. Das must be accepted. Following the judgments of the majority of the Judges who decided the Special Bench case, I think such an assumption is to be made, and hold that "debt" as defined in the Act does not include one payable under a decree or order of the High Court exercising its original jurisdiction. Though the point has not been argued before us, it may be noted that even treated as a case of *ultra vires*, the result is, probably the same. In applying the doctrine, the Act is to be interpreted as a whole; it is then seen that what is *ultra vires* in the Act is, as already discussed, the whole of the scheme by which jurisdiction is given to the Boards to settle debts payable under decrees of the High Court in its original jurisdiction, and not merely the ancillary provisions directly giving power to the Boards to interfere with the High Court. Full consideration of this question would involve considering what provisions of the Act were *ultra vires*, and whether they could be excluded from the Act without making the Act a substantially different law from that enacted; in other words the question of severability discussed in such cases as *In re Initiative and Referendum Act* (2) and *Attorney-General for British Columbia v. Attorney-General for Canada* (3). It would probably be found that

the result would be very similar to that now arrived at, and that by interpreting "debt" to exclude amounts payable under decrees of the High Court, all the provisions in the Act which are *ultra vires* of the local legislature and all that are so interwoven with those provisions as to require exclusion along with them would be severed together, leaving a valid Act dealing with matters within the competence of that Legislature. In other words a draftsman, given the defective Act and asked to exclude the provisions that were *ultra vires*, would have done so by the simple method of amending the definition of "debt" to exclude these decrees.

As already stated I base my conclusion on the view that the draftsman in fact did exclude the decrees in question though not as explicitly as might have been done. I therefore hold that the debt in this case which is before the Board is not a debt within the meaning of the Act, and the notice under s. 34 is therefore erroneous and the Munsif is not required to stay the proceedings in execution pending before him. I agree therefore that the Rule should be discharged.

s.

Rule discharged.

PATNA HIGH COURT

Civil Revisions Nos. 30, 52 and 59 of 1939

May 11, 1939

MOHAMAD NOOR AND CHATTERJI, JJ.

Syed RAZAUH RAHMAN AND OTHERS—

PETITIONERS

versus

UDIT SINGH AND OTHERS—OPPOSITE PARTY

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (IX of 1938), s. 15—S. 15, if repugnant to any existing Indian Law—Whether applies to execution proceedings—Order of executing Court refusing to execute decree for amount mentioned in it and proceeding to execute it after reducing amount under s. 15, whether falls under s. 47, Civil Procedure Code (Act V of 1908)—Revision, if lies.

The Civil Procedure Code by itself does not apply to suits for rent. It is s. 143, Bihar Tenancy Act, which, with certain reservations, makes the Civil Procedure Code applicable to rent suits and the procedure and regulation of Rent Courts and Revenue Courts are exclusively within the purview of the Provincial Legislatures. It was quite open to the Provincial Legislature to amend s. 143, Bihar Tenancy Act, and provide new procedure for the trial of rent suits. If by implication they authorized the Court not to execute decrees beyond a certain sum specified in s. 15, Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, they had full power to do so. Section 15, Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, is not therefore repugnant to any existing law relat-

(2) (1919) A O 935; A I R 1919 P O 145; 88 L J P O 142.

(3) (1937) A O 391; 156 L T 313; 106 L J P O 67; 81 S J 115; 53 T L R 334.

ing to the Concurrent List No. 3 of Sch. VII Government of India Act.

The directions given to Court in s. 15, apply to the proceeding for the execution of the decrees also.

Revisional powers are not exercised by the High Court in those cases in which a party entitled to appeal has not appealed. An order of the executing Court refusing to execute the decree for the sum which was mentioned in it and proceeding to execute it only after reducing it according to the direction given in s. 15 of Act IX of 1938 relates to a question of execution, satisfaction and discharge of decree and comes under s. 47, Civil Procedure Code, and is appealable and where no appeal has been preferred from such order revisional powers of the High Court cannot be invoked.

O. Rs. from the order of the Munsif, Second Court, Patna, dated December 7 and 19, 1938, and from order of the Munsif, Second Court, Gaya, dated January 24, 1939, respectively.

Messrs. B. N. Mitter and R. S. Sinha (in No. 30), A. H. Fakhruddin (in No. 52) and Raj Kishore Prasad (in No. 59), for the Petitioners.

The Advocate-General and Government Pleader (for the Crown in No. 30), Messrs. G. N. Mukherji, Advocate-General and Government Pleader (for the Crown in No. 52), and Kanhaiyaji, Advocate-General, and Government Pleader (for the Crown in No. 59), for the Opposite Party.

Mohamad Noor J.—These three applications in revision arise out of proceeding for execution of rent decrees. They are against three different orders of three different Courts in three different cases between different parties. They have been heard together as the question involved in all of them is the same. In each of them the executing Court has reduced the amount of decree for the purpose of execution according to the directions given in s. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938 (Act IX of 1938). The decree-holders in each case have come up in revision. The Provincial Legislature by amending the Bihar Tenancy Act and the Chota Nagpur Tenancy Act have made provisions for reduction of rents of *raiyyats*. The *raiyyats* under certain circumstances have been authorized to apply for reduction of rents and the officer deputed for the purpose is directed to reduce rent on certain basis. Act IX of 1938 provides among others that when rent has once been reduced under the provisions of s. 112 or s. 112-A, Bihar Tenancy Act or under s. 85, Chota Nagpur Tenancy Act, the landlord will not be entitled to recover in any proceeding rent

at a rate in excess of the rate which has been fixed after reduction under the provisions mentioned above. It goes further and provides that even if no application has been made for reduction of rent and that rent has not been reduced by revenue authorities, the landlord in any suit or proceeding will not be entitled to realize more rent than would have been fixed after reduction if the *raiyyat* had applied under s. 112-A, Bihar Tenancy Act, and s. 85, Chota Nagpur Tenancy Act. This, however, applies for arrears of rent due up to a certain year. Thus, on the one hand they have provided machinery for reduction of rent on the application of the *raiyyat* and on the other by Act IX of 1938 they have made it impossible for the landlord to realize for the previous years also rent at a higher rate than has been fixed after reduction or would have been fixed if the tenant had put in an application. In all these three cases the rent of the *raiyyat* has been reduced and the learned Munsif in each case has reduced the decree on the basis of the reduced rent. In other words he has refused to execute the decrees for previous years for a sum in excess of the amount which was payable after the reduction of the rent.

In the first place in my opinion these applications are not maintainable. It is the settled practice of this Court that revisional powers are not exercised in those cases in which a party entitled to appeal has not appealed. In all these three cases, the orders of the learned Munsifs were appealable. They obviously came under s. 47, Civil Procedure Code, Mr. B. N. Mitter who appears for one of the petitioners contended that the learned Munsif amended the decree and that the order of amendment was not appealable. In whatever form the order of the Munsif may be, in fact the effect was that he refused to execute the decree for the sum which was mentioned in it and proceeded to execute it only after reducing it according to the direction given in s. 15 of Act IX of 1938. It was really a question of execution, satisfaction and discharge of decree, and as I have said, obviously come under s. 47 and an appeal lay to the District Judge. The petitioners not having appealed, cannot invoke the revisional powers of this Court.

I now come to the merits of the applications. Mr. Mitter argues (1) that s. 15 had no application to execution proceedings, and (2) that if it did apply, it was repugnant to s. 38, Civil Procedure Code, an existing Indian Law and to the extent of that

repugnancy it was void under s. 107, Government of India Act. Now, as to the first part of the argument s. 20 makes it perfectly clear that the directions given to Court in s. 15 apply to the proceeding for the execution of the decrees also. No doubt the word 'decree' is not mentioned in the section, but the execution proceedings can refer to no other proceedings than proceedings for execution of a decree. Then the Civil Procedure Code by itself does not apply to suits for rent. It is s. 143, Bihar Tenancy Act, which, with certain reservations, makes the Civil Procedure Code applicable to rent suits and the procedure and regulation of rent Courts and Revenue Courts are exclusively within the purview of the Provincial Legislatures. It was quite open to the Provincial Legislature to amend s. 143, Bihar Tenancy Act, and provide new procedure for the trial of rent suits. If by implication they authorized the Court not to execute decrees beyond a certain sum specified in s. 15, they had full power to do so. In my opinion, this provision is not repugnant to any existing law relating to the Concurrent List No. 3 of the Sch. VII, Government of India Act. For these reasons the petitions fail. I would reject them. There will be no order for costs.

Chatterji, J.—I agree.

s. *Petitions rejected.*

LAHORE HIGH COURT

Second Appeal No. 351 of 1937

June 17, 1937

BHIDE, J.

GHULAM HUSSAIN AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

SECRETARY OF STATE—DEFENDANT

—RESPONDENT

Custom (Punjab)—Person described in school register and other documents as Rajput—Some documents describing him as Pandit or Kashmiri—Person held Rajput—Second appeal—Finding based on conjecture and misunderstanding of evidence.

Where a person is entered in school register and other documents as Rajput though in some documents he is described as Pandit or Kashmiri, the latter description not being a caste description, the person must be considered as a Rajput.

Finding of fact based partly on conjectures and partly on a misunderstanding of the evidence is liable to be set aside in second appeal.

S. A. from the decree of the District Judge, Rawalpindi, dated January 6, 1937.

Dr. Shuja-ud Din, for the Appellants.
Mr. Mohammad Monir, for the Advocate-General, for the Respondent.

Judgment.—The plaintiffs who are brothers sued in this case for a declaration that they were Rajputs by caste. The trial Court granted the declaration but the learned District Judge has dismissed the suit on appeal. From this decision the plaintiffs have appealed. The learned District Judge's finding appears to me to be based partly on conjectures and partly on a misunderstanding of the evidence and is therefore liable to be set aside. Plaintiff Ghulam Hussain produced a school certificate of the year 1900 showing that he was then entered as a Rajput in the school register. The learned District Judge has discarded this important evidence on a pure conjecture that the description may have been given with a view to take advantage of the Punjab Land Alienation Act, which was then passed or with a view to claim a higher status than what the plaintiffs possessed. The plaintiffs are described in various other documents as Rajputs. In some they are described as "Pandits" or "Kashmiris". But it is well-known that these are not castes and even the learned Counsel for the respondent did not urge that these were caste names. It is quite likely that the plaintiffs were described as "Kashmiris" owing to their having come from Kashmir and they have been described as Pandits owing to some of their ancestors being Sanskrit scholars. The description as "Pandit" or "Kashmiri" was, therefore, of no significance at all so far as the issue in this case was concerned. It is not suggested that the plaintiffs belong to any other caste.

In my opinion the trial Court's decision was correct. I accept the appeal and restore the trial Court's decree with costs throughout.

D.

Appeal allowed.

OUDH CHIEF COURT

Second Civil Appeal No. 122 of 1936

September 26, 1939

ZIA-UL HABAN AND HAMILTON, J.J.

PATIPAL SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

RAMPAL SINGH MINOR AND OTHERS

—DEFENDANTS—RESPONDENTS

Hindu Law—Widow—Possession by, of property not legally entitled to possess—Criterion as to whe-

ther she prescribed to absolute or limited estate—Widow held prescribed to absolute estate—U. P. Land Revenue Act (III of 1901), s. 233 (k)—Question of title not raised in partition proceedings—Partition completed—Question cannot be raised subsequently in Civil Court.

Mere possession by a Hindu widow of property to which she is not legally entitled is not sufficient to create an absolute title in her. The criterion is her own intention and conduct and the question whether she prescribed to an absolute estate or to a limited estate must be decided on the facts and circumstances of each case. [p. 139, col. 2]

A Hindu widow had obtained mutation of certain property in the teeth of opposition by the other heirs and there was absolutely nothing to show that she claimed to be in possession as a limited estate holder:

Held, that the widow prescribed to an absolute estate and not to a limited estate.

[Case-law referred to.]

If a question of title affecting the partition of a *mohal* which might have been raised in the partition proceedings is not raised and the partition is completed, s. 233 (k) of the U. P. Land Revenue Act, debars the parties to the partition from raising the question subsequently in a Civil Court. *Rai Bajrang Bahadar Singh v. Rai Beni Madho Bakhsh Singh* (11), followed. [p. 141, col. 2.]

S. C. A. against the order of the District Judge, Hardoi, dated March 17, 1936.

Messrs. *M. Wasim* and *Ali Hasan*, for the Appellants.

Mr. *Hyder Husain*, for the Respondents.

Judgment.—This is a plaintiffs' second appeal against a decree of the learned District Judge of Hardoi upholding the decree of the learned Civil Judge of that place by which the plaintiffs' suit for possession of property left by one *Musammat Parbati* was dismissed.

Musammat Parbati who died on March 3, 1931, was the widow of one *Jutta Singh*, who had a separated brother *Dal Singh*. *Jutta Singh* died about the year 1910 but some eight years before his death he had executed and got registered a will in respect of his property by which he bequeathed all his property in equal shares to five legatees, namely:

- (1) His wife *Musammat Parbati*,
- (2) His daughter *Musammat Tejni*,
- (3) His brother *Dal Singh's* daughter's son *Subedar Singh*,
- (4) *Dal Singh's* other grandson *Ajrail Singh*, and

(5) *Kundan Singh*, a cousin of *Subedar* and *Ajrail's* father, *Puran Singh*.

The will provided that *Musammat Parbati* would hold the property for her life and that after her death the remaining four legatees would be entitled to the entire property in equal shares. Of the five

legatees *Musammat Tejni* and *Subedar* died in the lifetime of the testator but when *Jutta Singh* died, his widow *Musammat Parbati* somehow or other came into possession of the entire property. On *Dal Singh's* death his property came into the possession of his widow, *Musammat Jitni* and when the latter died in 1914, some of the collateral relations of *Dal Singh* including *Sumer Singh*, father of one of the present plaintiffs-appellants, applied for mutation of names. *Musammat Parbati* also claimed the property left by *Dal Singh* and the Revenue Court ordered mutation in her favour, so that she remained in possession of *Dal Singh's* property also without any attempt on the part of the collaterals to dispossess her.

On November 14, 1930, *Musammat Parbati* executed two deeds of gift in favour of *Rampal Singh* and *Banke Singh*, defendants-respondents, and some others. After her death in 1931, two suits were brought in the Court of the Civil Judge of Hardoi for possession of the property left by *Parbati* against the present defendants-respondents. One of the suits, i. e. No. 57 of 1934 was brought by the present appellants and the other No. 77 of 1934, by some others. As both the sets of the plaintiffs claimed to be reversionary heirs of *Jutta Singh* and *Dal Singh*, the suits were consolidated and the plaintiffs in each suit made defendants in the other. As between the two sets of the plaintiffs, the learned Civil Judge held that the present appellants were the reversioners of *Jutta Singh* and *Dal Singh* but both the suits were dismissed on the ground that *Musammat Parbati* was in possession of the property not as a Hindu widow but that she held the property left by *Jutta Singh* under the will and the property left by *Dal Singh* as an absolute owner by adverse possession. The plaintiffs in both the suits appealed to the learned District Judge but he dismissed both the appeals so far as it related to possession of the property in suit. The plaintiffs in suit No. 77 have submitted to the decree of the learned Judge but those of suit No. 57 have filed this appeal.

So far as the property left by *Jutta Singh* is concerned, it is argued that *Parbati* was in possession of the property merely as a Hindu widow and not in pursuance of *Jutta Singh's* will. It may be mentioned that the plaintiffs-appellants' case in the Courts below was that *Jutta Singh* had revoked his will and that the

will was never acted upon. Both the pleas were, however, repelled by both the Courts below and the evidence produced by the appellants disbelieved. The findings that the will was not revoked and that it was acted upon are findings of fact, and as such, binding on this Court. It was, however, argued that the Courts below have not given full weight to Ex. 33, which is a copy of a *goshwara* relating to the mutation case that arose on Jutta Singh's death and showing that it was a case of mutation by *wirasat*, but we find that the learned Judges of both the Courts below have considered this document but have rejected it as evidence of the allegation that Parbati succeeded to the property as heir to her husband and not on his will. We are of opinion that the lower Courts were right in their view. In First Civil Appeal No. 74 of 1932 decided by this Court on February 4, 1935 also, the entry of *wirasatan* in a similar register was not accepted as proof of mutation having been made as heir. Moreover, there was in the present case the statement of Puran Singh, father of Ajrail Singh, made in the mutation Court to the effect that he on behalf of his minor son Ajrail Singh and Kundan Singh, the other surviving legatee, had consented to the property being mutated in favour of Parbati alone and the learned Judge finds that as both Puran Singh and Kundan Singh were well off, they could well afford to let the widow remain in possession of the entire property for her life. It was conceded that so far as the shares of the legatees who survived Jutta Singh, namely, Ajrail Singh and Kundan Singh were concerned, the plaintiffs can lay no claim to them and that they can only claim the remaining one-third of the property. The learned Counsel for the appellants finally relied on s. 105 of the Indian Succession Act and argued that so far at least as the shares of Tejani and Subedar Singh were concerned, they must be deemed to have reverted to the estate of the testator and to have been left intestate by him. No doubt s. 105 lays down that if the legatee does not survive the testator, the legacy shall ordinarily lapse and form part of the residue of the testator's property: but we have seen that in the present case the legacy bequeathed to all the five legatees was in equal shares so that on Jutta Singh's death, the entire property left by him went to the three remaining legatees in three equal shares.

We not only accept the lower Courts finding but are ourselves of opinion that Parbati was in possession of Jutta Singh's property under the latter's will, and this being so, her own share of the property must on her death go to the surviving legatees according to the terms of the will. Therefore the plaintiffs-appellants' claim to Jutta Singh's property cannot succeed.

As regards Dal Singh's property, it was argued that merely from the fact that Parbati remained in possession of that property, it cannot be presumed that she prescribed to an absolute estate and it was urged that she prescribed only to a limited estate and the property must on her death pass to the reversioners. It is true that mere possession by a Hindu widow of property to which she is not legally entitled is not sufficient to create an absolute title in her. The criterion is her own intention and conduct and the question whether she prescribed to an absolute estate or to a limited estate must be decided on the facts and circumstances of each case.

In *Deo Datt v. Raj Bali* (5 O. W. N., 653) (1), it was held that it cannot be laid down as a rule that in no case can the possession of a Hindu female without title mature into absolute ownership and that the determination of the question must be based upon the circumstances of each case.

In *Chandra Shekhar Singh v. Jagjiwan Bakhsh Singh* (A. I. R. 1929 Oudh, 215) (2), it was held that it is a settled rule of law that the possession of a Hindu female, in respect of the property to which he has come into possession, but is not entitled to it by way of inheritance under the Hindu Law, must be deemed to be adverse to the reversioners and cannot be considered to be that of a mere life estate holder, unless an arrangement or an agreement to that effect is proved to have been arrived at between her and the reversioners or unless she has herself declared that she held only as a limited owner possessed of a life estate and that the mere fact that a Hindu female declares that she is in possession of such property by way of inheritance does not show that she declares herself to be in possession as a limited owner and the

(1) 5 O W N 653; 113 Ind. Cas. 266; A I R 1928 Oudh 411.

(2) A I R 1929 Oudh 215; 115 Ind. Cas. 279; Ind. Rul. (1929) Oudh 231.

real view in such a case would be that she not being entitled to possession by way of inheritance her possession must be deemed to be that of a trespasser and consequently adverse against the reversioners, unless they prove that it was with their consent.

Similarly in *Sant Bakhsh Singh v. Bhagwan Bakhsh Singh* (7 O. W. N. 1082) (3), a Bench of this Court held that when a widow not entitled to anything more than maintenance out of her husband's estate is given possession of her husband's share, her possession would be *prima facie* adverse unless it can be shown that it was the result of any arrangement with the reversioners or that she took possession of the property prescribing only for the limited estate of a Hindu widow.

In *Hubraji v. Chandrabali Upadhiya* (8 O. W. N. 6) (4), also it was held that where mutation in favour of a widow is not proved to have been effected with the consent of the other members of the family with a view to console her and she remains in continuous possession of the property for more than twelve years without any right whatever, her acts and the circumstances attending the possession showing that she intends to hold the property as of right, she acquires title to the property by adverse possession and further that property acquired by a Hindu female by adverse possession becomes her *stridhan* and must go to her *stridhan* heirs.

The Allahabad High Court in *Uman Shankar v. Musammatt Aisha Khatun* (I. L. R. 45 All. 729) (5), held that where a Hindu widow took possession of the share of her deceased husband, had her own name recorded in respect thereof and dealt with the property for a series of years as if it were her own absolute property, then in the absence of any admission on the part of the widow that her possession was no more than that of the widow of a separated Hindu in possession as such her possession must be taken to be adverse to the surviving brothers.

In the case of *Chaudhri Satgur Prasad*

(3) 7 O W N 1082; 129 Ind. Cas. 338; A I R 1931 Oudh 25; Ind. Rul. (1931) Oudh 104; 6 Luck 365.

(4) 8 O W N 6; 130 Ind. Cas. 849; A I R 1931 Oudh 89; Ind. Rul. (1931) Oudh 161.

(5) 45 A 729; 74 Ind. Cas. 869; A I R 1924 All. 88.

v. Kishore Lal (L. R. 46 I. A. 197) (6), the widow of one of two joint brothers after the death of the surviving brother and his widow, successfully applied for mutation of names in respect of the property of which she was in possession alleging that she was owner of it as heir to her husband's separate property. Subsequently, she put forward the same claim in suits and she also made a gift of part of the property to religious uses. It was held by their Lordships of the Judicial Committee that the above-mentioned acts were public assertions by the widow of a right to exclusive possession and ownership and made her possession adverse within Sch. II, Art. 144 of the Indian Limitation Act. The case would, we think, be still stronger when the widow comes into possession of the separate property of her husband's brother.

In *Sham Koer v. Dah Koer* (L. R. 29 I. A. 132) (7), their Lordships of the Judicial Committee held that a possession as of right by the widow and daughter-in-law of a member of an undivided Mitakshara family of a portion of the undivided estate for twelve years bars the heirs of the deceased unless they can show that the possession was permissive.

In the present case so far from Parbati's possession over Dal Singh's property being permissive or proceeding by consent of the heirs, she obtained mutation in the teeth of opposition by the father of one of the present appellants and there is absolutely nothing to show that she claimed to be in possession as a limited estate holder. We are therefore of opinion that Parbati prescribed to an absolute estate and not to a limited estate in the present case.

The learned Counsel for the appellants relies on the case of *Lajwanti v. Safa Chand* (L. R. 51 I. A. 171) (8), in which it was held that a title acquired through adverse possession by a widow who claims and holds a widow's estate inures to the estate of her deceased husband and des-

(6) 46 I A 197; 75 Ind. Cas. 486; 11 L. W. 384; (1920) M. W. N. 3; 24 O. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 2 U. P. L. R. (P. O.) 55; 23 Bom. L. R. 451; 43 A. 152; 27 M. L. T. 200; A. I. R. 1919 P. O. 60 (P. O.)

(7) 29 I. A. 132; 29 O. 664; 6 O. W. N. 657; 4 Bom. L. R. 547; 8 Sar. 280 (P. O.)

(8) 51 I. A. 171; 80 Ind. Cas. 788; 23 A. L. J. 304; A. I. R. 1924 P. O. 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 Pat. L. R. 245; 28 O. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; L. R. 5 A (P. O.) 94 (P. O.)

cends upon her death accordingly, but we have already said that there is nothing in the present case to show that Parbati claimed Dal Singh's property, or held it as a widow. Reliance was also placed on behalf of the appellants on *Sant Bakhsh Singh v. Bhagwan Bakhsh Singh* (I. L. R. 6 Lucknow, 365) (3), but in that case *Musammatt Lachhmin*, widow of Pancham Singh obtained mutation in respect of property left by her husband's brother Bahadur Singh on the statement made in the mutation Court by Baldeo Singh, the surviving brother, that he and *Musammatt Lachhmin* were entitled as heirs to equal shares in Bahadur Singh's property which means that she came into possession by consent of Baldeo Singh. Reference was also made in this case to the case of *Lajwanti v. Safa Chand* (L. R. 51 I. A. 171) (8), and the learned Judges remarked:—

"In *Lajwanti v. Safa Chand* (8), it was held that title acquired through adverse possession by a widow who claims and holds a widow's estate inures to the estate of her deceased husband and descends upon her death accordingly. In *Deo Datt v. Raj Bali* (5 O W N 653) (1) one of us discussing the decision of their Lordships just quoted held that it could not be regarded as authority for the broad proposition that in every case whenever a Hindu widow is found in possession of property without title her possession must be regarded as that of a widow's estate but that the determination of the question as regards adverse possession must be based upon the circumstances of each case. In the present case we find that when Bahadur Singh died, Baldeo Singh was the person legally entitled to succeed to the estate. However, mutation was made in his name as well as in the name of *Musammatt Lachhmin* at his request and with his consent. . . . When Baldeo Singh stated that *Musammatt Lachhmin* succeeded to a moiety share as an heir he could not possibly mean anything else than that she was to hold it as a limited owner. It is further to be noted that *Musammatt Lachhmin* herself in the deed of gift Ex 1 refers to her possession both with regard to the share which came in her possession on her husband's death as well as in regard to the share which she obtained on the death of Bahadur Singh as possession as an heir. This seems to us to show beyond all doubt that she never regarded herself as in possession of an absolute estate."

This quotation from the judgment in *Sant Bakhsh Singh's* case clearly shows that the decision in that case proceeded on facts entirely different from what we have in the case before us.

The learned Counsel for the appellant also relies on the case of *Thakur Gaya Bakhsh Singh v. Deo Singh* (I. L. R. 9 Lucknow, 484) (9) and *Musammatt Ram Raji v. Balbhaddar* (95 Ind. Cas. 432) (10), but we do not think these cases lay down any rule

contrary to what we have stated above and which was laid down in the cases referred to above.

We are therefore definitely of opinion that *Musammatt Parbati* cannot, in the present case, be held to have prescribed to a limited estate only.

For reasons given above, the plaintiffs-appellants' claim fails in regard to both the properties. There is, however, another ground on which their claim is barred. It appears that during the pendency of the plaintiffs' appeal in the Court of the District Judge certain co-sharers applied to the Revenue Court for partition of the *mohals* in which the property in suit is situated and that the appellants were impleaded in that partition case. They, however, failed to put up any claim in the partition Court and the partition was confirmed in 1938. The plaintiffs' claim is now barred under s. 233 (k) of the U. P. Land Revenue Act. In the case of *Rai Bajrang Bahadur Singh v. Rai Beni Madho Bakhsh Singh* (I. L. R. 13 Lucknow, 503) (11), their Lordships of the Judicial Committee held that if a question of title affecting the partition of a *mohal* which might have been raised in the partition proceedings is not raised and the partition is completed, s. 233 (k) of the U. P. Land Revenue Act debars the parties to the partition from raising the question subsequently in a Civil Court and that the word "partition" is not used in the Act in the narrow sense of mere arrangement into units of area but that it imports and includes the distribution of rights in the units among the sharers. It is true that at the time when the partition suit was brought, the appellants' suit had been dismissed by the trial Court but this did not relieve the appellants of the necessity of putting forward their claim in the partition Court. Had they put forward their claim in the partition Court, partition would probably have been stayed till final decision of their suit in the Civil Court. In any case as the plaintiffs' claim title to the property, it was incumbent on them to bring a claim in the partition case to which they were parties but not having done so, their claim is barred by s. 233 (k) of the Land Revenue Act. We have allowed the respondents to file papers relating to the partition

(9) 9 Luck. 484; 150 Ind. Cas. 495; 11 O W N 351; A I R 1934 Oudh 190; 7 R O I.

(10) 95 Ind. Cas. 432; A I R 1926 Oudh 497.

(11) 13 Luck. 508; 175 Ind. Cas. 775; 1938 O L R 321; 1938 A L R 558; 10 R P O 17; 4 B R 713; A I R 1938 P O 210; 1938 O W N 606; (1938) R D 606; (1938) A L J 786; (1938) 2 M L J 596; 68 O L J 193; 33 S L R 845; 65 I A 314 (P.C.)

case in this Court, as they are papers that were not in existence and could not therefore be filed in the trial Court.

The result is that the appeal fails and is dismissed with costs.

B.

Appeal dismissed.

RANGOON HIGH COURT

Criminal Revision No. 178-B of 1939

June 2, 1939

MOSELY, J.

THE KING—PROSECUTOR

versus

NGA BA SAING—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 370, 421, 439 (5), (6), 369—Appeal against conviction dismissed—Recommendation for enhancement made subsequently—Accused asked to show cause—Whether can show cause against conviction—Sub-s. (6) of s. 439 only refers to sub-s. (5)—Scope—Construction of s. 369.

When an appeal is preferred and it appears to the Judge that there is reason to believe that an enhancement of the sentence should be considered, it is the practice of the Rangoon High Court to issue notice in revision to the accused to show cause against enhancement, and the appeal and the revision are heard at one and the same time. Where a recommendation for enhancement of sentence has been made to the High Court after the decision of the appeal, the accused when called upon to show cause against the enhancement of the sentence cannot be allowed to show cause against his conviction, but may only show cause against enhancement of the sentence. The order of the High Court in appeal must be regarded as final, and the accused person cannot be heard to show cause against his conviction. It does not make any difference that the accused's appeal from jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and, if necessary, the evidence. *Emperor v. Jorabhai Kisanbhai (3), Emperor v. Sher Singh (5) and Emperor v. Dhanna Lal (6)*, relied on.

Sub-s. (6) of s. 439, Criminal Procedure Code, can only refer to sub-s. (5) of the section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Sub-s. (6) is intended to operate as an exception to what is otherwise laid down in the section itself.

Section 369, Criminal Procedure Code, must be read with s. 430 of the Code.

Or. R. for review of the order of the Headquarters (S. P.) Magistrate, Sagaing, dated February 22, 1939.

Order.—The respondent, Nga Ba Saing, was convicted under the second part of s. 307, Penal Code, and sentenced to five years' rigorous imprisonment. The learned

District Magistrate, Sagaing, has submitted the case in revision with the recommendation that the sentence be enhanced. The accused had preferred an appeal (No. 267 of 1939) before this, and that appeal was summarily dismissed about a month before receipt of the District Magistrate's recommendation. The respondent, when called upon to show cause against enhancement of sentence, has endeavoured, in addition, to show cause against his conviction, and the first question to be considered in this case is whether that can be done, having regard to the fact that the accused's appeal has already been dismissed.

When an appeal is preferred and it appears to the Judge that there is reason to believe that an enhancement of the sentence should be considered, it is the practice of this Court to issue notice in revision to the accused to show cause against enhancement, and the appeal and the revision are heard at one and the same time. I do not know of any previous case in this Court where a recommendation for enhancement of sentence has been made after the decision of the appeal, and there is certainly no reported case in the rulings of this Court on the subject. There is, however, considerable authority in the Indian High Courts for the view that in such a case the accused person cannot be allowed to show cause against his conviction, but may only show cause against enhancement of the sentence.

The High Court's power in revision are laid down in s. 439, Criminal Procedure Code. Sub-s. (1) enacts that the High Court may exercise any of the powers conferred on a Court of Appeal by certain sections, of which the only one in point, s. 423 (1) (a), lays down that the Appellate Court in an appeal from an order of acquittal may, *inter alia*, find the accused guilty and pass sentence on him according to law, and s. 439, sub-s. (1), goes on to provide that the Court may enhance the sentence. This power to enhance the sentence is subject to sub-s. (2), namely notice to the accused person, and to sub-s. (3) in regard to the maximum enhancement in certain cases. Sub-section (4) prevents a finding of acquittal being converted into a conviction. Sub-s. (5) says that where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision should be entertained at the instance of the party who could have appealed. This sub-section prevents a revision application being treated as an appeal when no

appeal has been brought. Sub-section (6), which is the one in question in this case, says:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-s. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

This last sub-section was only added when the Code was revised in 1923. It is important to note that the initial words are "notwithstanding anything contained in this section," and not "notwithstanding anything contained in this Code." It would seem clear therefore that sub-s. (6) can only refer to sub-s. (5) of the section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, if proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Had it been otherwise, it could have been contended in the case of an accused to whom notice had been issued and who had not appealed or in a non-appealable case had not applied for revision of his conviction, that he could not question the correctness of his conviction, and that was in fact decided under the old Code in *Emperor v. Chinto* (1). It would seem therefore that sub-s. (6) is intended to operate as an exception to what is otherwise laid down in the section itself.

It is only by virtue of the provisions of this sub-section that the accused can show cause against his conviction, and, as I have said, under the words of the section itself it would seem that the accused is not entitled to do so where his appeal has been previously dismissed. It is laid down elsewhere in the Code that judgments once passed cannot be altered or revised except as provided for by this section. Section 369 of the Code says:

"Save as otherwise provided by this Code..... no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

This section must be read with s. 430 of the Code where it is said that "judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in s. 417" (appeals against an acquittal by the Government) "and Chap. XXXII" of which s. 439 is a part. It appears therefore to me that the order

of this Court in appeal must be regarded as final, and that the accused person cannot now be heard to show cause against his conviction. Another view was taken incidentally in *Emperor v. Mangal Naran* (2) where it was remarked that it was the practice of the Bombay High Court to issue notice against enhancement in revision after the disposal of the appeal, and that the accused then still had the right to show cause against his conviction, though any attempt to set aside his conviction would not have much chance of success.

This view, however, was dissented from in *Emperor v. Jorabhai Kisanbhai* (3) a case on all fours with the present one, where it was said that such a case where the appeal had already been heard on the merits was not provided for in sub-s. 6, and was outside the purview of that sub-section. It was also remarked that to allow cause to be shown against the conviction would be to re-hear the appeal on the merits, and that that would be a proceeding which is against the ordinary principle of finality of judgments, such as has often been referred to by the Privy Council; for instance, in *Hook v. Administrator-General of Bengal* (4) at p. 508. This ruling was followed in *Emperor v. Sher Singh* (5). In that case a petition by the accused for revision of his conviction and sentence was dismissed, whereupon the Crown presented an application in revision for enhancement of the sentence. It was held there that the accused was no longer entitled under s. 439, sub-s. (6), to re-open the question of his guilt in the face of the previous finding by the High Court. *Emperor v. Dhanna Lal* (6) a similar case, also followed *Emperor v. Jorabhai Kisanbhai* (3). It was said there:

"Sub-section (6) was meant to give an accused person to whom a notice of enhancement of sentence was issued and who has not appealed, or if no appeal lay, has not applied for revision of his conviction, an opportunity to question the correctness of his conviction if it was proposed to enhance his sentence."

(2) 49 B 450; 87 Ind. Cas. 424; A I R 1925 Bom 268; 26 Cr. L J 968; 27 Bom. L R 355.

(3) 50 B 783; 97 Ind. Cas. 803; A I R 1926 Bom 555; 27 Cr. L J 1173, 28 Bom. L R 1051.

(4) 48 O 499 at p. 508; 60 Ind. Cas. 631; A I R 1921 P O 11; 48 I A 187; 19 A L J 366; 40 M L J 423; 29 M L T 336; (1921) M W N 313; 33 O L J 405; 3 U P L R (P O) 17; 23 Bom. L R 648; 25 O W N 915; 14 L W 221 (P O).

(5) 8 L 531; 100 Ind. Cas. 234; A I R 1927 Lah. 217; 28 Cr. L J 266; 28 P L R 559.

(6) 10 L 241; 117 Ind. Cas. 669, A I R 1929 Lah. 797; (1929) Cr. Cas. 429; 30 Cr. L J 815; 30 P L R 409; Ind. Rul. (1929) Lah. 685.

Another case on all fours with the present one is *Emperor v. Abdul Qayum* (7) which also followed the decision in *Emperor v. Jorabhai Kisanbhai* (3). It does not appear to me to make any difference that the accused's appeal from jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and, if necessary, the evidence. As to the merits of the case for enhancement, I am afraid that I cannot see any. This was a case of an assault with a *dah* by one ex-convict on another ex-convict, apparently arising out of a sudden quarrel. It is true that the person assaulted was unarmed. He had six injuries, two of which were on the head. The other four were on the hand, arm and fingers, and might have been caused when the complainant was defending himself. The evidence given only referred to the first blow struck. Both the accused and the complainant appear to have been drunk at the time. The main ground of the learned District Magistrate's recommendation for enhancement was that the accused person had made a previous attempt to murder the same man, Maung Po An, but I find that the previous case in which this accused, Nga Ba Saing, was convicted (Criminal Regular Trial No. 98 of 1935 of the Sub-Divisional Magistrate, Myinmu) was a case of an assault against a totally different person, Maung San Htaik, who gave a different father's name. It does not appear to me to be necessary to take any steps to enhance the sentence, and that will be ordered accordingly.

D.

Order accordingly.

(7) 55 A 715; 146 Ind. Cas. 157; A I R 1933 All. 483; (1933) Cr. Cas. 830; 34 Cr. L J 1205; (1933) A L J 957; L R 14 A 248 Cr.; 6 R A 268 (2).

PATNA HIGH COURT

Appeal No. 48 of 1938

December 23, 1938

WORT, J.

NRIPENDRA NATH CHATTERJI—

PLAINTIFF—APPELLANT

versus

JUGAL PRASAD MANDAL AND OTHERS—

DEFENDANTS—RESPONDENTS

Bihar Tenancy Act (VIII of 1934), ss. 52, 180—S. 52 is wider than s. 180—Under former section tenure-holders are entitled to abatement—Second appeal—Finding as to whether lands were totally unfit for cultivation—Interference in second appeal.

Section 52, Bihar Tenancy Act, is much wider than s. 180 inasmuch as it deals with every class of

tenants. S. 52 undoubtedly gives right of abatement to tenure-holders.

The question whether the lands were totally unfit for cultivation for the years in suit, is a matter for the Court below and the High Court cannot interfere in second appeal, when the lower Appellate Court has accepted the finding of the trial Court that the entire land has been diluviated and no area was cultivable in the years of the suit.

A. from the appellate decree of the Additional Sub-Judge, Bhagalpur, dated November 8, 1937.

Mr. Subal Chandra Mazumdar, for the Appellant.

Mr. S. C. Misra, for the Respondents.

Judgment.—This appeal arises out of an action for rent in which the defendants claimed abatement and in the result appears to have claimed total abatement on the ground that the lands in suit were covered with water of the Ganges for the years for which rent was claimed. It is contended by Mr. Mazumdar appearing on behalf of the plaintiff-appellant that the learned Judge is in error both in law and on the facts of the case, inasmuch as in the first instance, the claim by the defendants was merely for an abatement in the sense that the lands were less fit for cultivation than they would have been but for the fact that the lands had become diluviated and when they re-appeared, sand was deposited on them. I must say that it looks very much as if it had been the defendants' original case, because an application was made for the appointment of a Commissioner for the purpose of ascertaining these facts; but that appears to have been abandoned and ultimately the Judge refused to appoint a Commissioner. In the result, the Judge came to the conclusion that the lands were totally unfit for cultivation for the years in suit. Whether this was so or not was a matter for the Court below and I cannot see how this Court can interfere, although I must say, if I had to try this case in the first instance, that I should have very grave doubts whether the defendants' case in this regard was made out. Not only is the evidence vague but it appears to be somewhat contrary to the case that was made out at first. But this much is to be said for the defendants that in para. 5 of the written statement defendant No. 1 does state that "the rent-claimed land was entirely washed away by the Ganges" in two years. This appears to have entitled the landlord to rent at least for some of the years in suit. The Appellate Court accepted the

finding of the trial Court which was to this effect :

"On this point the evidence is *ex parte* and unchallenged. Defendant has pledged his oath and has examined a boundary man to say that the entire land has been diluviated and no area was cultivable in the year in suit."

Strictly speaking I suppose he should have amended the defence before being allowed to make a case of that kind. But it has been accepted, as I have said by the trial Court and the Appellate Court and I have no jurisdiction to interfere as much as I feel inclined to. As regards the point of law, the matter seems to be perfectly clear. Mr. Mazumdar relies upon s. 180, Bihar Tenancy Act, which amongst other things provides as follows :

"A *raiya*...until he acquires a right of occupancy in the land, shall be liable to pay such rent for his holdings as may be agreed upon between him and his landlord."

Mr. Mazumdar contends that that section applies and not s. 52. Now, s. 52 is a much wider section than s. 180, inasmuch as it deals with every class of tenants. The words of the section are "Every tenant shall ..." and we know from the definition of tenant in s. 4 of the Act that a *raiya* is simply one class of tenant. Section 52 undoubtedly gives right of abatement, and as these defendants are not *raiya*s but tenure-holders, as has been held by the Judge in the Court below, it seems to me on the question of law that the learned Judge was right in holding that, if the facts were established, the tenants would be entitled to abatement. In the paragraph of the written statement to which I have referred, the defendant agrees to pay one anna per *bigha* for the purpose of fixing his rights in the land when it should re-appear from water. Ordinarily stated the Judge would have given judgment for the plaintiff for this amount; but he points out that he is unable to assess that as the area has not been shown. If it had been a matter of any great value to the landlord, I might incidentally say in parenthesis that it is of greater value to the defendants, I might have remanded the case for this question to be determined. But as it is of no particular value to the plaintiff-landlord, I do not propose to adopt that course. With these observations I hold that the appeal fails and must be dismissed with costs.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Civil Appeal No. 70 of 1937

June 28, 1938

EDGLEY, J.

Kazi ABDUL SATTAR—DEBTOR—

APPELLANT

versus

DINAJPUR TRADING AND BANKING CO.,

LTD., AND OTHERS—RESPONDENTS

Provincial Insolvency Act (V of 1920), ss. 42, 53, 54, 17—Powers of Court under s. 42, extent of—Transfers effected long before insolvency petition but having considerable effect on insolvency—Order refusing discharge, if can be based on such transfers—Questionable transactions falling under s. 42 but not avoidable under ss. 53 and 54—Review of—Fraudulent transfer—Onus to prove fraud—Insolvency—Appeal—Procedure—Creditor dying during discharge proceedings—Substitution of heirs—Criterion.

Section 42, Provincial Insolvency Act, gives the Court wide authority to examine the insolvent's conduct whether before or after the insolvency. Fraudulent transfers by the insolvent prior to insolvency come within the purview of s. 42 (1) (i). But there must be some limit regarding the alleged fraudulent transfers upon which the order of discharge can be refused and the Judge ought not to take into his consideration conduct which could not have had anything to do with the bankruptcy either in producing it or in affecting it in any way after its commencement. Only such conduct or affairs as may or can have had some effect upon the bankruptcy ought to be taken into consideration. But where the transfers have considerable effect upon the insolvency then an order refusing discharge can be based on such transfers although they might have been effected long before the application for insolvency. *G. C. Moses v. A. C. Oakeshott* (3) and *Ex parte Constable; In re Barker*, (3), referred to. [p. 147, col. 2.]

In view of the wide powers conferred upon the Court by s. 42 of the Act, the Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under ss. 53 and 54 of the Act. [p. 148, col. 1.]

In an application by debtor for discharge, if the creditors allege that the debtor's case comes under s. 42 (1) (i) by reason of some fraudulent transfers effected by him, the onus would lie upon the creditors to prove fraud, if any, in respect of the transaction. [p. 148, col. 2.]

The procedure as regards the issue of notices on creditors is prescribed primarily in order to afford them a reasonable opportunity to appear at the time of the hearing of the application for discharge. [p. 147, col. 1.]

Where during the course of discharge proceedings started by the insolvent, a creditor who is a party to such proceedings dies, the criterion which should be adopted for the purpose of deciding whether the heirs of such creditor should be substituted is to ascertain whether or not the interests of such persons are likely to be adversely affected by their non-substitution :

Held, that the non-substitution of the heirs did not adversely affect their interest and therefore the failure to substitute did not render the appeal incompetent. *Thakur Singh v. Ganga Singh* (1), referred to.

O. A. from the original order of the District Judge, Dinajpur, dated September 25, 1936.

Messrs. *Bijali Bhusan Sanyal* and *Sudhansu Bh. Sen*, for the Appellant.

Messrs. *Girija Bh. Sanyal* and *Nirmal K. Sen*, for the Respondents.

Judgment.—This appeal is directed against an order of the learned District Judge of Dinajpur, dated September 25, 1936, under which he directed that the application for discharge of the appellant should be disallowed. In the case with reference to which this appeal arises, the appellant filed his application for insolvency on April 10, 1935. An adjudication order was passed on August 29, 1935, and the appellant applied for his discharge on February 8, 1936. This application was contested and was disallowed by the learned District Judge in his order, dated April 25, 1936, against which this appeal is directed. The first point that arises for consideration in connection with this appeal is whether or not this Bench has jurisdiction to hear it. With regard to this question, it appears that the appellant, at the time when he filed the appeal, valued it at Rs. 5,400. It is, however, provided in Item No. 4 (iii), s. 1, Chap. II of the Appellate Side Rules that a Judge sitting singly may hear all appeals against orders made in insolvency proceedings in cases where the property of the insolvent does not exceed Rs. 1,000 in value. In the case out of which this appeal arises, it appears from the record that the total value of the insolvent's property as realized by the Receiver amounts to Rs. 279-8-0. It is therefore clear that this Bench is competent to hear the appeal. A preliminary objection has been urged to the effect that no appeal lies in this case, as there is a note at p. 25 of the paper-book to the effect that the appeal has abated as against the heirs of the deceased respondents Nos. 9, 11 and 13. The deceased respondents were creditors upon whom notices of the date of the hearing of the application for discharge were served in accordance with the provisions of r. 9 framed under s. 79 of Act V of 1920. This procedure has been prescribed primarily in order to afford the creditors a reasonable opportunity to appear at the time of the hearing of the application for discharge. It is argued, however, on behalf of the respondents that the procedure prescribed by the provisions of the Code of Civil Procedure in the matter of substitution of

parties should be followed in insolvency proceedings and as the heirs of the three respondents mentioned above have not been substituted, the appeal to this Court must be regarded as incompetent.

When the insolvent's application for discharge was being considered by the lower Court it appears from the record that the requisite notices as required by r. 9 of the rules framed under s. 79, Provincial Insolvency Act, were duly served upon creditors Nos. 9 and 11. As regards creditor No. 13 there is a note in the order-sheet dated March 18, 1936, that creditor No. 13 was reported to be dead. Her heirs were, however, substituted on March 22, 1936, and there is also a return of service on the record which shows that her heirs were duly served with the requisite notices. Apparently, the original creditors Nos. 9 and 11 died during the pendency of this appeal in this Court and as regards the original creditor No. 13, owing to some mistake, which has not been explained, her name was shown in the memorandum of appeal instead of her heirs. The question therefore which has to be considered is whether or not the failure to make the heirs of the original creditors Nos. 9, 11 and 13 parties to this appeal renders the appeal incompetent. With regard to this matter, it is significant that the only creditors who took part in the proceedings in the lower Court with reference to the insolvent's application for discharge were creditors Nos. 1 and 2. It is true that certain other creditors proved their debts. Those who did so prove, were creditors Nos. 1 to 12, 19 and 22 to 25; and it is admitted that it is only these creditors who would be entitled to partake in the ultimate distribution of the assets of the insolvent. As regards creditors Nos. 9 and 11, beyond proving their debts in the lower Court, they appear to have taken no interest in the proceedings there and although the notices required under r. 9 of the rules framed under s. 79, Provincial Insolvency Act, were duly served upon them, they did not put in an appearance during the course of the proceedings in connection with the application of the insolvent's discharge. Similarly, as regards creditor No. 13, her heirs were duly served with the requisite notice but they did not think it fit to appear in those proceedings in the lower Court. There is a provision in the Provincial Insolvency Act (s. 17) which provides for the procedure to be followed in the case of the death of the insolvent himself. There is also a specific provision to the effect that in certain circumstance

the procedure in the Civil Procedure Code shall specifically apply to the insolvency proceedings: see s. 18, Provincial Insolvency Act. The Act is, however, silent with reference to the procedure which should be adopted in the matter of substitution of the heirs of deceased creditors.

This being the case, in my opinion, the criterion which should be adopted for the purpose of deciding whether such heirs should be substituted is to ascertain whether or not the interest of such persons are likely to be adversely affected by their non-substitution. In this connection it was pointed out by the Lahore High Court in *Thakur Singh v. Ganga Singh* (1), that the death of a creditor not really interested in the proceedings does not necessarily cause an appeal to abate. In the case now before us, it cannot be said that the heirs of the deceased respondents mentioned above are likely to be adversely affected owing to their non-substitution. As stated above, the original creditors Nos. 9 and 11 took no interest in the matter in the lower Court beyond proving their debts. Their names have been entered in the schedule of creditors and their heirs have admittedly received such shares of the assets of the appellant as would be finally payable at the time of the distribution of the assets. As regards the heirs of creditor No. 13, this creditor and her heirs even failed to prove their debts and it is therefore difficult to say how her heirs could possibly be affected by the fact of their non-substitution in these proceedings. As stated above, the procedure as regards the issue of notices on creditors appears to have been prescribed primarily in order to afford them a reasonable opportunity to appear at the time of the hearing of the application for discharge. In my opinion, this procedure cannot be said to constitute such persons parties to the proceedings in the same sense that plaintiffs and defendants are parties in a civil suit. I do not think that the heirs of the deceased respondents can be affected in any way by their non-substitution; and in my view, the fact that the heirs of the deceased respondents Nos. 9, 11 and 13 have not been impleaded in the case cannot in any way affect the competency of the appeal. The learned District Judge refused the application for discharge, because he was inclined to think that the insolvent shortly before applying for his discharge fraudulently transferred certain properties to his wife and son for

the purpose of cheating his creditors. The transfers in question were effected by three *kobalas*: the first was dated February 19, 1933, and was in favour of his wife and the remaining two *kobalas* were dated October 21, 1933, and they were in favour of his wife and his son, respectively.

The first point urged on behalf of the appellant is that the Court below should have only considered the conduct of the insolvent subsequent to the date of his insolvency. The language of s. 42, Provincial Insolvency Act, is clearly against this contention and gives the Court wide authority to examine the insolvent's conduct whether before or after the insolvency. The order of the learned Judge appears to have been passed mainly with reference to the provisions of s. 42 (1) (i) of the Act, which empowers the Court to refuse to grant an absolute order of discharge on proof of the fact that the insolvent has concealed or removed his property or any part thereof or has been guilty of any other fraud or fraudulent breach of trust. In this connection, it may be observed that the provision of s. 39 (2) (j), Presidency Towns Insolvency Act, is somewhat similar in its terms to s. 42 (1) (i), Provincial Insolvency Act. With reference to the provisions of the former Act, it was held in *G. C. Moses v. A. C. Oakeshott* (2) that a fraudulent transfer by the insolvent prior to the insolvency came within the purview of s. 39 (2) (j) of the Act and rendered the insolvent guilty of a breach within the meaning of the subsection. The same principle must be held to be applicable in the case before us; and this contention which has been raised on behalf of the appellant cannot, therefore, be accepted. It was next urged that some limit should be imposed with regard to the time of the alleged fraudulent transactions upon which an order for discharge can be refused, and that it is not open to the Court to base an order of refusal upon transactions which took place long before the application for insolvency. In support of the contention, reliance is placed upon the observations of Lord Esher in *Ex parte Constable; In re Barker* (3). His Lordship stated with regard to similar transactions in England that:

"It seems to me that there must be some limit and I think the Judge ought not to take into his consideration conduct which could not have

(2) 30 O W N 518; 95 Ind. Cas. 522; A I R 1928 Oal 794.

(3) (1890) 25 Q B D 285; 59 L J Q B 331; 38 W R 609, 7 Morrell 111.

(1) A I R 1927 Lah. 424; 103 Ind. Cas. 623; 9 L L J 257.

had anything to do with the bankruptcy either in producing it or in affecting it in any way after its commencement. Only such conduct or affairs as may or can have had some effect upon the bankruptcy ought to be taken into consideration."

In my view, this is the principle which should certainly be adopted in cases which fall under s. 42 (1) (i), Provincial Insolvency Act. But, in the case now before us if these particular allegations of fraud against the insolvent can be maintained, there is no doubt that the transfers upon which the order of the learned District Judge was based must have had some considerable effect upon the insolvency. This contention must, therefore, fail. The next argument put forward on behalf of the appellant is that the application for discharge should not have been refused unless the transactions mentioned in the order of the learned District Judge could be brought within the provisions of ss. 53 and 54, Provincial Insolvency Act. These sections mention certain specific transactions which may be treated as voidable or void provided they took place within a certain definite period before the presentation of the petition, for insolvency. But it is quite clear that in view of the wide powers conferred upon the Court by s. 42 of the Act the Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under ss. 53 and 54 of the Act. I, therefore, do not consider there is any substance in this argument put forward on behalf of the appellant. It is next argued that in any event, having regard to the nature of the transactions represented by the three *kobalas* mentioned above, it cannot be said that these transactions were fraudulent in such a way as to make him guilty of fraud or of fraudulent breach of trust under s. 42 of the Act.

With regard to the first *kobala* dated February 19, 1933, it purports to convey to the appellant's wife certain immovable properties belonging to him in satisfaction of a debt due to her in respect of her dower, which amounts to Rs. 2,200. No evidence was given in the Court below to the effect that no such debt was due from the appellant to his wife on account of dower; and this being the case, the transaction would appear to be *prima facie* genuine. The learned District Judge appears to have proceeded upon the view that the value of the property conveyed by the *kobala*, dated February 19, 1933, was very much greater than the value as stated in the

kobala, but the evidence with regard to the actual value of this property does not appear to be sufficient to indicate that it was undervalued at the time when the transaction took place. The *kobala* in question purports to convey to the appellant's wife property of about 21 *bighas* and 17 *cottas* in area besides a one-third share of a *jama* of Rs. 51-9-1. The average price of this land according to the *kobala* would be about Rs. 33 a *bigha*. The appellant admits that part of the land covered by the transfer appertained to some property held by him at Fatepur which would sell at Rs. 50 or so per *bigha*, but in view of the fact that the transfer was made by the appellant to his wife in lieu of her dower, it is not unreasonable to suppose that he made the transfer at a price somewhat lower than the ordinary value of the land. In any case, having regard to the provisions of s. 42, Provincial Insolvency Act, it is clear that the onus would lie upon the respondent to prove fraud, if any, in respect of the transaction. In my opinion, this onus has not been discharged and it has not been proved that this transaction was fraudulent.

Similarly, as regards the second *kobala*, dated October 21, 1933, it cannot be said to have been proved that this transaction was in any way fraudulent. The transfer was made for the purpose of reducing further the debt due by the appellant to his wife on account of dower and he transferred to her certain property the value of which was said to be Rs. 1,000. The first item consisted of the equity of redemption in respect of an area comprising 2 *bighas* 2 *kottas* and 6 *dhurs*. This was valued at Rs. 200. The second item comprises the equity of redemption in respect of the appellant's house and garden. According to his evidence, the total value of this property was Rs. 2,000 and, as it has been mortgaged the equity of redemption was stated to be Rs. 700. It is significant that as regards this item of property, the Receiver subsequently sold one-third of the house and the garden transferred for a sum of Rs. 200. This is, therefore, an indication to the effect that the property was actually overvalued at the time of the execution of the *kobala*. As regards the last item covered by this document, it comprises certain household articles and domestic articles, the total value of which was estimated at Rs. 100. It is true that with regard to this item, the estimate given in the schedule seems to be very low; but there

is no satisfactory evidence on the side of the respondents to the effect that the proper valuation of these articles should have been greater and, in view of the fact that the articles in question were probably in daily use by the insolvent himself and his wife, it cannot be said that it has been established that this part of the transaction was fraudulent. The third *kobala* mentioned in the order of the learned District Judge is dated October 21, 1933. The transfer of the properties mentioned in this document was effected for the purpose of repaying a debt due by the appellant to his son, which appears to have amounted to Rs. 900. There is no evidence to the effect that such a debt did not exist; and, having regard to the nature of the immovable properties mentioned in the *kobala*, some of which were mortgaged, it does not appear to have been established that the properties were sold by the appellant to his son at an inadequate price.

In my opinion, therefore, it has not been proved that the appellant committed any fraud in connection with the transfers mentioned above. Although admittedly the insolvent's assets were not of a value equal to 8 annas in the rupee of his unsecured liabilities, he gave evidence which, in my opinion, was sufficient to show that the fact that the assets were not of such value had arisen from circumstances for which he could not justly be held to be responsible. In view of the circumstances stated above, I am of opinion that the order of the learned District Judge cannot be maintained. The appeal is accordingly allowed with costs throughout. The order of the lower Court set aside and the appellant is discharged. The hearing fee in this Court is assessed at three gold *mohurs*. With regard to the circumstances of the case, it is not necessary, in my opinion, to attach any conditions to the insolvent's discharge under s. 42 (3), Provincial Insolvency Act. The prayer for leave to appeal under s. 15 of the Letters Patent is rejected.

D.

*Appeal allowed.***BOMBAY HIGH COURT**

Sut No. 410 of 1938

July 18, 1938

ENGINEER, J.

KARBALAI GULAM AND OTHERS—

PLAINTIFFS

versus

Haji EBRAHIM BUSERI & Co.—

DEFENDANTS

Limitation Act (IX of 1908 as amended in 1938),

Sch. I, Art. 5—Summary suit instituted before amendment more than one year after accrual of cause of action is barred and is not revived by amendment.

Where before January 15, 1938, a summary suit instituted more than one year after the accrual of the cause of action is barred under Art 5, Limitation Act, as it originally stood, the suit is not revived by the amendment of January 15, 1938, which prescribes a period of three years. *Appasami Odayar v. Subramanya Odayar* (1); *Mohesh Narain v. Taruck Nath* (2); *Vinayak Govind v. Babaji* (3) and *Mahomed Mehdi v. Sakinabai* (4), relied on. *Gopaldas v. Tribhawan* (5), distinguished.

Mr. M. A. Jinnah, for the Plaintiffs.

Mr. M. C. Setalvad, Advocate-General, for the Defendants.

Judgment.—This is a summons for judgment and the first point that arises is whether as submitted by the defendants, the suit as a summary suit is barred by the Law of Limitation. The Article applicable in summary suits is Art. 5 which as it originally stood provided a period of one year. That Article was amended by an amendment which came into force on January 15, 1938. By this amendment the period of limitation is increased to three years. It is common ground that before January 15, 1938, more than one year had expired from the accrual of the cause of action, so that if the original Article applies, the plaintiffs are not at liberty to file this suit as a summary suit. The plaintiffs, however, contend that the amendment is retrospective and that the Limitation Act in force when the suit was filed was the Act as amended and therefore the period of limitation applicable is three years.

The Limitation Act of 1859 provided by s. 18 that all suits that might then be pending or that should be instituted within the period of two years from the date of the passing of that Act should be tried and determined as if that Act had not been passed, but all suits to which the provisions of that Act were applicable and which might be instituted after the expiration of the said period should be governed by that Act and no other law of limitation, any statute, Act or Regulation then in force notwithstanding. In the Limitation Act of 1871 which received the assent of the Governor-General on March 24, 1871, and which came into force on July 1, 1871, it was expressly provided that nothing contained in ss. 2 and 3 or in Parts 2 and 3 applied to suits instituted before April 1, 1873, ss. 2 and 3 and Parts 2 and 3, Limitation Act of 1871, make up the whole

of that Act except the last Part, viz. Part 4, which refers to the acquisition of ownership by possession.

Thus, in both the Acts of 1859 and 1871, express provision was made for cases where suits were filed after the coming into operation of the respective Acts up to a certain period. When we come to the Limitation Act of 1877, we find that it provided in s. 2 that all references to the Limitation Act of 1871 should be read as if made to the Act of 1877, and that nothing contained in the Acts of 1871 and 1877 should be deemed to affect any title acquired or to revive any right to sue barred under the Act of 1871 or under any enactment thereby repealed. In *Appasami Odayar v. Subramanya Odayar* (1) their Lordships of the Privy Council observed that if the later Acts of Limitation altered the law, they would not revive the right of suit. The Limitation Act under which the suit was barred was the Act of 1859. In *Mohesh Narain v. Taruck Nath* (2) at p. 38 the Privy Council held that on April 1, 1873, the plaintiffs' suit was barred by the law of limitation under the Act of 1871, and that the Act of 1877 could not revive the plaintiffs' rights so barred. The provision aforesaid no longer appears in the Limitation Act, but there is a general provision now appearing in the General Clauses Act of 1897, s. 6 of which provides that the repeal of an enactment shall not revive anything not in force or existing at the time when the appeal takes effect, or affect the previous operation of any enactment so repealed. In *Vinayak Govind v. Babaji* (3) at p. 233 the Appeal Court held that a claim barred by limitation when Act IX of 1871 came into force was not revived by the passing of that Act. In the Limitation Act of 1859, the period of limitation for recovering a deposit was three years from the date of the deposit. The deposit was made on December 12, 1864, and the accounts in question were adjusted in July 1865. In 1871, a new Act of Limitation came into force which provided a period of three years from the date of the demand as the period of limitation for recovering a deposit. The plaintiffs made a demand in April 1877, and filed a suit on June 25, 1877. It was held that the suit was barred by the law of limitation.

This decision was followed in *Mahomed* (1) 12 M 26; 15 I A 167; 5 Sar. 255; 12 Ind. Jur. 370 (P O).

(2) 20 I A 30 at p. 38; 20 C 487; 6 Sar. 261; 17 Ind. Jur. 164 (P O).

(3) 4 B. 230 at p. 233.

Mehdi v. Sakinabai (4). That was a suit for restitution of conjugal rights. The husband demanded restitution by his letter of July 11, 1906, and the wife refused the demand on July 19, 1906. In the Limitation Act of 1871 there was an Article, viz. Art. 35, which provided a period of two years from the date of demand and refusal as the period of limitation for suits for restitution of conjugal rights. In 1908 the present Limitation Act came into force by which Art. 35 was repealed. On June 16, 1911, the husband made a fresh demand, and the demand not being complied with by the wife, he filed a suit on June 20, 1911. It was held that the plaintiff's right to sue had become barred under Act XV of 1877, and that it could not be revived by Act IX of 1908 which repealed Art. 35 of the earlier Act. Heaton, J. who decided the suit in the first instance, considered himself bound by the authority in *Vinayak Govind v. Babaji* (3) although he himself was of a different opinion. The matter was taken to the Appeal Court and the Court of Appeal consisting of Sir Basil Scott, C. J. and Chandavarkar, J. affirmed the law laid down in *Vinayak Govind v. Babaji* (3). On behalf of the plaintiffs, *Gopaldas v. Tribhawan* (5) was cited in support of their submission. In that case it was held that s. 48, Civil Procedure Code, 1908, has a retrospective effect but this decision proceeded on the ground that s. 154 of the Code clearly contemplated a retrospective effect of the Code and an interference with rights acquired under the old Code, and that therefore there was a different intention within the meaning of s. 6, General Clauses Act. I therefore hold that it was not competent for the plaintiffs to file the suit as a summary suit.

The question then arises as to what order I should make in the matter. In my opinion, it is not necessary to dismiss the suit. The filing of the suit is not barred, only the right to file a summary suit is barred. If the Prothonotary had refused to accept it as a summary suit, the plaintiffs could have got it put on the file as a short cause or a long cause. The order I therefore make is that the suit be transferred to the list of long causes. As regards the merits of the defence, it is not necessary for me to say more than that the defence is of such a character that the Court would

(4) 37 B 393; 17 Ind. Cas. 629; 14 Bom. L. R. 908.

(5) 45 B 365; 59 Ind. Cas. 790; A I R 1921 Bom. 40; 22 Bom. L. R. 1420.

be justified in directing an early hearing of the suit. I direct the defendants to file their written statement within four weeks. Parties to make their respective affidavits of documents within ten days thereafter, usual inspection forthwith thereafter, and the suit to be on some board for hearing on November 14, 1938. As regards the costs of the Chamber Summons, the plaintiffs have chosen a wrong method of procedure and I direct the plaintiffs to pay the costs of the Chamber Summons. Counsel certified,

D.

Order accordingly.

ALLAHABAD HIGH COURT

Criminal Revision No. 274 of 1939

July 26, 1939

MULLA, J.

NAND KISHORE AND ANOTHER—

APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423, 236, 237, 238—Powers of Appellate Court under s. 423, if limited by ss. 236, 237 and 238—Accused not charged under s. 424, Penal Code (Act XLV of 1860)—His conviction under that section held wrong in law—Penal Code (Act XLV of 1860), s. 424—Scope—If applies where property is openly seized by person in exercise of alleged right.

Section 423, Criminal Procedure Code, is to be read with ss. 236, 237 and 238. The powers conferred upon the Appellate Court by s. 423, Criminal Procedure Code, are limited by the provisions of ss. 236, 237 and 238. *Mahabir Prasad v. Emperor* (1), relied on.

Where the complainant who had put forward a very clear and definite case of cheating under s. 418, Penal Code, never alleged that the accused had either concealed or removed the property within the meaning of s. 424, Penal Code, and no evidence was produced on behalf of the prosecution to show that the property had been concealed or removed by the accused; to such a case ss. 236 and 237, Criminal Procedure Code, are not applicable and the conviction of the accused by the Appellate Court under s. 424, Penal Code, even though they were not charged with that offence, is wholly wrong in law. [p. 153, col. 1.]

The removal referred to in s. 424, Penal Code, is *ejusdem generis* with concealment which precedes it. Section 424 is designed to meet a special class of cases, and has no application to a case where property is openly seized by a person in the exercise of an alleged right. [p. 154, col. 1.]

Cr. R. from an order of the Sessions Judge, Agra, dated December 23, 1938.

Mr. B. S. Darbari, for the Applicants.

The Deputy Government Advocate, for the Crown.

Order.—This is an application in revision by two persons, Nand Kishore and

Hemraj against an order passed by the learned Sessions Judge of Agra in appeal, convicting them of an offence under s. 424, Indian Penal Code. It appears that the applicants were convicted by the trial Court under s. 418, Indian Penal Code, but the learned Sessions Judge found that an essential ingredient of that offence had not been established by the evidence for the prosecution and he thereupon set aside the applicants' conviction under that section and proceeded to convict them under s. 424, Indian Penal Code, maintaining the sentence of fine imposed upon them. As the conviction by the learned Sessions Judge has been challenged mainly on the ground that it is wholly illegal, it is necessary to set out a few relevant facts in order to develop the points of law which arise for consideration.

The applicant Nand Kishore is the manager of the local branch of the Motor and General Finance Company, Limited, at Agra. The head office of the company is at Delhi. The other applicant Hemraj is also an employee of the local branch at Agra and works under Nand Kishore. A part of the business of this company is the sale of motor cars and lorries on the hire-purchase system. It appears that some years ago the company sold three motor lorries on that system to one Bhagwan Das and a person named Shiv Dayal, who is the complainant in the case, out of which the present application arises, stood surety for Bhagwan Das. Bhagwan Das failed to pay the instalments on the due date, with the result that one of the lorries was seized by the company under the terms of the agreement between it and Bhagwan Das. Later on, Bhagwan Das again defaulted in paying the instalments due in respect of the other two lorries, one of which was numbered 1865-AA and is the subject of dispute in the case out of which this application arises. The company gave a notice to Bhagwan Das of its intention to seize the motor lorries under the terms of the agreement. In reply to this notice Bhagwan Das gave a counter-notice to the company saying that if his lorries would be seized by the company, he would prosecute them in the Criminal Court as well as sue them in the Civil Court. It is alleged that this notice was given by Bhagwan Das at the instigation of Shiv Dayal, who was in fact the principal person. The result, however, was that the company stayed its hands and tried to settle the dispute by an agreement between the parties. For that purpose they called Shiv

Dayal to the company's office at Agra where some conversation took place between him and one Ved Prakash, an official of the company attached to the head office at Delhi. Now the case set up by Shiv Dayal is that the company agreed to take one of the two lorries regarding which default had been made by Bhagwan Das and to leave the other No. 1865-AA with Shiv Dayal, leaving him to adjust the matter between himself and Bhagwan Das. In pursuance of that arrangement Shiv Dayal executed a fresh agreement on the hire-purchase system on his own behalf in respect of the lorry No. 1865-AA and one Badri Prasad stood surety for him.

It is further alleged that Shiv Dayal settled the matter between himself and Bhagwan Das by paying a sum of Rs. 300. Now the case for the prosecution is that after the execution of the above-mentioned agreement by Shiv Dayal, which was signed on behalf of the company by the applicant Hemraj, the latter suggested that the former should send the lorry to the company's office at Agra after repairs with a view to get a permit from the Police with the company's assistance. Acting upon this assurance Shiv Dayal sent the lorry a few days later from Shamshabad, where he lives, to the company's office at Agra. Having thus secured the lorry, Hemraj and the other applicant, who is the manager of the local branch of the company at Agra, seized it on behalf of the company. Upon these facts Shiv Dayal charged the applicants with an offence under s. 418, Indian Penal Code. The prosecution case very clearly was that the applicants had given a false assurance to Shiv Dayal and he, acting upon that assurance, had sent the lorry to the company's office at Agra, where the applicants seized it, so that he lost his property. If Shiv Dayal's allegation is true, there can be no doubt that the applicants committed an offence of cheating, though the application of s. 418 is very doubtful. The learned trying Magistrate, however, found upon the evidence that Shiv Dayal's allegation relating to the circumstances in which he was induced to send the lorry to Agra, was false. Upon that finding the learned trying Magistrate could not but have acquitted the applicants, because an essential ingredient of the offence of cheating had not been established. In spite of that, the learned Magistrate somehow persuaded himself into convicting the applicants, though the process of reasoning

by which he arrived at that conclusion is rather difficult to understand.

The applicants then went up in appeal to the learned Sessions Judge of Agra, who found that the conviction under s. 418, Indian Penal Code, could not be maintained because the lorry had not been obtained by the applicants by means of any false representation such as that alleged by Shiv Dayal. Having arrived at that conclusion, the learned Judge ought to have allowed the applicants' appeal, but instead of doing so he proceeded to consider the facts of the case and ultimately reached the conclusion, that they disclosed an offence under s. 424, Indian Penal Code. In arriving at that result, the learned Judge was influenced by the statement made by the applicants in their defence in which they admitted the fact that the lorry had been seized on behalf of the company, though they clearly said at the same time that this seizure had taken place at the shop of one Chiranjil Lal at Agra and not at the office of the company, as alleged by Shiv Dayal. The learned Sessions Judge argued that the fact of the seizure of the lorry having been admitted by the applicants, their act clearly amounted to an offence under s. 424, Indian Penal Code, because they had no right to seize the lorry, and as they did so and removed it to their office, their action must be deemed to amount to a dishonest removal of the lorry within the meaning of s. 424, Indian Penal Code. It appears further that the learned Judge did not consider it necessary to send the case back for re-trial because he thought that in view of the admission made by the applicants any such proceeding would be wholly unnecessary. In these circumstances the applicants have been convicted under s. 424, Indian Penal Code. The first point which arises for consideration upon the facts mentioned above is whether the learned Judge was legally entitled to convict the applicants of an offence under s. 424, Indian Penal Code, even though they were never charged with it. Upon a careful consideration I think the answer must be in the negative. It is an elementary principle of criminal law that a person cannot be convicted of an offence without being definitely charged with it. This principle is embodied in s. 233, Criminal Procedure Code, which runs as follows :

"For every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately."

The same section, however, lays down the

exceptions to the general rule which are to be found in the succeeding ss. 234, 235, 236 and 239. The only one of these four sections which can possibly be applied to the present case is s. 236 which runs as follows :

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

The next section, namely 237, which is governed by s. 236 provides for the conviction of an accused person of an offence with which he has not been charged and runs as follows :

"If, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

Let us now examine whether the provisions of these sections could possibly apply to the facts with which we are concerned in the present case. The complainant Shiv Dayal had put forward a very clear and definite case of cheating. There was absolutely nothing in that case even to suggest that the applicants could be guilty of an offence under s. 424, Indian Penal Code. He never alleged that the applicants had either concealed or removed the lorry. Upon the facts alleged by him there could be no case under s. 424, Indian Penal Code. What is still more important is that no evidence was produced on behalf of the prosecution to show that the lorry had been concealed or removed by the applicants. The fact that the lorry was seized at the shop of one Chiranji Lal and was removed from there to the office of the company is to be found only in the statement made by the applicants in their defence in the trial Court. The statement made by the accused persons in their defence cannot, by any means, be said to be evidence as contemplated by s. 237, Criminal Procedure Code. It is thus clear that ss. 236 and 237, Criminal Procedure Code, were wholly inapplicable to the facts in this case and hence the conviction of the applicants by the learned Judge under s. 424, Indian Penal Code, even though the applicants were not charged with that offence, was wholly wrong in law. It is true that s. 423, Criminal Procedure Code, which defines the powers of an Appellate Court lays down that "in an appeal from a

conviction the Court may . . . alter the finding maintaining the sentence." But this is to be read with ss. 236, 237 and 238, Criminal Procedure Code. The powers conferred upon the Appellate Court by s. 423, Criminal Procedure Code, are limited by the provisions of ss. 236, 237 and 238, Criminal Procedure Code. In this connection I may refer to a decision of this Court in *Mahabir Prasad v. Emperor* (1). In that case a person was charged with a substantive offence but was convicted by the Appellate Court for abetment thereof, and it was held that :

"It is not open to a Court to find a man guilty of abetment of an offence on a charge of the offence itself. The only section which empowers an Appellate Court to alter a finding and base a conviction for abetment is s. 423, Criminal Procedure Code, but this section must be read with ss. 237 and 238 of the Act, and as abetment is not a minor offence, it can only come under s. 237 if there is no element in the abetment which is not included in the charge."

I would therefore hold that the learned Sessions Judge in this case erred in law in convicting the applicants under s. 424, Indian Penal Code, though they had not been charged thereunder. Again it appears to me that even upon the merits the conviction recorded by the learned Judge cannot be maintained. The whole basis of the conviction is obviously the fact that the applicants stated in their defence that they had seized the lorry at the shop of Chiranji Lal. It is however to be borne in mind that this was no part of the prosecution case and there was nothing in the prosecution evidence to support it. The learned Judge has, therefore, relied merely upon the statement of an accused person without taking that statement as a whole, as he was bound to do. Read as a whole, the statement of the applicants was that they were entitled, under the agreement between the parties, to seize the lorry. The complainant Shiv Dayal asserted his title to the lorry only on the basis of a written agreement executed by him which had been signed on behalf of the company by the applicant Hemraj. It is obvious that the validity of such an agreement can easily be questioned. There is nothing to show that Hemraj was duly authorized by the company to enter into any such agreement on their behalf. If that agreement was not legally valid and binding on the company, it necessarily follows that the applicants in their capacity as servants of the company, were entitled to seize the lorry and, if they

(1) 24 A L J 998; 97 Ind. Cas. 430; A I R 1927 All. 35; 42 A L J 120; 37 Cr. L J 1118.

did so, they cannot possibly be said to have dishonestly or fraudulently concealed or removed any property as contemplated by s. 424, Indian Penal Code. If the company was entitled to seize the lorry as urged by the applicants, there could be no element of dishonesty because there could be no wrongful loss to Shiv Dayal. Lastly, it appears to me that the learned Judge has not correctly interpreted the removal referred to in s. 424, Indian Penal Code. It is to be borne in mind that this removal is *ejusdem generis* with concealment which precedes it. Section 424 is designed to meet a special class of cases and has, in my opinion, no application to a case where property is openly seized by a person in the exercise of an alleged right.

The result, therefore, is that I allow this application and set aside the conviction and sentence of the appellants. The fine, if any paid by the applicants, may be refunded.

S.

Application allowed.

MADRAS HIGH COURT

Civil Miscellaneous Petitions Nos. 2992, 450
and 3619 of 1938

November 22, 1938

LEACH, C. J. AND KRISHNASWAMI

LYENGAR, J.

GOPU CHINA JOGAYYA, GOPU
SESHAVATHARAM AND COMPANY—

PETITIONERS

versus

MANAPALLI BAPANAYYA AND OTHERS

—RESPONDENTS

*Provincial Insolvency Act (V of 1920), s. 56—
Court, if can appoint additional Receiver (other
than Official Receiver) for special purpose.*

Section 56, Provincial Insolvency Act, does not operate to prohibit the Court appointing an additional Receiver (other than Official Receiver) for a special purpose. The Act contemplates the appointment of some one other than the Official Receiver in special circumstances and the Court has power to appoint an additional Receiver when the case demands it. All that the law requires is that the estate shall be represented by a Receiver appointed in the insolvency proceedings.

O. Misc. Ps. praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to post Appeal No. 331 of 1938 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezvada in O.S. No. 79 of 1932 for dismissal under O. XXII, r. 8, Civil Procedure Code, declaring that it had abated so far as the

first Appellant (first Respondent herein) is concerned.

Messrs. K. Rajah Ayyar and N. Vasudeva Rao, for the Petitioner.

Messrs. K. V. Gopalaswamy and V. Parthasarathy, for the Respondents.

Order.—After this appeal had been instituted, the first appellant was adjudicated an insolvent in the District Court of Kistna at Masulipatam and Mr. V. Rama Rao, the Official Receiver of that Court, was authorized under an order dated August 25, 1938, to continue the appeal in the place of the first appellant. The insolvent was not able to furnish the necessary security, but his brother-in-law Mr. Venkatakrishniah, was prepared to furnish it himself if he were appointed a Special Receiver for the purpose of conducting the appeal. This was brought to the notice of the learned District Judge in a formal application later in the day, whereupon the learned District Judge cancelled his previous order and appointed Mr. Venkatakrishniah as Receiver for the purpose of the appeal. The first respondent in the appeal has filed a petition (No. 2992 of 1938) asking the Court to declare that the appeal has abated so far as the first appellant is concerned, the contention being that the District Court had no power to appoint anyone the Official Receiver to take the place of the insolvent.

Section 56 of the Provincial Insolvency Act state, Court may, at the time of the order of adjudication or at any time afterwards, appoint a Receiver for the property of the insolvent and such property shall thereupon vest in the Receiver. It is conceded that under this section the Court, if it wished, could appoint two or more persons as Receivers, but it is said that, when a Receiver or Receivers have been appointed under the section, only he or they can act on behalf of the insolvent. In our opinion, the section does not operate to prohibit the Court appointing an additional Receiver for a special purpose. Section 57 of the Act confers upon the Local Government the power to appoint Official Receivers to act within such local limits as it may prescribe and states that, where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under the Act, he shall be Receiver for the purpose of every order appointing a Receiver or an *interim* Receiver issued by any such Court, unless the Court for special reasons otherwise directs. Therefore the Act clearly contemplates the

appointment of some one other than the Official Receiver in special circumstances and we consider that the Court has power to appoint an additional Receiver when the case demands it. The Court has passed an order appointing a Special Receiver to represent the estate in the present appeal. All that the law requires is that the estate shall be represented by a Receiver appointed in the insolvency proceedings and the appointment has been made. In these circumstances, we refuse the application filed by the first respondent for an order declaring the abatement of the appeal. The appeal has not abated and as there is before us a petition by Mr. Venkatakrishnaiah, the Special Receiver, asking that he be added an appellant, we direct that his name be brought on the record in the place of the name of the insolvent.

There is also before us an application by the first respondent for an order directing the new appellant to furnish security for costs. This application is unopposed. The first respondent asks that the security be ordered in the sum of Rs. 2,235 of which Rs. 1,735 represents the costs awarded to him in the trial Court and the balance of Rs. 500 the estimated costs of the appeal. By an order of the trial Court the costs awarded to the first respondent were made a charge on certain properties of the insolvent. The first respondent asks for a further order in respect of the trial Court costs as he states that a petition for a revision of that order has been filed in this Court. We are informed by the learned Advocate for the insolvent that that application has been returned to him by the Court and that it is not intended to refuse it. In these circumstances, we consider that the proper order to make now is that the Special Receiver shall deposit in this Court a sum of Rs. 500 as security for the costs in the appeal of the first respondent. Ten days' time will be allowed for the payment of the money.

The Special Receiver is entitled to his costs in the application by the first respondent for an order declaring that the appeal has abated and the first respondent will get his costs as against the Special Receiver in the application for an order directing him to furnish security for costs. There will be no order as to costs in the formal application made by the Special Receiver for an order directing that his name be brought on the record.

(Memo of costs will follow).

N.D. Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 27 of 1937

May 16, 1939

DAVIS, J. C. AND TYABJI, J.

LALUMAL DHOLUMAL AND OTHERS—

APPLICANTS

versus

HARUMAL LALSING AND OTHERS—

OPPONENTS

Civil Procedure Code (Act V of 1909), O. XXXII, r. 5 (2)—Minor without guardian applying for execution of rent decree—Court, if can allow Receiver appointed in proceedings to execute decree on his behalf.

Sub-r. (2) to r. 5 of O. XXXII, Civil Procedure Code, does not say that an order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. The sub-rule cannot be construed to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor to go on, or to permit them to be frustrated by mere accident or technicality.

So where an application for execution of rent decree is made by the minor without a guardian being appointed, the Court may allow the Receiver appointed in the proceedings to recover rent on behalf of the minor.

O. R. App. to revise the judgment and decree of Judge of the Small Cause Court, Sukkur, dated December 12, 1936.

Mr. Fatehchand Assudomal, for the Applicants.

Davis, J. C.—This is an application in revision against the judgment of the Judge of the Small Cause Court, Sukkur, in which he granted plaintiff, who was appointed Receiver in Suit No. 3 of 1924, a decree for Rs. 49 being the rent of the house in suit. Defendants Nos. 1 and 2 who were tenants, some time after the suit was instituted, paid the rent into Court and said they were not concerned to whom it was paid. So the dispute rested ultimately between the Receiver in Suit No. 3 of 1924 appointed in execution proceedings in Suit No. 3 of 1924 and defendants Nos. 3 to 5 in this suit. Defendants Nos. 3 to 5 in this suit were Narainibai, wife of Dholomal, and her two minor sons by Dholomal while the plaintiff in Suit No. 3 of 1924 was Sobhomal, the son of Dholomal by another wife. The learned Advocate for the applicants Narainibai and her two minor sons contended that the learned Judge was wrong when he relied on s. 64, Civil Procedure Code, to oust Narainibai and her two minor sons, for that section applies only to a private transfer and not to any transfer made under a decree, even if the decree be an award in execution proceedings and the learned

Advocate relied upon the Privy Council case in *Muhammad Afzal Khan v. Abdul Rahman* (1). The learned Advocate argues that it matters not if Ex. 42 which purported to be an assignment of the suit property by Dholomal to his wife Narainibai, was not a genuine document and did not evidence a genuine assignment, because under the award decree, Ex. 37 dated October 21, 1935, Narainibai and her two minor sons had a good title to the property in suit. But Sobhomal, the plaintiff in Suit No. 3 of 1924, was not a party to the award decree of October 21, 1935, and he is not, therefore in any way affected by its provisions. We cannot see, then, that it affects his title or his claim to recover rent in these execution proceedings.

The learned Advocate for the applicant then, however, falls back on the position that the Receiver was not validly appointed; he was not entitled to sue as a plaintiff, and it does appear that the learned Judge has in his judgment said that once he is satisfied that Narainibai and her two minor sons have no title, the question of title does not concern him. Obviously the plaintiff must succeed upon his own rights upon the strength of his own case and not upon the weakness of the defence. But the learned Judge was bound to accept as valid the decree in Suit No. 3 of 1924. Therefore the only point he really had to consider was whether the plaintiff as Receiver was entitled to execute that decree. The learned Advocate for the applicant contends that he was not so entitled, because he was appointed in proceedings brought by Sobhomal, when under the law, he was still a minor. Therefore, these proceedings under O. XXXII, r. 5, being void *ab initio*, the Receiver's appointment was void and he could not recover the rent for the property in suit. But O. XXXII, r. 5, was intended for the benefit of a minor and was not intended to enable a father to defraud his minor son of his rights; and we observe that sub-r. (2) to r. 5, does not say any order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. We cannot construe that sub-rule to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor to go on, or to permit them to be frustrated (1) 13 L 702; 139 Ind. Cas. 85; A I R 1932 P C 235; 59 I A 405; Ind. Rul (1932) P C 285; 9 O W N 629; 36 C W N 1129; 36 L W 456; (1932) M W N 1063; 63 M L J 664; (1932) A L J 909; L R 13 A 350; 16 R D 522; 53 O L J 324; 35 Bom. L R 1; 34 P L R 63 (P C).

by mere accident or technicality, such as in this case would deprive Sobhomal of the right to recover these rents through the Receiver. The learned Advocate for the applicant relies upon the fact that the execution application was brought by Sobhomal when he was over 18 years of age but under 21 years and that as a guardian had been appointed to his property, his age of majority was 21 years. We do not think, however, that this argument seriously concerns us in these proceedings. We see no reason why, we should hold all the proceedings in which the Receiver was appointed void, because the execution application was brought by Sobhomal when he was over 18 years and not yet 21 years of age. Under O. XXXII, r. 5 (2) we are not compelled to do so and we do not think that justice in any way requires that we should do so; justice, in fact, requires quite the contrary.

It turns out, then, that these proceedings are really in the nature of Small Cause Court proceedings, and that if Narainibai and her two minor sons wish to prove their title to property in dispute, it is perfectly open to them to file a suit based upon title for that purpose. We therefore dismiss their revision application with costs.

D.

*Application dismissed.***NAGPUR HIGH COURT**

Second Appeal No. 224 of 1937

March 27, 1939

NIYOGI, J.

**R. S. Pandit KRISHNA CHANDRA
SHARMA—APPELLANT***versus***Seth RISHABHA KUMAR—****RESPONDENT**

Minor—Contract of sale by guardian on behalf of minor—Purchaser, if can seek specific performance against minor—Conveyance and contract of sale—Distinction pointed out.

A guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor. The principle underlying is that a minor is not personally bound by any contract made on his behalf by his guardian. A contract for sale of immovable property does not of itself create an interest in or charge on such property. If it is a contract of purely personal nature and no personal liability can be imposed on the minor, it must logically follow that the minor cannot be compelled to perform the contract; for the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question. In every case when there is refusal to implement the contract of sale by the guardian, the breach is committed by the guardian

and never by the minor. The purchaser therefore can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him. Consequently s. 24-A of the Specific Relief Act, debars the purchaser from claiming the relief of specific performance against the minor. [p. 159, col. 1.]

[Case-law reviewed.]

There is a distinction between a conveyance and a contract of sale of minor's property. When the minor's property is already alienated, the Court is required only to find whether the alienation is binding on the minor or not. In such a case, no consideration of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. *Brahmadeo v. Haro Singh* (12), dissented from, *Venkatachalam Pillai v. Bethuram Rao* (13), relied on. [p. 158, col. 2.]

S. A. from the appellate decree of the Court of the Additional District Judge, Saugor, dated November 28, 1936, in Civil Appeal No. 24-A of 1936 confirming the decree of the Court of Subordinate Judge, Second Class, Khurai, dated February 29, 1936.

Mr. J. Sen, for the Appellant.

Mr. V. V. Kelker, for the Respondent.

Judgment.—This is a plaintiff's appeal from the concurring judgment of the Additional District Judge, Saugor, in Civil Appeal No. 24-A of 1936 delivered on November 28, 1936.

The suit out of which this appeal arises was to enforce specific performance of a contract of sale, in respect of a house belonging to the minor defendant, made by his mother acting in her capacity as his guardian. The sale deed had in fact been executed on October 14, 1934, but the guardian mother changed her mind and refused to have it registered. The sale deed was not, however, produced in Court as it was alleged to have been lost. The plaintiff had at first claimed the relief that the defendant be directed to get the sale-deed registered and also for rectification of the contract, but subsequently he withdrew these reliefs and prayed for a decree for specific performance.

The plaintiff averred that the sale was justified by legal necessity and also for the minor's benefit. The original Court did not formulate the issues of fact arising out of

the pleadings but tried the suit only on the preliminary issue whether on the facts pleaded by the plaintiff, he was entitled to a decree for specific performance. It held that he was not, and dismissed the suit. The lower Appellate Court agreed with that view and affirmed the decision.

The general rule is that a contract to be specifically enforced by the Court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former: see Fry on Specific Performance, Sixth Edition, Chap. VIII, p. 219. In *Lumley v. Ravenscroft* (1), Lindley L. J., observed "You cannot get specific performance against an infant." The doctrine has, no doubt, some limitations which it is not necessary to indicate here. The weight of authorities in India is opposed to the granting of specific performance in favour of or against a minor. In *Fatima Bibi v. Debnath Shah* (2), Norris, J., following *Flight v. Bolland* (3) held that a minor could not maintain a suit for specific performance of a contract entered into on his behalf by his guardian on the ground of mutuality. That view was not accepted by the Madras High Court in *Krishnasami v. Sundarappayar* (4) in which it was held, following the opinion of Mr. Whitley Stokes, that the doctrine of mutuality had no application in India. The same view was taken in *Khairunnessa Bibi v. Loke Nath Pal* (5). In *Mir Sarwarjan v. Fakhruddin Mahomed* (6) the Calcutta High Court held that if a contract is validly entered into on behalf of a minor and there is mutuality in such contract, it is capable of being specifically enforced. In that case the manager of an infant's estate entered into an agreement to purchase certain property on behalf of the minor and the question was whether the minor on attaining majority could sue

(1) (1895) 1 Q B 683; 64 L J Q B 441; 14 R 347; 72 L T 382; 43 W R 584; 59 J P 277.

(2) 20 O 508.

(3) (1828) 4 Russ. 298; 23 R R 101.

(4) 18 M 415; 5 M L J 164.

(5) 27 O 276.

(6) 34 O 163; 11 O W N 34; 4 O L J 431 (F B).

for specific performance of the agreement. The appeal was taken to the Privy Council in *Mir Sarwarjan v. Fakhruddin Mahomed* (7). Their Lordships approved of the application of the doctrine of mutuality but reversed the decision on the ground that it was not within the competence of the manager of a minor's estate to bind the minor or the minor's estate by a contract for the purchase of immovable property, and further that as the minor in that case was not bound by the contract, there was no mutuality and that he could not obtain specific performance of the contract. It is pertinent to notice that although the minor being a Muslim, the guardian's contract was void, their Lordships did not rest the non-enforceability of the contract on its being *ab initio* void but on the ground that the guardian's contract, valid or void in itself, did not affect the minor or the minor's estate. Their Lordships applied the doctrine of mutuality and refused specific performance on the ground of want of mutuality notwithstanding that the contract sought to be enforced was advantageous to the minor. In *Narayan Chetty v. Muthiah Chetty* (8) Ramesam, J., held that where a guardian of a minor enters into a contract on behalf of the minor that contract cannot be specifically enforced though it may be for the purpose of necessity or for the minor's benefit. In *Swarath Ram Ram Saran v. Ram Ballabh* (9) the Allahabad High Court declined to recognise the distinction between a case where a minor is a purchaser and a case where he is a vendor on the ground that in either case there is absence of the element of mutuality. In *Nripendra Chandra Sarkar v. Ekbarali Joardar* (10) which was a case of a contract by the manager of a joint family to sell land belonging to joint family including a minor, it was held that the application of the principle laid down in *Mir Sarwarjan v. Fakhruddin Mahomed* (7) was not limited to the case of a contract for the purchase of immovable property and that consequently the contract was not enforceable against the minor's share. In *Abdul Haq v. Yehia*

Khan (11), it was pointed out that no distinction could be drawn between a contract of purchase and a contract of sale and that the decision of the Judicial Committee was based on the broader ground that it is impossible for the Court to decree specific performance against a minor. Das, J., rested his decision on the ground of mutuality which Foster, J., was not prepared to accept although for other reasons he agreed with the decision of Das, J. A different view was taken by Wort, J., in *Brahamdeo v. Haro Singh* (12). The criterion which the learned Judge appears to have adopted was whether the sale of the minor's property was justified by legal necessity or benefit and acting on the principle that a guardian's alienation made for legal necessity or benefit of the minor is binding on the minor he decreed specific performance. With due respect, the learned Judge overlooked the distinction between a conveyance and a contract. When the minor's property is already alienated, the Court is required only to find whether the alienation is binding on the minor or not. In such a case no consideration of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. This was pointed out by Sundaram Chetti, J. in *Venkatachalam Pillai v. Sethuram Rao* (13). The Madras High Court, with the exception of *Krishnasami v. Sundarappayar* (14) which was decided before the clear pronouncement of the principle by their Lordships of the Privy Council in *Mir Sarwarjan v. Fakhruddin Mahomed* (7), has been quite consistent in declining specific performance against a minor on the ground of want of mutuality as is evident from the two cases cited already, and *Chidambara Swamigal v. Ramakrishna Reddiar* (14), *M. Nageswara Rao v. Mandava* (15). I may in passing

(7) 39 O 232; 13 Ind. Cas. 331; 39 I A 1; 16 O W N 74; (1912) M W N 22; 9 A L J 33; 15 O L J 69; 14 Bom. L R 5; 21 M L J 1156; 11 M L T 8 (P O).

(8) 47 M 692; 80 Ind. Cas. 658; A I R 1924 Mad. 680; 48 M L J 575; 34 M L T 350; (1924) M W N 482; 20 L W 103.

(9) 47 A 784; 89 Ind. Cas. 27; A I R 1925 All. 595; 23 A L J 625.

(10) 57 O 268; 127 Ind. Cas. 66; A I R 1930 Cal. 457; 34 O W N 272; Ind. Rul. (1930) Cal. 818.

(11) A I R 1924 Pat. 81; 78 Ind. Cas. 483; 4 P L T 553; 2 Pat. L R 181.

(12) A I R 1935 Pat. 237; 157 Ind. Cas. 327; 1 B R 747; 8 R P 117.

(13) 56 M 433 at p. 441; 142 Ind. Cas. 315; A I R 1933 Mad. 322; 64 M L J 354; 37 L W 340; Ind. Rul. (1933) Mad. 219; (1933) M W N 315.

(14) A I R 1924 Mad. 863; 82 Ind. Cas. 926; 47 M L J 683; 20 L W 559; (1924) M W N 878; 35 M L T 110.

(15) A I R 1928 Mad. 830; 110 Ind. Cas. 492; (1928) M W N 214.

refer also to *Malla v. Muhammad Sharif* (16) which applied *Mir Sarwarjan v. Fakhruddin Mahomed* (7), in the wider sense indicated by the observations of their Lordships of the Privy Council cited *ab.ve.*

The review of the authorities shows that barring *Wort, J.* all the High Courts are unanimous on the view that a guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor.

The principle underlying the view enunciated by their Lordships of the Privy Council evidently appears to be that a minor is not personally bound by any contract made on his behalf by his guardian as was laid down by their Lordships of the Privy Council in *Waghela Rajsanji v. Sheikh Masluddin* (17) see also *Ramajogayya v. Jagannadham* (18). A contract for sale of immovable property does not of itself create an interest in or charge on such property (see s. 54 of the Transfer of Property Act). If it is a contract of purely personal nature and no personal liability can be imposed on the minor, it must logically follow that the minor cannot be compelled to perform the contract; for the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question; Can the purchaser recover compensation from the minor for a breach of contract by the guardian? In every case when there is refusal to implement the contract of sale by the guardian, the breach is committed by the guardian and never by the minor. The purchaser, therefore, can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not, therefore, entitled to claim compensation from him. If that is so, s. 24-A of the Specific Relief Act debars the purchaser from claiming the relief of specific performance against the minor.

(16) A I R 1927 Lah. 355; 99 Ind. Cas. 684; 8 L 212; 28 P L R 492.

(17) 11 B 551; 14 I A 89; 5 Sar. 16 (P O).

(18) 42 M 185; 49 Ind. Cas. 872; A I R 1919 Mad. 641; 36 M L J 29; 25 M L T 23; 9 L W 229; (1919) M W N 148 (F B).

The appeal is dismissed with costs. Counsel's fees Rs. 25.

D.

Appeal dismissed.

MADRAS HIGH COURT

Appeal No. 168 of 1936

February 9, 1939

LEACH, C. J. AND SOMAYYA, J.

RM. AR. AR RM. ARUNACHALAM
CHETTIAR AND OTHERS—APPELLANTS

versus

SABARATNAM CHETTIAR AND OTHERS—
RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 28—Hindu father adjudged insolvent—Son's share in family property, if vests in Official Assignee—Creditor of son, whether can attach son's share without leave of Insolvency Court—Such attachment, if defeats Official Assignee's right to sell son's share to discharge father's lawful debts.

Section 28 (2), Provincial Insolvency Act, refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver, the son's share does not vest in him and hence proceedings can be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interests in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised. While the interest of the son remains unsold or unattached, the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right, he may lose it and he loses it if the interest of the son is attached by a creditor of the son. *Sat Narain v. Behari Lal* (1), *Bala Venkata Seetharama Chettiar v. Official Receiver, Tanjore* (2), *Sat Narain v. Sri Kishen Das* (3), *Gopalakrishnayya v. Gopalan* (4), *Chinna Veeriah v. Guriva Reddi* (5) and A. A. No. 253 of 1938, relied on, *Balusami Naidu v. Official Receiver* (6), dissented from. [p. 161, col. 2]

A. against an appellate order of the District Court, Ramnad at Madura, dated July 2, 1936.

Messrs. *M. Patanjali Sastry* and *T. K. Sundararaman*, for the Appellants.

Messrs. *C. S. Venkatachariar* and *M. Murugappa Chettiar*, for the Respondents.

Leach, C. J.—On September 24, 1931, the appellant obtained a decree for Rs. 19,383-10-1 with interest against one Ramaswami Chettiar and his five sons. The father and the sons constituted a joint Hindu family. In 1926, the father was

adjudicated an insolvent by the Subordinate Judge of Tinnevely. The Court of the Subordinate Judge of Devakottah subsequently obtained seisin of the insolvency proceedings and the estate of the insolvent vested in the Official Receiver of Ramnad. The Official Receiver sought to bring the whole of the family properties to sale for the benefit of the creditors on the ground that the sons' shares in those properties were available for the discharge of the father's debts on the principle of Hindu Law that sons are liable for their father's debts. The Official Receiver received bids for the various items of property in March, 1932, but he did not accept any bid and adjourned the sale until April 9, 1932. Meanwhile the appellant had filed in the Court of the Subordinate Judge of Devakottah proceedings in execution of his decree and asked for the attachment of the shares of the sons in the family properties. An order was issued and the properties were attached. The appellant then filed an application asking the Court to restrain the Official Receiver from proceeding to sell the shares of the sons in the attached properties. By consent, on April 9, 1932, an order was passed by the Subordinate Judge allowing the Official Receiver to proceed with the sale of the properties, but subject to his paying five-sixths of the proceeds (the amount representing the sons' shares) into Court pending the decision of the main application. In pursuance of this order, the Official Receiver sold the properties in June 1932 and realized a total sum of Rs. 17,400. Of this amount, Rs. 14,500 representing the shares of the sons was deposited in the Court of the Subordinate Judge. The Subordinate Judge having heard the parties held that the appellant was entitled to an order for payment to him for the Rs. 14,500 on the ground that the Official Receiver's power to sell the interests of the sons in the properties for the discharge of the father's debts was defeated by the order of attachment. The Official Receiver appealed to the District Judge, who reversed the decision of the Subordinate Judge on the ground that the right to sell the properties had vested in the Official Receiver either at the time of adjudication or sometime before the sale of the properties took place. The learned District Judge failed to understand the question which was before him. The fact that the right to sell the son's share had devolved on the Official Receiver was not the only factor. The present appeal is from the order of the District Judge.

The appellant contends that the Official Receiver merely stands in the shoes of the father. He says that as the attachment would be valid against the father and would prevent him from exercising his power to sell his son's interests in the family properties in order to discharge his own debts, the attachment puts an end to the right of the Official Receiver to sell as he has no greater rights than the father. The Official Receiver does not attempt to support the decision of the District Judge on the ground given by the District Judge, but he says that there cannot be a valid attachment without the leave of the Insolvency Court and in this connection relies on the provisions of s. 28, Provincial Insolvency Act, 1920. Before examining the effect of s. 28, it will be convenient to refer to certain authorities which lay down principles which have application here. In *Sat Narain v. Behari Lal* (1), the Privy Council held that when a Hindu is adjudicated an insolvent under the Presidency Towns Insolvency Act, 1901, his sons' interests in the joint family property do not thereby become vested in the Official Assignee, although under s. 52, or in some other way their interest in the family property might be available for the payment of the father's debts. There is no provision in the Provincial Insolvency Act which renders the position any different to the position under the Presidency Towns Insolvency Act. In *Bala Venkata Seetharama Chettiar v. Official Receiver, Tanjore* (2), a case governed by the Provincial Insolvency Act, a Full Bench of this Court expressly held that on the insolvency of a Hindu who is subject to the Mitakshara Law, the insolvent's power to sell his sons' shares in the family property for paying his just and proper debts vests in the Official Receiver but that the sons' shares do not vest in him. This principle was re-affirmed by the Judicial Committee in *Sat Narain v. Sri Kishen Das* (3). There their Lordships pointed out that although s. 52 (2)(b), Presidency Towns Insolvency Act, entitles

(1) 6 L L 1; 84 Ind. Cas. 883; A I R 1925 P O 18; 53 I A 22; 47 M L J 857; 10 O & A L R 1332; (1925) M W N 1; 23 A L J 85; L R 6 A P O 1; 26 P L R 81; 27 Bom. L R 135; 21 L W 375, 1 L C 500; 1 O W N 916; 29 O W N 797 (P O).

(2) 49 M 818; 97 Ind. Cas. 825; A I R 1928 Mad. 994; 51 M L J 269; 24 L W 345; (1928) M W N 743 (F B).

(3) 17 L 644; 164 Ind. Cas. 6; A I R 1936 P O 277; 63 I A 381; 1936 O L R 474; 9 R P O 62; 1936 O W N 681; 2 B R 757; 44 L W 417; 40 O W N 1382; 17 P L T 717; 61 O L J 80; 38 Bom. L R 1129; 1936 A L R 795; (1936) M W N 1204; 33 P L R 976; 71 M L J 813; (1937) A L J 414 (P O).

the Official Assignee to exercise the father's powers to sell the share of his son in the family property to discharge his debts, such powers are subject to limitation. Section 28 (2), Provincial Insolvency Act, states :

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors and thereafter except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose."

This section refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver as the case may be, it does not follow that proceedings cannot be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interests in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised.

The right of a creditor to proceed to attach a son's property notwithstanding the father's insolvency has been recognized by two Benches of this Court. In *Gopalakrishnayya v. Gopalan* (4), Ramesam and Devadoss, JJ. held that notwithstanding that on the insolvency of a Hindu father joint with his son the power of the father to sell the son's share in the family property passed to the Official Receiver in the insolvency, the Official Receiver is not entitled to exercise that power after there has been an attachment of the son's share by a creditor. The attaching creditor is entitled to proceed with the execution by selling the share of the son. In A. A. O. No. 253 of 1936, *Manickam Pillai v. Vallayya Naicken* a decision which has not yet been reported, King and Krishnaswami Ayyangar, JJ. had to consider the direct question whether s. 28 (2), Provincial Insolvency Act, prohibits an attachment of a son's share without the leave of the Insolvency Court.

(4) 51 M 342; 111 Ind. Cas. 505; A I R 1928 Mad. 479; 54 M L J 674; 27 L W 420.

They held that it did not. The learned Judges in that case pointed out that all that the Official Receiver can do in respect of the property of the undivided sons of an insolvent is to exercise the power of the insolvent himself and sell that property to meet the insolvent's debt; but that power can be defeated at any time by any action taken by the sons themselves to dispose of their property or by any action taken by the sons' creditors against them. This principle was also recognized by Krishnan Pandalai, J. in *Chinna Veeriah v. Guriva Reddi* (5). In that case, after the adjudication of the managing member of a joint Hindu family a creditor filed a suit on a promissory note executed by the managing member. The suit was dismissed as against the insolvent and the Official Receiver but was decreed as against the other members of the joint family. It was argued on appeal that the suit could not even be maintained as against the other members of the family on the ground that on the insolvency of the managing member the power to sell the whole of the family property to discharge the debts of the family vested in the Official Receiver as the property of the insolvent. The Court held that the creditor was not resorting to any property of the insolvent or trying to interfere with the power of the Official Receiver. The creditor was only seeking to realise his debt from the share of the son in the family property and therefore the suit was maintainable.

The learned Advocate for the Official Receiver has quoted the decision of Pandurang Row, J. (sitting alone) in *Baluswami Naidu v. Official Receiver, Madura* (6). The learned Judge does appear to have formed the opinion that in the case of the insolvency of a Hindu father, s. 28 (2), Provincial Insolvency Act, does prevent the creditors of a son from attaching the son's share in the family property without the leave of the Insolvency Court. As I have indicated, I do not share this view and as I have also indicated it is opposed to the decisions of two Benches of this Court: *Gopalakrishnayya v. Gopalan* (4) and A. A. O. No. 253 of 1936 *Manickam Pillai v. Vallayya Naicken*. The position is that while the interest of the son remains unsold or unattached, the Official Assignee has the right to sell the properties for the lawful debts;

(5) 66 M L J 277; 148 Ind. Cas. 831; A I R 1934 Mad. 223; 39 L W 347; (1934) M W N 622; 6 R M 541.

(6) (1938) 1 M L J 824; 179 Ind. Cas. 584; A I R 1938 Mad. 752; 47 L W 587; (1938) M W N 455; 11 R M 599.

of the insolvent father, but unless he exercises his right he may lose it and he loses it if the interest of the son is attached by a creditor of the son. For these reasons I hold that the decision of the District Judge is wrong and the decision of the Subordinate Judge should be restored. Accordingly I would allow the appeal with costs against the Official Receiver here and below.

Somayya, J.—I agree.

N.—8.

Appeal allowed.

PATNA HIGH COURT

Criminal Appeals Nos. 171 and 173
of 1939

September 13, 1939

HARRIES, O. J. AND FAZL ALI, J.
CR. A. No. 171 RAMBRICHH SINGH
—ACCUSED—APPELLANT, CR. A. No. 173
JADU JHA AND OTHERS—APPELLANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE
PARTY

Criminal trial—Duty of prosecution—Defence story untrue—Prosecution must still establish truth of their story—Conviction—Fight between two mobs—Mere suspicion that accused were present is not sufficient for conviction—Court doubting truth of prosecution version—Benefit of doubt.

Even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true. [p. 168, col. 2.]

If a fight has taken place between two armed mobs, but there is no evidence as to what actually occurred, a mere suspicion that the accused were present can form no basis for a conviction. [p. 169, col. 1.]

Once the Court has any doubt about the truth of the version even as first recorded in the first information report, then the accused is entitled to the benefit of that doubt. [*ibid.*]

Cr. As. from the decision of the Sessions Judge, Bhagalpur, dated July 20, 1939.

Sir Sultan Ahmed and Mr. K. K. Banerji, in Cr. A. No. 171, Messrs. Jafar Imam, S. N. Sahay, B. N. Rai, S. Mehdi Imam and R. J. Bahadur (in Cr. A. No. 173), for the Appellants.

The Government Pleader, for the Crown.

Messrs. Binoy Bhusan Ray and G. C. Das, for the Complainant.

Harries, C. J.—These are two connected appeals arising out of a criminal case tried by the learned Sessions Judge of Bhagalpur. The appellants in the two appeals are

Jadu Jha, Bhukhan Jha, Satyadeo *alias* Sahdeo Missir, Rama Dhanuk, Shaikh Gafoor, Mahabir *alias* Jung Bahadur Gope and Rambrichh Singh. The two appeals arise out of the same matter and can be disposed of in one judgment. The seven appellants together with three other persons, who were acquitted, were tried on a number of charges arising out of a riot which took place on January 16, 1939, in village Singhar, P. S. Kishunganj, in the District of Bhagalpur. Jadu Jha was charged under ss. 302 and 148 of the Indian Penal Code; the appellants Bhukhan Jha, Satyadeo, Rama Dhanuk and Mahabir were charged under s. 148 and s. 302 read with s. 149 of the Indian Penal Code; and the appellants Shaikh Gafoor and Rambrichh Singh were charged under s. 147 and s. 302 read with s. 149 of the Indian Penal Code. Jadu Jha was found not guilty of the charge under s. 302 of the Indian Penal Code, but was convicted under s. 302 read with s. 149 and s. 148 of the Indian Penal Code, and sentenced to transportation for life under s. 302 read with s. 149 of the Indian Penal Code and to two years' rigorous imprisonment under s. 148 of the Indian Penal Code, the sentences to run concurrently. The remaining appellants were found guilty under s. 302 read with s. 149 and s. 147 of the Indian Penal Code, and sentenced to transportation for life under s. 302 read with s. 149 and to one year's rigorous imprisonment under s. 147, the sentences to run concurrently. It is against these convictions and sentences that the present appeals have been preferred.

There can be no doubt that a riot took place in the village of Singhar on January 16, 1939, and that during the course of that riot one Jhapta Tiar was killed and another person Mukhlal Chaudhuri severely injured. It is in respect of the death of Jhapta Tiar that the seven appellants have been convicted under s. 302 read with s. 149 of the Indian Penal Code.

The case for the prosecution can be shortly stated as follows:—In the village of Singhar there was a plot No. 657 of an area of about $1\frac{1}{2}$ bighas. This plot formed part of a larger area of 16 or 17 bighas, which was the *bakasht* land of Mahant Sundar Gir. This land has formerly formed part of a larger area which had been owned by one Sundar Mahto and his nephew Gorelal. These two persons partitioned the land, and Sundar Mahto got the *bakasht* land on the north-west of the *patti*

and Gorelal the land in the south-east portion. The appellant Jadu Jha and his brother Janardan Jha purchased the land of Sundar about eight years ago in execution of a money decree and the entire interest of Gorelal was purchased by Mahant Sundar Gir in 1933. The plot in question, it is said, formed part of the land allotted to Gorelal in this partition and, therefore, became the property of the *mahant*. In 1934 the *mahant* obtained *dakhaldhani* of the property and since then, it is said, he has been in *khas* possession of the same. In the year 1935 the appellant Jadu Jha undoubtedly laid claim to this *bakasht* land of Gorelal alleging that the latter had given it to him in *raiyati* settlement. There were proceedings under s. 144 of the Code of Criminal Procedure between the appellant Jadu Jha and the *mahant*; but these proceedings were eventually compromised and the appellant Jadu Jha gave up all claims to the area of 18 *bighas* of *bakasht* land which included plot No. 657 which is the important plot in this case.

According to the prosecution, on the morning of January 16, 1939, Satto Kuar, the Mahant's Tahsildar, sent off ten ploughs and ploughmen together with two peons Jhapta Tiar and Mukhlal to plough the *bakasht* land. According to the prosecution, Jhapta Tiar was a man of another village who had been in the *mahant's* employ as a *sipahi* for about two months. The party arrived at Singhar and commenced to plough plot No. 657. The prosecution allege that shortly afterwards Jadu Jha at the head of a mob of about forty or fifty men came from Jadu Jha's Basa, about a quarter of a mile to the north-west of the field, and approached Jhapta Tiar. Jadu Jha is said to have asked Jhapta Tiar why he was ploughing the land, and the latter replied that he was entitled to plough his master's land. Thereupon, it is said, Jadu, who was armed with a spear, came towards Jhapta, who ran towards the south. The mob pursued him, caught him up and Jadu speared him below the right arm pit, and the appellant Mahabir struck him on the head with a *garasa*. Jhapta fell down whereupon the mob joined in beating him. After disposing of Jhapta, it is said that the mob turned their attentions to Mukhlal and that Jadu Jha speared him in the stomach, whereas others struck him with *pharsa*, *bhala* and *lathi*. After Mukhlal had fallen down, the mob attempted to lift him up, but this they failed

to do. The learned Sessions Judge remarks that "Mukhlal is a man of altogether unusual physique and of colossal bulk", and for this reason it is suggested that the mob could not move him. The appellant Jadu and his followers then returned to Jhapta Tiar, who was by then dead and picked up the body and carried it to an orchard of Bhubneshwar Singh. There, it is said, they wrapped the body in a cloth, placed it in a bullock cart and took it to the Basa of Jadu Jha. After that four or five members of the mob returned to the field which was covered with long paddy stubble, and they set fire to it. It is suggested by the prosecution that they did this in order to conceal the blood marks caused by the attacks on Jhapta and Mukhlal.

The two peons, Jhapta and Mukhlal were seated on the boundaries of the plot some distance from each other and some distance from the ploughmen who were actually ploughing. The latter, it is said, ran away some little distance and witnessed the whole occurrence. One of them, namely Shyamlal (P. W. No. 1), went to Sonbarsa, where Satto Kuar, the Mahant's Tahsildar, was and reported to him what had occurred. Satto Kuar, it is said, immediately proceeded on horseback to the Police Station at Kishunganj, which was about six miles away, and at 11-30 A. M. he made a first information report. In this report Satto Kuar mentions that he had sent the ploughmen together with Jhapta and Mukhlal to plough the land and that the appellants Jadu Jha, Bukhan Missir, Gafoor Mia, Sahdeo Missir, Mahabir Gop and another person Uma Missir who was acquitted together with forty or fifty men came on to the plot armed with *bhala*, *garasa* and *lathi* and began to assault the two peons. He mentions that this mob caused injuries to Mukhlal with *bhala* and *garasa* and assaulted Jhapta with the same weapons. He further mentioned that he could not say where they had carried Jhapta from the spot and said that the latter was so severely injured that he might well be dead. He added that the accused persons were grievously hurt and that the ploughmen were witnesses of the occurrence.

According to the prosecution, just as the Assistant Sub-Inspector had completed the recording of this report, the appellant Mahabir arrived at the *thana* and made other report. According to Mahabir's report, Satto Kuar together with about a hundred men came to Singhar armed with

bhalas, garasas and lathis and went to the house of the appellant Jadu Jha. It is said that they used force, whereupon the appellants Gafoor Mia, Jhapta Tiar, Bukhan Jha, Bago Missir and the informant defended themselves. In this assault Jhapta Tiar is said to have been struck down and killed. Mahabir alleged that he had been struck with a spear and that he had an injury on the left thumb.

It will be seen that according to this report the deceased man Jhapta Tiar was said to be a servant of Jadu Jha and not of Mahant Sundar Gir.

The Police took up investigation and visited the scene of the riot and found that part of the stubble had been burnt as alleged by the prosecution. According to the Police, blood-stained earth was found in places in spite of the fires, and this earth was later found to be stained with human blood by the Chemical Examiner and Imperial Serologist. The Police came to the conclusion that the version given in Satto Kuar's report was the correct one, and accordingly proceedings were brought against the seven appellants and three others.

According to the prosecution, the occurrence took place between a mob of forty or fifty led by the appellant Jadu Jha on the one hand and two peons of Mahant Sundar Gir on the other hand. It is not alleged that the ten ploughmen took any part in the proceedings. The motive for the attack is said to be the appellants' desire to recover this *bakasht* land which he had claimed in 1935 to be his property.

It is difficult to believe that the riot was the result of any claim made by the appellant Jadu Jha to this property. As I have stated earlier, it was the case for the prosecution that this property had given rise to proceedings under s. 144 of the Code of Criminal Procedure and that those proceedings had been compromised. By that compromise Jadu Jha acknowledged that the *mahant* was entitled to *khas* possession of this land, and that being so, there appears to be no reason why the appellant Jadu Jha should have suddenly laid claim to the land. There are indications in this case which suggest that the trouble between the villagers of Singhar and the *mahant* was far more acute than the prosecution suggest. It was admitted by the witnesses for the prosecution that the *mahant's* land had been previously cultivated by *bataidars* and that the *mahant* over a period of time had succeeded in ejecting these persons. Fur-

ther, it must be remembered that Jadu Jha and some of the other appellants were prominent members of the Local Congress organization and were taking an active part in the Kisan movement. There was undoubtedly enmity between Jadu Jha and the *mahant* and litigation had taken place between them. In such circumstances it may well be that the occurrence which took place on the morning of January 15, 1939, was something different from that suggested by the prosecution. It is more likely that this was an occurrence between Kisans demanding possession of *bakasht* lands and the *malik* who was denying such possession. From the evidence of Satto Kuar (P. W. No. 2) it would appear that he did not expect any trouble on the morning in question: hence he only sent two peons Jhapta Tiar deceased and Mukhlal. It is to be observed, however, that these two persons were of somewhat unusual character. Jhapta Tiar is admitted to have been an absconder in a murder case, whereas, according to the Sessions Judge, Mukhlal was a man of extraordinary physique who might well have been a retired wrestler, though Mukhlal denied this. However, if only two peons were sent, it does suggest that no trouble was anticipated on the morning in question.

I am, however, far from satisfied that this was an occurrence between a mob on the one hand and two peons on the other. At 11 a.m. that is half an hour before Satto Kuar made his report, Lalji (P. W. No. 20) *chaukidar* of the village reported at the *thana* that there was an apprehension of a breach of the peace between Jadu Jha and Mahant Sundar Gir and that both parties had collected *lathials*. He concluded by saying that he could not say what was the cause of the trouble. Lalji had gone to the *thana* on foot, and it is fairly clear that he must have left the village immediately before the riot started. In the report he clearly says that both sides had collected *lathials*. The learned Sessions Judge does not attach any great importance to this report and he regards it as an exaggeration on the part of the *chaukidar*. The learned Judge thought that Lalji having seen Jhapta Tiar and Mukhlal with the ploughmen might well have thought that the *mahant* had gathered together *lathials*. Lalji *chaukidar* gave evidence, and he undoubtedly resiled from his earlier statement. In the witness box he said that he had seen a number of men at Jadu Jha's house and more men on the *mahant's* land.

According to him, this was the sole reason why he went to the *thana* to make a report. When it was put to him that he had mentioned that both sides had collected *lathials*, he denied having ever made such a statement. The Police, on the other hand, had to admit that such a statement had been made and recorded. If both sides had collected *lathials* on this particular morning, then it is clear that the prosecution have given a false version of what occurred.

That the occurrence was something different from that suggested by the prosecution is also indicated in the first information report made by Satto Kuar. The names of the accused are given as Jadu Jha, Gafoor Mian, Bhukhan, Satdeo Missir, Mababir Gop, Uma Missir and forty or fifty men more, residents of villages Karawan, Sonbarsa and Tilakpur. These are villages lying at a distance of two or three miles from Singhar, and if the mob consisted of persons from other villages, the probabilities are that this was part of the Kisan agitation and not a private quarrel between Jadu Jha and the *mahant*.

Another important statement in the first information report is that the accused persons have been grievously hurt. It is not suggested now by the prosecution that any of the accused persons were hurt, and indeed they could not have been hurt if the prosecution version be true. As I have stated, the account now given by the prosecution of the affair is an unprovoked attack by a large mob upon two persons who attempted to run away. There is, however, the clearest statement in the first information report that "the accused persons have been grievously hurt. The Assistant Government Advocate who appeared for the Crown attempted to explain away this difficulty by saying that the word used was not "accused" but "injured." In short, he says the sentence ought to read "the injured persons have been grievously hurt"; and it is to be observed that the first information report was so translated in the Court below and that was the translation which was placed before the Sessions Judge. Accordingly the Sessions Judge does not deal with this aspect of the case. The word used in this sentence is *mojrim*, and there can be no doubt whatsoever that that word means "accused" or "offenders." It cannot possibly mean "injured". The Assistant Government Advocate suggested that the word might be *majrooh* which means "injured"; but it is clear that the word written is not *majrooh* but *mojrim*.

Mr. Jafar Imam, who has argued this case with great ability on behalf of the main appellants, has contended that the word *majrooh* is not a word which any person in that locality would be likely to use and that in any event an Assistant Sub-Inspector would never use the word *mojrim* when he meant injured persons. According to Mr. Jafar Imam, *mojrim* is a word in common use, whereas *majrooh* is not. It would be impossible for me to arrive at any decision upon this question but for the fact that I had the advantage of sitting with my learned brother Fazl Ali, J., who has a wide knowledge of the language and of all districts in this province. He is satisfied that a Sub-Inspector could never use the word *mojrim* to mean injured. It has only one meaning and that is "accused person or offenders."

If Satto Kuar stated that accused persons had been grievously hurt, then it is obvious that there were *lathials* on the side of the *Mahant* and that a fight had taken place between two armed mobs. This is, of course, denied by the prosecution; but, in my view, the statement that accused persons had been grievously hurt can only be explained on the ground that there had been a fight between armed parties. If such was the occurrence, then it is clear that the case for the prosecution is wholly false.

There are other indications in the first information report that the document is not a genuine one. Counsel who appeared with Counsel for the Crown in the Court below also appeared with the Assistant Government Advocate in this case, and according to him, the original document was never inspected thoroughly by anybody in the Court below. As I have stated, a translation had been prepared which was before the learned Sessions Judge. A mere glance at the first information report will show that additions have been made to it. The report of the occurrence is written on both sides of the page, and the first page ends with these words "after one hour Shyamlal Missir came running to the *muth* and reported that Mukhlal Singh peon and Mohan Mandal alias Jhapta Tiar had gone to get the land ploughed". On the reverse side of the sheet the report was continued, and it is clear that the first word on the reverse side is *usme*. The opening sentence on the reverse side of the sheet can be translated "thereupon or in that affair the accused persons Jadu Jha and others caused injuries to Mukhlal Singh by assaulting him with

bhala and *garasa*, &c., &c." However, above the first line on the reverse side of the page have been inserted three lines which have been written very close together. The lines in the remainder of the report are well and evenly spaced; but these three lines are squeezed in in the narrow space between the line beginning with *usme* and the top of the page. What appears in the three lines written in that narrow space are the words "Jadu Jha, Bhukhan Missir, Gafoor Mian, Sahdeo Missir, Mahabir Gop, Uma Missir and forty or fifty men more came armed with *bhala*, *garasa* and *lathi* and began to assault him." In short, the names of the accused other than Jadu Jha all appear in these three lines which have been squeezed in at the very top of the page. As I have stated, a cursory glance at this document is enough to show that these three lines could never have been written by a person taking down Satto Kuar's statement in the ordinary course of his duty. The spacing is entirely different and the handwriting is smaller, and it is clear that when these three lines were written it was obvious to the mind of the writer that he had very little space in which to write them.

It is inconceivable that, if Satto Kuar knew the names of the accused, he would have omitted to mention them when the report was first recorded. If this report as originally recorded did not contain the names of Bhukhan Missir, Gafoor Mian, Sahdeo Missir, Mahabir Gop and Uma Missir, then it must have been deliberately altered in order to strengthen the case for the prosecution. It cannot be overlooked that after this report was recorded the appellant Mahabir arrived and made another report, and in that report he mentions not only that he was present but also that the appellants Gafoor Mian and Bhukhan Jha were also there. It was strongly urged by Mr. Jafar Imam that the names of these appellants were added in the *thana* after it became known from Mahabir that Bhukhan, Gafoor and Mahabir were present in the occurrence. It is quite impossible for me to come to any conclusion as to when and why these names were added; but I am perfectly satisfied in my own mind that the only name which appeared in this report when it was first recorded, was the name of Jadu Jha. The report has undoubtedly been altered and the names of other appellants interpolated therein.

Column 2 on the front page of the first information report also shows that altera-

tions had been made. This is the column in which the names and residences of the accused are given; and it is clear that the name of Mahabir Gop was added in this column. Whoever filled this column first wrote five names, Jadu, Bhukhan, Gafoor, Sahdeo and Uma, and numbered them 1 to 5. Between the name of "Sahdeo" and "Uma" the name of "Mahabir Gop" has been added and numbered 5, and the original No. 5 which stood opposite Uma's name has clearly been altered to 6. This also shows that there were alterations made in this report of which the prosecution have offered no explanation whatsoever. The attention of the Court was also drawn to another addition on the first page. On the last line of the first page of the report it is stated that Mukhlal Singh peon and Mohan Mandal had gone to get the land ploughed. Underneath the name "Mohan Mandal" appears the words "*uruf* Jhapatu Tiar". According to the prosecution, the deceased Jhapatu Tiar was also known as Mohan Mandal, and it may well be that this was an honest mistake. No attempt seems to have been made to alter the words first written in the report and the words "*uruf* Jhapatu Tiar" are written just under the words Mohan Mandal. I, therefore, do not attach any great importance to this alteration. However, the insertion of names in this first information report does throw the very gravest doubt upon the genuineness of the case for the prosecution.

That some of the names of the appellants mentioned in the report could not have been given by Satto Kuar, is, in my view, clear from the evidence. It must be remembered that Satto Kuar was not an eye-witness and that he merely stated what Shyamlal Missir (P. W. No. 1) had reported to him. Shyamlal in evidence had to admit that he had not named either Sahdeo or Uma to the Police. He stated that he did not know their names at that time and then said that he forgot whether he gave their names to Satto Kuar or spoke of them as the sons of Khuddar. If he did not know their names at the time, he could not have named them to Satto Kuar, and if he made any reference to these two men he could only have mentioned them as the sons of Khuddar. Even if he had said that the sons of Khuddar were there, such could not account for Uma being named by Satto Kuar because he is not a son of Khuddar. Shyamlal, when he was called to identify Uma and Sahdeo, could not distinguish between them, and before the

Committing Magistrate he wrongly pointed out Bhubhan for Satyadeo, which suggests that he knew neither. It seems clear from Shyamlal's evidence that he could not have named either Satyadeo or Uma, yet both names appear in the interpolation in the first information report. The prosecution can offer no explanation as to how these names appear except that Shyamlal must have given them to Satto Kuar. It is clear from Satto Kuar's own evidence that he had no information whatsoever except that given him by Shyamlal; but in spite of that names appear in the first information report, which Shyamlal could never have given and those names appear in the most suspicious circumstances. That being so, I cannot accept this first information report as a genuine document; and that being so, grave doubts arise in my mind about the truth of the case for the prosecution.

The Assistant Sub-Inspector came on to the scene later in the afternoon, and during night he recorded the statements of the various ploughmen. These ploughmen are all servants of the *mahant*, and therefore, their evidence must be scrutinized with great care. If some one in authority had determined to make out a case against the appellants, these unfortunate ploughmen would have no alternative but to support it. I would, therefore, not attach any great weight to the evidence of the ploughmen unless it is corroborated by independent testimony. As I have stated, the ploughmen all support the prosecution version that this was an unprovoked attack upon two peons; and this version, as I have already pointed out, is most unlikely having regard to the report made at the *thana* at 10-30 A. M. that morning by Lalji *chaukidar* (P. W. No. 20). The fact that Lalji *chaukidar* in the witness-box denied having stated that both sides had collected *lathials*, also suggests that the prosecution, for reasons best known to themselves, were not putting forward a true version.

Three witnesses made it clear that in this mob were men from Karawan, though they undoubtedly tried to resile from that version later. Jahuri (P. W. No. 19), a *raiya*t of the village, in a statement on oath made under s 164 of the Code of Criminal Procedure mentions a mob from Karawan which was joined by Jadu's men. In evidence in the Sessions Court he denied the truth of this and could not

remember whether he had ever told the Magistrate when his statement was recorded under s 154. Medni (P. W. No. 21), another *raiya*t of the village, also stated to the Magistrate that a mob from Karawan also surrounded the deceased man Jhapta Tiar. In the Sessions Court he says that what he meant was that a mob came from the Karawan side of the Basa which joined Jadu's mob. Shyamlal (P. W. No. 1) mentioned to the Magistrate in his examination under s. 164 of the Code of Criminal Procedure that a mob of forty or fifty men came from Karawan and Singhar. Before the Committing Magistrate he said that the mob came from Jadu's Basa, and in the Sessions Court he said that the mob came with Jadu from the north-west and denied that he had stated in his examination under s. 164 that the mob came from Karawan as well as Singhar. It is clear that these witnesses did at first say that the mob consisted of men from Karawan as well as of Singhar but that they have denied this, presumably, with a view to supporting the case of the prosecution that this was a mob assisting Jadu in a personal quarrel.

All the indications show that this was a riot between *kisans* on the one hand and the *zamindar's* men on the other. Unfortunately at that time feelings were running high between the parties, and such an occurrence might well have taken place. If that be the true view of the occurrence, then there is the real danger that Jadu might be mentioned as the leader whether he was present or not.

The learned Sessions Judge fully realised the danger of acting on the evidence of interested witnesses, but, in his view the main case for the prosecution was supported by the evidence of witnesses upon whom reliance could properly be placed. The first witness upon whom he relies is Nageshwar Singh (P. W. No. 32). This witness stated that he was a Congress worker and that he witnessed the occurrence. The appellant Jadu was a prominent Congress worker, and at first sight there seems to be no reason why Nageshwar should testify against him and against other appellants who were prominent in the Congress and Kisan movements. The learned Sessions Judge has referred to certain letters which had passed between Jadu and Nageshwar from which it would appear that Jadu was sympathetic towards

Nageshwar. These letters were written some time before this occurrence, and it would appear that Nageshwar in the meantime had ceased to be a Congress worker. For some reason or another the prosecution called two witnesses, namely Kirti Narsin Singh (P. W. No. 33) and Sukhdeo Chaudhury (P. W. No. 34) to prove the *bona fides* of the witness Nageshwar Singh. I am not clear why this evidence was admitted; but as it was admitted, I must pay due regard to it. These two witnesses were prominent Congress men, and they stated that, though Nageshwar had been a Congress worker, he had been expelled from the Congress owing to some complaint made against him. These witnesses undoubtedly say that they did not know the nature of the complaint, but they are quite clear that Nageshwar was at this time not a Congress worker and had actually been expelled from the organization. The witness still posed as a Congress worker apparently with a view to showing that he was quite independent and even sympathetic to the accused. When I find that he was an expelled member and did not admit it frankly, then I cannot regard him as an independent witness. Further, this occurrence took place on a Monday, and though Nageshwar admitted that the Police were investigating on the following Tuesday, he made no statement to them on that day. It was on Wednesday that he first made a statement that he had seen what had occurred and had recognized a number of the appellants. Had Nageshwar Singh been the honest man that he poses to be, I should have expected him to have made a statement on the first possible opportunity. In my view, it would be extremely dangerous to act on the evidence of such a witness.

Another witness, who at first sight appears to be independent, is Kunjo Ohhabi (P. W. No. 35). This witness makes a remarkable statement that he never mentioned to anyone in the village what he had seen, and if that be so, it is difficult to understand how the Police ever heard of him. Later, however, he said he met Agbori Ohhabi near his house on his way home and told him what he had seen. I am doubtful whether this witness can be regarded as an independent witness. He admits that he brought a criminal case against the servants of Jadu Jha in 1341 F. when he was *bataidar* of land in the village, and later said that he had forgotten if he gave evidence for *Mahant*

Sundar Gir in his case against Gorelal. The witness could not possibly forget whether he had given such evidence and he was obviously lying when he said that he had forgotten. In my view, the witness is under the influence of the *mahant* and accordingly cannot be regarded as an independent witness.

The last so-called independent witness is Prayag Singh (P. W. No. 40) who stated that he saw the body of Jhapta Tiar being brought to the Basa of Jadu Jha in a bullock cart. He recognized Jadu, Gafoor, Bhukhan, Mahabir and Rambrichh in the mob which was accompanying the cart. He stated in evidence that he named these five persons to the Police when he was examined; but Sub-Inspector Kamla Prasad Singh (P. W. No. 45) stated that Prayag Singh did not mention to the Police which of the accused persons had accompanied the cart. He now definitely states that five of the appellants whom he named were with the cart. Further this witness admitted that he was present when the Assistant Sub-Inspector came to the village on January 16, yet he made no statement until the following day.

The injured peon Mukhlal is obviously an interested witness, and the Sessions Judge very rightly points out that it would be dangerous to act upon his evidence without corroboration. It appears to me that there is no independent evidence corroborating any of these prosecution witnesses, and, therefore, in the circumstances of this case it would be dangerous to act upon the evidence of the eye-witnesses.

It is unnecessary to consider at any length the various versions put forward by the accused. As I have stated earlier in the judgment, Mahabir, in the report which he made, alleged that the deceased man, Jhapta Tiar, was a peon of the appellant Jadu Jha. The learned Sessions Judge was satisfied upon the evidence that this was untrue and that Jhapta Tiar was in fact a servant of the *mahant*. In my view, the learned Sessions Judge was right in holding that Jhapta Tiar was a servant of the *mahant* and that he was killed on the plot in question and not at the Basa of Jadu Jha. However, even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true.

In my judgment, the riot which took place on the *mahant's* land on the morning of January 16, 1939, was riot between a

body of *leians* on the one hand and *lathials* of the *mahant* on the other. It may be that some of the appellants, if not all of them, were present in that affair; but on the evidence before me I cannot hold positively that their guilt has been established. Once the case, as presented by the prosecution, is found to be false, there is no evidence before this Court upon which any of the appellants can be convicted. If a fight took place between two armed mobs, then there is no evidence as to what actually occurred. A mere suspicion that the appellants or some of them were present can form no basis for a conviction. It is true that even before the interpolations in the first information report, the name of Jadu Jha is mentioned; but once the Court has any doubt about the truth of the version even as first recorded, then Jadu Jha is entitled to the benefit of that doubt. In my view the guilt of the appellants has not been established beyond reasonable doubt, and that being so, they must be acquitted.

In the result, therefore, I would allow these appeals, set aside the convictions and sentences passed upon the appellants and acquit them on all the charges. They must be set at liberty forthwith unless required by the authorities upon any other charge.

Fazi Ali, J.—I agree.

S. *Appeal dismissed.*

NAGPUR HIGH COURT

Second Appeal No. 563 of 1936

January 31, 1939

NIYCGI, J.

SHOBHALAL—PLAINTIFF—APPELLANT

versus

SIDHELAL—DEFENDANT—RESPONDENT

Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Unpaid vendor's charge—English and Indian law, difference between—Title passing to vendee—His suit for possession—Court, while decreeing possession, if can incorporate statutory charge under s. 55 (4) (b)—Vendor, how can enforce that charge—Recourse to separate suit—Second appeal—Court's duty is only to see whether evidence is admissible and proper for consideration.

The equity which arises in favour of the vendor who has not received his purchase money is no doubt recognised in English Law which gives him a lien, that is a right to enforce payment out of the interest he has transferred and this lien continues even after he has parted with the legal estate. The reason is that as soon as the contract of sale is made, the seller is deemed to part with the equitable estate, but in India contract of sale does not of itself create interest in or charge on such

property, (s. 54 of the Transfer of Property Act). In India the vendor is no doubt entitled to a charge for unpaid purchase money but that is a right which comes into existence not at the date of the contract for sale but on the completion of the conveyance. This charge is created by the statute. Thus while in England the vendor's lien is a creature of equity and is capable of being moulded to suit the circumstances of each case, the statutory charge is rigorous and inflexible. *Webb v. Macpherson* (4), relied on [p. 171, col. 1]

Where title in the property has passed to vendee notwithstanding the non-payment of part of purchase money, although in a suit for possession by the vendee of immovable property it is not competent to the Court to pass a decree for possession conditional on the vendee paying the balance of the purchase money, it is open to the Court, while decreeing possession to the vendee to incorporate in the decree the statutory charge under s. 55 (4) (b) of the Transfer of Property Act, in favour of the vendor for the unpaid purchase money. It is true that the unpaid vendor in India is only entitled to a statutory charge provided for under s. 55 (4) (b) and that the vendee under s. 55 (1) (f) is entitled to possession, but there is no reason why the unpaid vendor should be driven to a separate suit to recover his unpaid purchase money. When he has a charge on the property which he is called upon to deliver to the purchaser, that charge continues to operate upon the property even when the possession of it passes to the vendee. It would therefore obviously be the proper course, to avoid multiplicity of litigation, to declare in the decree granting possession to the vendee that it is subject to the charge of the vendor to the extent (if the purchase money that remains to be paid. If the decree incorporates this charge it would be open to the vendor to enforce it by seeking execution of that decree *Bastigara v. Chinnava* (7), followed. [p. 171, col. 2.]

The Court is not concerned in second appeal with the weight that is to be attached to the evidence but whether the evidence is admissible and proper for consideration.

S. A. from the appellate decree of the Court of the Additional District Judge, Damoh, dated October 31, 1936, in Civil Appeal No. 20-A of 1936, modifying the decree of the Court of the Subordinate Judge, Second Class, Damoh, dated July 24, 1936, in Civil Suit No. 79-A of 1935.

Mr. D. N. Choudhary, for the Appellant.

Mr. J. R. Mudholker, for the Respondent.

Judgment.—This is a plaintiff's appeal from a varying judgment of the Additional District Judge, Damoh, delivered on October 3, 1936, in Civil Appeal No. 20-A of 1936.

The respondent Siddhelal executed a sale-deed on October 7, 1932, affecting 8 pies share of *Mouza Tigra Fatehpur*, Tahsil Hatta, in favour of the appellant. The consideration as recited in the sale-deed was Rs. 400 and the vendee undertook to satisfy certain *Taccavi* loans which were

charged in the property amounting to Rs. 639-12-6. The conveyance was duly executed and registered but there arose some hitch during the mutation proceedings and the vendor declined to deliver possession with the result that the appellant instituted the suit out of which this appeal arises for a declaration of his ownership and for possession of the property. The defendant raised various contentions out of which the one that is material for the disposal of this appeal is that he did not receive the consideration which was stated to be Rs. 800 out of which Rs. 160-3-6 were intended to be paid in cash and the balance of Rs. 639-12-6 was to be paid as stated above. The lower Appellate Court found that the real consideration was Rs. 800 and that the vendee, namely the plaintiff, did not pay Rs. 160-3-6. It, however, held that the title to the property had passed to the vendee and decreed that the property should be delivered to him subject, however, to his depositing Rs. 160-3-6 into Court for payment to the vendor, the defendant. This appeal is directed mainly against the form of the decree as passed by the lower Appellate Court.

It is contended in the first instance that the lower Appellate Court's finding that the real consideration of the sale was Rs. 800 was at variance with the pleadings and the evidence in the case. I cannot assent to this contention in view of the fact that the defendant in his written statement dated August 7, 1935, clearly averred that as a result of an award by the arbitrators the plaintiff was to pay to the defendant Rs. 160-3-6 in cash and he was further to undertake the liability to pay *Taccavi* loans of Rs. 639-12-6. He further expressly denied receipt of Rs. 160-3-6. The plaintiff pleaded that the consideration was only Rs. 400 but he did not affirm that he had paid this amount to the vendor, but contended that the failure to pay the purchase money did not prevent transfer of title to the vendee and that the appropriate course for the defendant was to file a separate suit to recover the purchase money if not paid. It is true that the evidence regarding the arbitration is not clear or complete but to the extent that there is evidence bearing on the issue, it fully sustains the lower Appellate Court's finding. In second appeal I am not concerned with the weight that is to be attached to the evidence but whether the evidence is admissible and

proper for consideration. It is not shown that the facts and circumstances considered by the lower Appellate Court were not relevant and proper for consideration. I therefore see no reason to dissent from the lower Appellate Court's finding that the real consideration was Rs. 800 out of which the vendee agreed to pay Rs. 160-3-6 in cash and bear the burden of the *Taccavi* loan amounting to 639-12-6.

Since the vendee failed to pay the consideration which he agreed to pay in cash the question which arises is whether he is entitled to possession of the property without having to pay the part of the purchase money which he stipulated to pay in cash as a condition precedent to his obtaining possession of the property. In such a case as the present the points which require to be considered are: (1) whether the parties intended that the title should not pass to the vendee unless the vendor received the consideration, and (2) if it is found that there was no such intention and that the title passed to the vendee notwithstanding the non-payment of the purchase money whether the vendee is entitled to unconditional possession of the property purchased by him and the remedy of the vendor for recovering the purchase money lies in a separate suit.

As to the first point, the respondent indeed contends in support of the lower Appellate Court decree that the title did not pass to the vendee. In the absence of any pleading to that effect, I cannot listen to any such contention. It is also negatived by the plain recitals of the sale-deed. I must, therefore hold that the title in the property passed to the vendee notwithstanding non-payment of the part of the price as agreed.

As to the next question it was held in *Bajjnath Singh v. Paltu* (1) that although the non-payment of the purchase money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser is entitled to possession, it is open to the Court to subject the decree to restrictions and conditions appropriate to the circumstances of the case. On that view the learned Judges ordered the purchaser in that case to pay to the seller the amount of the purchase money as a condition precedent to the delivery of possession to him. This case was followed in *Bal-*

(1) 30 A 125; A W N 1908, 38; 5 A L J 96.

Krishna v. Shripat Singh (2) in a case of sale to which the Transfer of Property Act, 1882, was not applicable. The case *Bajinath Singh v. Paltu* (1) was not followed in *Velayutha Chetty v. Govindaswami Naicken* (3) and for good reasons. The equity which arises in favour of the vendor who has not received his purchase money is no doubt recognised in English Law which gives him a lien, that is a right to enforce payment out of the interest he has transferred and this lien continues even after he has parted with the legal estate. The reason is that as soon as the contract of sale is made, the seller is deemed to part with the equitable estate, but in India contract of sale does not of itself create interest in or charge on such property: see s. 54 of the Transfer of Property Act. In India the vendor is no doubt entitled to a charge for unpaid purchase money but that is a right which comes into existence not at the date of the contract for sale but on the completion of the conveyance. This charge is created by the statute. Thus while in England the vendor's lien is a creature of equity and is capable of being moulded to suit the circumstances of each case the statutory charge is rigorous and inflexible. The distinction was pointed out by their Lordships of the Privy Council in *Webb v. Macpherson* (4) where they observed that the charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by the Courts of equity to an unpaid vendor. The law in India does not recognise the distinction between legal and equitable property in the sense in which that was understood when the equity was administered by the Court of Chancery in England and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. In *Velayutha Chetty v. Govindaswami Naicken* (3) it was held that the only remedy which the unpaid vendor in India could avail himself of is to counter-claim for the enforcement of his charge. As there is no equitable lien recognised in India and though it is recognised in England it is held to be non-possessory, their Lordships of the Madras High Court held that the defendant was bound to

(2) 6 N L R 98; 7 Ind. Cas. 511.
 (3) 34 M 543; 8 Ind. Cas. 364; (1910) M W N 637; 9 M L T 108.
 (4) 31 O 57 at p. 72; 30 I A 238; 8 O W N 41; 8 Sar. 554 (P.O.).

deliver possession unconditionally and he was relegated to a separate suit to recover his purchase money. That case was followed in *Kandasami Pillai v. Ramasami Mannadi* (5) and *Krishnamma v. Mali* (6). In *Baslingawa v. Chinnava* (7) it was held that although in a suit for possession by the vendee of immovable property it is not competent to the Court to pass a decree for possession conditional on the vendee paying the balance of the purchase money, it is open to the Court, while decreeing possession to the vendee to incorporate in the decree the statutory charge under s. 55 (4) (b) of the Transfer of Property Act, in favour of the vendor for the unpaid purchase money.

It is true that the unpaid vendor in India is only entitled to a statutory charge provided for under s. 55 (4) (b) of the Transfer of Property Act, and that the vendee under s. 55 (1) (f) is entitled to possession, but there is no reason why the unpaid vendor should be driven to a separate suit to recover his unpaid purchase money. When he has a charge on the property which he is called upon to deliver to the purchaser, that charge continues to operate upon the property even when the possession of it passes to the vendee. It would therefore obviously be the proper course, to avoid multiplicity of litigation, to declare in the decree granting possession to the vendee that it is subject to the charge of the vendor to the extent of the purchase money that remains to be paid. If the decree incorporates this charge, it would be open to the vendor to enforce it by seeking execution of that decree. I have therefore no hesitation in following the course adopted in the Bombay case declaring in the decree that the property is subject to the charge in favour of the vendor and that he is entitled to enforce it in execution of the decree against the appellant.

The lower Appellate Court's decree will now be modified in the form described above. As the appeal virtually fails, the appellant will pay the respondent's costs of this appeal. Costs of the lower Courts will be paid as ordered by the lower Appellate Court.

D.

Appeal allowed partly.

(5) 42 M 203; 51 Ind. Cas. 507; A I R 1919 Mad. 188; 36 M L J 313; (1919) M W N 194.

(6) 43 M 712; 56 Ind. Cas. 530; A I R 1920 Mad. 164; 38 M L J 467; 11 L W 563; (1920) M W N 320; 28 M L T 88.

(7) 56 B 556; 138 Ind. Cas. 534; A I R 1932 Bom. 247; 34 Bom. L R 427; Ind. Rul. (1932) Bom. 405.

ALLAHABAD HIGH COURT

Criminal Revision No. 507 of 1939

August 16, 1939

MULLA, J.

SAT NARAIN AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 144
 (1), (2), (3)—Order under first two clauses of s. 144 cannot be issued to general public—Order under cl. (3), when can be issued to general public.

The first two clauses of s. 144, Criminal Procedure Code, do not invest the Magistrate with any power to issue an order to the general public. They are confined to the case of an individual person or persons to whom a notice may be issued directing them to refrain from a certain act or to take certain order with certain property in their possession or management.

It is clear from the terms of sub-cl. (3) of s. 144, that no order under s. 144 can be issued to the public generally except when "frequenting or visiting a particular place" and any order which ignores this limitation must be held to be bad in law.

[Case-law relied on.]

Or. R. from an order of the Additional Sessions Judge, Allahabad, dated March 8, 1939.

Mr. M. L. Chaturvedi, for the Applicants.

The Deputy Government Advocate, for the Crown.

Order.—This is an application in revision by two persons Sat Narain and Munni Lal who have been convicted under s. 188, Indian Penal Code. The first applicant was admittedly the editor of a paper styled the *Punch* which was being published in Allahabad in April, 1938, while the second applicant, Munni Lal, was the printer and publisher of the same paper. It is a matter of common knowledge that in the month of April, 1938, serious communal riots took place in Allahabad resulting in the deaths of several persons. The District Magistrate of Allahabad found soon after those disturbances that some people were engaged in circulating false and alarmist reports which had the effect of promoting communal tension and causing fear and alarm to the public. He therefore thought it necessary to stop the publication of such reports, and with that object in view, he issued an order under s. 144, Criminal Procedure Code, in the following terms :

"To the General Public.

Whereas in Allahabad City serious rioting resulting in the deaths of eleven persons and injuries to many others had just recently subsided, but communal ill-feeling and panic are still prevalent, and whereas irresponsible persons are circulating communally biased or alarmist or false reports and statements and false or alarmist rumours by words

written or spoken, which are likely to cause fear or alarm to the public or some section of the public whereby any person may be induced to commit some offence against human life or against the public tranquillity, and whereas in my opinion there is sufficient ground for proceeding under this section and immediate prevention and speedy remedy are desirable.

I hereby prohibit the printing or publication or circulation in Allahabad Municipality and Cantonment of any such report, statement or rumour by any written word, in newspapers or in leaflets, or by any other means."

This order was promulgated all over the city of Allahabad by means of loudspeakers fixed to motor lorries. The fact that this order came to the knowledge of the applicant Sat Narain is not denied. The other applicant pleaded ignorance of this order but the point has not been raised in this Court and it may therefore be taken for granted that he also had notice of the order. In spite of this knowledge, a statement appeared in an issue of the *Punch* dated April 14, 1938, setting out that a certain Hindu shrine had been destroyed and razed to the level of the ground. The shrine in question was in fact a very small temple about a cubit in height situated on a masonry platform under a *pipal* tree. It is not denied that this temple was destroyed but it is said that it was razed only to the level of the *chabutra* upon which it stood and not to the level of the ground as alleged in the statement published in the paper. The District authorities were of opinion that this statement was false and alarmist and also communally biased within the meaning of the order under s. 144 referred to above, and as the publication of the statement was a defiance of that order, they filed a complaint against the applicants charging them with an offence under s. 188, Indian Penal Code. The applicants were tried on that charge and were eventually convicted.

Two principal pleas were taken in defence : firstly, that the District Magistrate had no jurisdiction to issue the order under s. 144, and secondly, that the statement contained in the paper to which objection had been taken was not false and hence it did not involve any disobedience of the order under s. 144. I shall confine myself to the first contention which is the real contention in the case. Upon a careful consideration of the terms of s. 144, Criminal Procedure Code, I am constrained to hold that the order under s. 144, Criminal Procedure Code, to which objection has been taken on behalf of the applicants did not conform to the provisions of the law, how-

ever desirable, it may have been in view of the public situation. A careful perusal of the first two clauses of s. 144 leaves no doubt in my mind that they are confined to the case of an individual person or persons to whom a notice may be issued directing them to refrain from a certain act or to take certain order with certain property in their possession or management. Under these two clauses no order can be issued to the general public. It is significant to note in this connection that the order is required to be "served in manner provided by s. 134." Now s. 134 provides for the service of the order in the "manner herein provided for the service of a summons," and makes a definite reference to "such person," showing thereby that some individual person or persons have to be served with the order. The incorporation of these provisions in sub-cl. (1) of s. 144, Criminal Procedure Code, in relation to the service of an order passed thereunder leaves no doubt in my mind that the said clause confers no jurisdiction upon the Magistrate to issue any such order to the general public. The point is further clarified by reference to sub-cl. (2) of s. 144, Criminal Procedure Code, which runs as follows:

"An order under this section may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed be passed *ex parte*."

It is thus clear to my mind that the first two clauses of s. 144, Criminal Procedure Code, do not invest the Magistrate with any power to issue an order to the general public. A provision for such an order is, however, made in sub-cl. (3) of s. 144, Criminal Procedure Code, which runs as follows:

"An order under this section may be directed to a particular individual or to the public generally when frequenting or visiting a particular place."

The obvious conclusion from the terms of this sub-clause is that no order under s. 144 can be issued to the public generally except when "frequenting or visiting a particular place." This is a clear limitation placed by the law upon the power given to the Magistrate to issue an order to the general public under s. 144, Criminal Procedure Code, and any order which ignores this limitation must be held to be bad in law. I have therefore no hesitation in holding that the order passed by the learned District Magistrate of Allahabad in the present case was one which he had no power lawfully to promulgate within the meaning of s. 155, Criminal Procedure Code. It

necessarily follows that the conviction of the applicants under s. 148, Indian Penal Code, is bad in law and must be set aside. My attention has not been drawn to any case decided by this Court either for or against the interpretation which I have placed upon the terms of s. 144, Criminal Procedure Code. But I find that the view that I have taken is fortified by several decisions of other High Courts. I need only refer to the following cases: *Queen-Empress v. Lakshmidas Makandas* (1), *Emperor v. Bhagubhai* (2), *D. V. Belvi v. Emperor* (3), *Motilal Gangadhar v. Emperor* (4), *Ashutosh Roy v. Harish Chandra* (5), *Abdul Majid v. Nripendranath* (6) and *Ponnappa Aiyangar v. Venamamalai Ramanuja Jeer* (7). The result, therefore, is that I allow this application in revision and set aside the conviction of the applicants. The fine, if any paid by them, shall be refunded.

s.

Application allowed.

- (1) 14 B 165.
- (2) A I R 1914 Bom. 198; 27 Ind. Cas. 146; 16 Cr. L J 98; 16 Bom L R 684.
- (3) A I R 1931 Bom. 325; 134 Ind. Cas. 344; (1931) Cr. Cas. 581; 32 Cr. L J 1144; 33 Bom. L R 673; Ind Rul. (1931) Bom 456.
- (4) A I R 1931 Bom. 513; 134 Ind. Cas. 1237; (1931) Cr. Cas. 945; 33 Cr. L J 75; 33 Bom. L R 1178; Ind. Rul. (1932) Bom. 21.
- (5) 29 O W N 411; 86 Ind. Cas. 810; A I R 1925 Cal. 625; 26 Cr. L J 874.
- (6) 38 O W N 556; 148 Ind. Cas. 773; A I R 1934 Cal. 393; (1934) Cr. Cas. 534; 35 Cr. L J 861; 6 R O 480.
- (7) A I R 1920 Mad. 817; 53 Ind. Cas. 483; 20 Cr. L J 755; 10 L W 480; (1919) M W N 872.

MADRAS HIGH COURT

Appeal Against Appellate Order No. 56 of 1935

December 8, 1938

VARADACHARIAR AND ABDUR RAHMAN, JJ.
NINKILERI LAKSHMIKUTTY
KETILAMMA—APPELLANT

versus

THEKKA MADATHIL VISHNU
NAMBISAN—RESPONDENT

Insurance—Assured assigning policy to wife—Effect—Creditor of assured; if can attach moneys in hands of wife—Construction of assignment endorsement—Reverter clause—Held amount not assets of deceased assured—Deed—Construction.

The policy in question was an endowment policy obtained by the deceased. The assured assigned this policy in favour of his wife by an endorsement on the policy itself. This assignment was duly communicated to the Insurance Company and there registered. The endorsement, which appeared in a usual form suggested by the Company provided that the benefit of all moneys to become payable under the policy was assigned to wife and

declared that her receipt shall be a sufficient discharge to the Company for the same, provided, however, that in the event of her predeceasing the assured or in the event of his surviving, the date on which the said policy would mature, the benefit of the policy and the right to receive moneys thereunder should revert to the assured as if the assignment had not been made. Before the policy had matured and during the lifetime of the assignee the assured died. In execution of a decree obtained against the deceased assured, the decree-holder sought to attach the policy amount as assets of the assured in the hands of the assignee:

Held, that on its true construction the endorsement in this case operated as a present transfer in favour of the assignee, though provision had also been made for a reverter to the assignor, in certain contingencies. It did not amount to a power-of-attorney or a transfer in future. The provision for reverter only emphasised the immediate operative-ness of the transfer. If the events that happened had brought the reverter clause into operation, the creditors of the assured would no doubt have been entitled to treat the policy amount as having become part of the estate of the assured. But in the events that happened the assignee was entitled to recover the policy amount and there was no scope for the operation of the reverter clause. Consequently the policy amount did not form the part of the assets of the deceased and could not therefore be attached and sold. *Yacoob Sahib v. Pacha Bibi* (1) and *Shamdas v. Savitri Bai* (2), relied on, *In re Williams, Williams v. Ball* (3) and *Manu v. Ma Gun* (4), distinguished, *Haridas Lalji v. Narottam Raghavji* (5), referred to.

A. against the order of the District Court of North Malabar at Tellicherry, dated September 24, 1934, and made in A. S. No. 111 of 1934, preferred against the order of the Court of the District Munsif of Kuthuparamba in R. E. P. No. 791 of 1933 (Summary Suit No. 5444 of 1933, District Munsif's Court, Cannanore).

Messrs. O. T. G. Nambiar and N. T. K. Nambiar, for the Appellant.

Mr. P. Govinda Menon, for the Respondent.

Varadachariar, J.—The only question for decision in this Miscellaneous Appeal is whether certain insurance policy amount which has been sought to be attached by the respondent decree-holder can be held to be "assets" of the late Kerala Varma Raja in the hands of the appellant.

The appellant is the widow of Kerala Varma Raja. The policy in question was an endowment policy obtained by the deceased in 1927 and was payable on April 5, 1952, or on the death of the assured earlier. On July 3, 1933, the assured assigned this policy by an endorsement on the policy itself. This assignment was duly communicated to the Insurance Company and there registered, though as usual the Company guarded itself from admit-

ting the validity of the assignment. The assured died in 1933 and the decree under execution was passed against the appellant as his legal representative. The question does not now arise between the Company, and the assignee and a person who has obtained a decree against the assets of the assured.

The Court of first instance released the policy amount from attachment on the ground that by reason of assignment, the policy amount belonged to the assignee and did not form part of the estate of the assured at his death. The learned District Judge reversed this decision on the ground that the assignment was not an absolute or outright assignment taking effect at once but was only contingent; he thought it followed that the amount due to the assured under the policy formed part of the estate of the deceased. The decision of the learned District Judge is opposed to the judgment of this Court in *Yacoob Sahib v. Pacha Bibi*, 38 Ind. Cas. 248 (1). The only other reported decision on the point which has been brought to our notice is a decision of the Sind Judicial Commissioner's Court in *Shamdas v. Savitri Bai* (2) and the principle of that decision is also in favour of the appellants' contention.

Learned Counsel for the respondent has contended that the endorsement on the policy is no more than a mandate or at best it operates only as a testamentary transfer and that no interest in the policy passed to the assignee during the lifetime of the assignor. He also repeated the argument which had found favour with the lower Court that the words of transfer did not amount to an absolute interest. The endorsement which appears in a usual form suggested by the Company, runs as follows:—

"In consideration of natural love and affection, I do hereby assign the benefit of all moneys to become payable under the policy (reserving to myself the right to receive in cash or apply in reduction of premia any bonuses that may be declared upon such policy from time to time) to my wife and declare that her receipt shall be a sufficient discharge to the Company for the same, provided, however, that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy, if so expressed, would mature, the benefit of the policy and the right to receive moneys thereunder shall revert to me as if this assignment has not been made."

(1) 38 Ind. Cas. 248; A I R 1917 Mad. 20; 4 L W 339.

(2) A I R 1937 Sind 181; 170 Ind. Cas. 225; 31 S L R 48; 10 R S 39.

In support of the first contention, respondent's learned Counsel relied upon the judgment of the Court of Appeal in England *In re Williams, Williams v. Ball* (3) and on some observations of the Rangoon High Court in *Manu v. Ma Gun* (4). The language of the document which the Court had to construe in the English case was quite different, the very point made in that connection in the English case was that the endorsement relied on did not purport to assign at all but only purported to authorise the named person to draw the insurance amount in the event of the assured predeceasing her. It was significant that no notice of the so-called assignment had even been given to the Insurance Company in that case. Ashbury, J., held that there were no present words of gift at all. In the Court of Appeal, the learned Judges were inclined to construe the so-called endorsement as a mere power-of-attorney. Alternatively, they added that at best it might have operated to give to the named person an interest on the death of the assured if it had complied with the formalities required by law for a will. No help can be derived from that judgment in the construction of the terms of the endorsement in the present case, because the words here used are that the assured doth "hereby assign the benefit of all money, etc., to the wife". On these words it cannot be said that the endorsement amounted to a mere power-of-attorney or that the transfer was one in future. In the Rangcon case, *Manu v. Ma Gun* (4) the argument turned on the effect of mere nomination. Reliance was placed by the learned Counsel before us on the way that the observations *In re Williams, Williams v. Ball* (3) had been understood by the learned Judges of the Rangoon High Court. As we have dealt with the English case ourselves, the observations of the Rangoon High Court on that case cannot carry the matter further.

It was next argued that because in certain contingencies the assignee will not, on the terms of the endorsement, be entitled to receive the policy amount or the assignor might become entitled to recover the same, the transaction was only revocable and in that sense the disposition, if any, was only testamentary. This argument seems to us to confound a con-

tingent transfer with a revocable transfer. Even this distinction is immaterial here, because on its true construction, the endorsement in this case operates, in our opinion, as a present transfer in favour of the assignee, though provision has also been made for a reverter to the assignor, in certain contingencies. The provision for reverter only emphasises the immediate operativeness of the transfer. If the events that have happened have brought the reverter clause into operation, the creditors of the assured would no doubt be entitled to treat the policy amount as having become part of the estate of the assured. But it cannot be disputed that in the events that have happened, the assignee is entitled to recover the policy amount and there is no scope for the operation of the reverter clause.

It was finally contended that an assignment of an actionable claim within the meaning of s. 130 of the Transfer of Property Act must be "absolute" and that the assignment in the present case is not absolute. Reliance was placed in this connection on the observations of Beaman, J., in *Haridas Lalji v. Narottam Raghavji* (5). The learned Judge has not expressed any final opinion on this point, in the case referred to. The question of the 'absolute' character of the transfer may be material when there is a dispute as to the transferee's right to sue the Insurance Company, no such question arises here. We may however, observe that there is no possibility in this case, of the assignor and the assignee having fractional rights in the policy amount at one and the same time. The only qualification on the rights of the transferee (apart from the bonus amount with which we are not now concerned) is by way of a defeasance clause (cf. s. 31 of the Transfer of Property Act and s. 134 of the Succession Act). The result is that so long as the transferee's interest exists, she has the whole interest and when the defeasance clause comes into operation, the interest of the person who takes under the defeasance clause is equally an absolute interest. We do not find anything in the terms of s. 130 of the Transfer of Property Act or in the principle underlying it that excludes a transfer of this kind from its scope.

As desired by Mr. Govinda Menon, the learned Counsel for the respondent, we wish to make it clear that this judgment will not apply to any amount that the

(3) (1917) 1 Ch. 1; 86 L. J. Ch. 36; 115 L. T. 689; 61 S. J. 42; (1919) W. O. & I. Rep. 122.
(4) 2 B. 388; 84 Ind. Cas. 385; A. I. R. 1925 Rang. 8.

(5) 14 Bom. L. R. 237; 14 Ind. Cas. 769.

deceased might be entitled to receive by way of bonus in respect of the policy, because the endorsement expressly reserves to the assignor the right to the bonus, so that he may, if he so desired, apply it to reduction of premia. If the bonus has been appropriated by the assured himself towards premia due on the policy, there will be nothing left for the assured or his creditors to claim. If on the other hand there is any sum remaining payable by way of bonus, that cannot be held to have passed under the assignment.

We set aside the decision of the learned District Judge and restore that of the District Munsif with costs here and in the Court below.

N.D.

Decision set aside.

LAHORE HIGH COURT

Civil Original Case No. 256 of 1938

December 19, 1938

YOUNG, C. J. AND MCNEOR, J.

In the matter of MUSLIM BANK OF INDIA, LTD., IN (LIQUIDATION), LAHORE—

Company—Contributories—Father purchasing shares for minor sons by signing application form on their behalf—Father held owner of shares and contributory—Benami transaction.

In India, the presumption in law is that if a person buys property in the name of another but with his own money, the transaction is *benami* and that the property in what is bought is in the person whose money was used for the transaction. So where a father with his own money purchases shares of a company for his minor sons and signs the application form on behalf of his sons, the father must be considered as owner of the shares and must be placed on the list of contributories. The same principle applies where the father purchases by transfer shares by signing his minor son's name on the transfer form as transferee through himself. *In re Hercules Insurance Co.* (1) and *Gopikrishn Gosain v. Gunga Persaud Gosain* (2), relied on.

Mr. Nazir Ahmad (Official Liquidator), for the Petitioner.

Mr. Allah Din Malik for Messrs. Rafiq Ahmad and Bashir Ahmad and Mr. Parkash Chandra, for Abdul Rashid, for the Respondents.

Young, C. J.—This judgment will cover applications by Bashir Ahmad, Rafiq Ahmad and Abdul Rashid to be removed from the list of contributories of the Muslim Bank of India, Ltd., in liquidation. It will also cover the application of the Official Liquidator of the Muslim Bank to place upon the list of contributories the name

of the father of Bashir Ahmad and Rafiq Ahmad and also the name of the father of Abdul Rashid. The ground of the applications of the three applicants is that they were minors at the time of the transactions which resulted in their names being put upon the list of contributories. The Liquidator admits that they were minors and therefore seeks to put on the list of contributories the names of their respective fathers. In the case of Bashir Ahmad and Rafiq Ahmad with which we will deal first, Tahir ud-Din, their father, applied for one share for each of them. He signed the application form "on behalf of" his sons. Tahir ud-Din had opened saving bank accounts in the names of his sons in the Muslim Bank. Tahir ud-Din paid the purchase money by his own cheque out of these accounts. Dividends were credited to these accounts and the balance in these accounts was drawn out by the minors when they became of age. It is argued by the Official Liquidator that in these circumstances the father Tahir ud-Din is liable to be placed upon the list of contributories on the ground that when he signed the applications on behalf of his minor sons he must be taken to know that the sons were incapable of acting or contracting being minors and that therefore he must be treated as the owner of the shares. In support of this proposition he refers us to the well-known *Pugh and Sharman's case: In re Hercules Insurance Co.* (1). In that case Sharman not being allowed to take more shares in the company applied for shares in his daughter's name. His daughter was a married woman, and at the date of the transaction, was under a disability as she could not before the Married Women's Property Act of 1881 acquire property without the consent of her husband. The learned Vice-Chancellor in deciding this case remarked as follows:

"It is very remarkable that the point has not arisen before, whether a man is liable to be treated as the owner of the shares by applying for them in a false or fictitious name; for I must treat this as a false or fictitious name. I must attribute to Mr. Sharman the knowledge that his daughter being a married woman was incapable of contracting."

Further on the Vice-Chancellor says: "I think, on general principles, that Mr. Sharman by applying for shares in the fictitious name of his daughter, is as liable to take the share as if he had taken them in his own name. I call Mrs. Pugh's name fictitious, because Mr. Sharman knew perfectly well that she could not bind herself. If he had applied in the name of a person capable of contracting, the case would be different."

(1) (1872) 13 Eq. 566; 41 L J Ch. 580.

It is argued by Counsel for Tahir-ud-Din in this case that *Pugh's case* (1) is distinguishable as there it was held that Mr. Sharman really applied for the shares for himself. In the case of Tahir-ud-Din it has not been proved that the application for the shares on behalf of his minor sons was not *bona fide* and that the shares must be held therefore to have been applied for on behalf of his sons and not for himself. On this point, it is clear that the learned Vice-Chancellor in *Pugh's case* (1) according to the extracts we have given above, decided this matter on a question of general principles that Mr. Sharman was liable because he applied in what in law was a fictitious name. In addition we would add that in India, the case would be even stronger as the presumption in law is that if a person buys property in the name of another but with his own money the transaction is *benami* and that the property in what is bought is in the person whose money was used for the transaction; see *Gopiekrish Gosain v. Gunga Persaud Gosain* (2). It is clear therefore that the father Tahir-ud-Din in this transaction must be treated as the owner of the shares. We allow therefore the applications of Bashir Ahmad and Rafiq Ahmad and we also allow the application of the Official Liquidator and add Tahir-ud-Din's name to the list of contributories as regards the two shares.

With regard to the case of Abdul Rashid, the facts were that Salamat Ullah, the father, signed an application for 25 shares 'for Abdul Rashid.' He paid 50 per cent. of the value of the shares by his own personal cheque. He attended a shareholders' meeting and signed the proceedings on behalf of Abdul Rashid. Dividends were credited to Salamat Ullah in his banking account and money was used by him. As regards this particular transaction, therefore, the same principles apply as in the case of Tahir-ud-Din with which we have just dealt. The application of Abdul Rashid must be allowed and the application of the Official Liquidator also will be allowed and the name of Salamat Ullah will be put on the list of contributories as regards these 25 shares. There is, however, another transaction entered into by Salamat Ullah on behalf of Abdul Rashid. He purchased by transfer 12 shares. He signed Abdul Rashid's name on the transfer form as transferee through himself. Equally the dividend on these shares was

paid to Salamat Ullah's account and the money was drawn by him. It appears to us that the principle laid down in *Pugh's case* (1) would also apply to this case. Salamat Ullah had signed his son's name in the transfer form. He must therefore equally be taken to know that his son being a minor could give him no authority to sign the transfer on his behalf. In these circumstances we may apply the interpretation in *Richardson's case*, [*In re Imperial Mercantile Credit Association*] (3) as given in *Massy and Giffin's case*, [*In re National Bank of Wales, Ltd.*] (4) as follows:

"In the other case, *In re Imperial Mercantile Credit Association* (3) it was simply a case where the transferee whom they sought to put upon the register had actually signed the transfer but had signed it in the name of another who had given him no authority to do it, namely an infant. Therefore they treated him as the real person who had signed the contract and consented to go on the register in respect of the shares."

In this case therefore we must treat Salamat Ullah as the real person who signed the contract of transfer and order therefore that his name be placed upon the list of contributories as the owner of these 12 shares. The applications of Bashir Ahmad, Rafiq Ahmad and Abdul Rashid are allowed. The application of the Official Liquidator is allowed. In the circumstances, we allow no costs to any of the parties.

D. Applications allowed.

(3) (1875) 19 Eq. 588; 44 L J Ch. 252; 32 L T, 18; 23 WR 467.

(4) (1907) 1 Ch. 582; 76 L J Ch. 290; 96 L T 943; 14 Manson 66; 51 S J 266.

CALCUTTA HIGH COURT

Criminal Revision No. 63 of 1939

February 9, 1939

EDGLBY, J.

BABURALI SARDAR AND OTHERS—

ACCUSED—PETITIONERS

versus

KALA CHAND BEPARI AND OTHERS—

COMPLAINANTS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 345 (5-A)—No impropriety in order of lower Courts—Case heard and determined by competent Court—High Court, if can record compromise—Use of discretion—Aggrieved person must be before High Court.

It is clear from the language of s. 439, Criminal Procedure Code, read with s. 345 (5-A) of the Code that the High Court can, in certain circumstances allow a compromise to be recorded in the exercise of its revisional jurisdiction in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. The language of s. 439 is very wide and it does not limit the jurisdiction of the High Court to interfere in revi-

sion merely in cases in which the High Court has called for the record of a case on the ground of some alleged illegality or impropriety in the order made by an inferior Criminal Court. The High Court is competent to record the compromise having regard to the provisions of s. 345 (5-A) even although there is no impropriety in the order of either of the lower Courts in suitable circumstances; the parties can be allowed in such cases to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them. But the exceptional powers conferred by s. 345 (5-A) should not be used where the proceedings before the lower Court disclose no irregularity or impropriety, except where the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before the Court passed final orders.

Ordinarily the party who seeks to invoke the jurisdiction of the High Court under sub-s. (5-A) of s. 345, must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence. In any event it would not be competent for the High Court to allow a compromise to be recorded under sub-s. (5-A) of s. 345, unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded.

Mr. Nimal Chandra Das Gupta, for the Petitioners.

Syed Nausher Ali, for the Crown.

Mr. Santosh Kumar Basu, *amicus curiae*.

Order.—In this case the petitioners were convicted by Mr. H. N. Bose, Deputy Magistrate of Narayanganj, on August 15, 1938, in respect of offences under s. 323, Indian Penal Code, and were sentenced to pay fines of Rs. 30 each or in default to undergo rigorous imprisonment for six weeks. On November 9, 1938, the learned Additional Sessions Judge of Dacca was asked to refer this case to the High Court on the ground of certain alleged illegalities in the order of the trial Court, but he declined to do so. This Court was then moved in revision on January 19, 1939. The main ground urged in support of the petitioners' application was to the effect that the dispute between the petitioners and the complainant had been compromised. A rule was therefore issued upon the District Magistrate of Dacca and the complainant to show cause why the order of the trial Court should not be set aside on the ground that, even although there was no suggestion that the case should be compromised before the Courts below recorded their orders of August 15 and November 9, respectively, it was nevertheless competent for the High Court to allow the parties to compromise the case and to acquit the petitioners having regard to the provisions of s. 345 (5-A), Criminal Procedure Code.

In this connection it may be mentioned that the allegation in the petition before this Court with regard to the compromise is to the effect that this compromise was made on November 15, 1938, that is six days after the petitioners' application in revision had been rejected by the learned Additional Sessions Judge of Dacca.

The first point for consideration in connection with this case is whether or not this Court has jurisdiction under s. 345 (5-A), Criminal Procedure Code, to allow the parties to compromise a dispute of this nature, although there was no proposal before either of the Courts below to the effect that any such compromise should be made. With regard to this question, it has been argued that the matter has come before this Court in its revisional jurisdiction by reason of this Court having sent for the record in the exercise of its powers under s. 435, Criminal Procedure Code. Section 435 empowers this Court to call for and examine the record of any proceeding before any inferior Criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of such inferior Court. In the case with which we are now dealing, it is quite clear that the orders passed by the Courts below contained no illegality or irregularity with reference to the suggested compromise, inasmuch as no question with regard to any such compromise was ever raised before either of the Courts while they had seisin of the case. It has therefore been suggested that, in these circumstances, this Court can have no jurisdiction to modify the order of the trial Court under s. 439, Criminal Procedure Code. At the same time it is clear from the language of s. 439, Criminal Procedure Code, read with s. 345 (5-A) of the Code that this Court can in certain circumstances allow a compromise to be recorded in the exercise of its revisional jurisdiction in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. The language of s. 439 is very wide and it does not limit the jurisdiction of this Court to interfere in revision merely in cases in which this Court has called for the record of a case on the ground of some alleged illegality or impropriety in the order made by an inferior Criminal Court. In the case with which we are now dealing, it is therefore suggested that this Court

is competent to record the compromise having regard to the provisions s. 345 (5-A), Criminal Procedure Code, even although there is no impropriety in the order of either of the Courts below and although neither the trial Court nor the learned Judge while they were still in seisin of the case rejected any proposal to the effect that the case should be compromised. With this contention I am inclined to agree and I think that one of the objects of the Legislature in enacting sub-s. (5-A) of s. 345, Criminal Procedure Code, was in suitable circumstances to allow the parties in such cases to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them.

At the same time sub-s. (5-A) of s. 345 of the Code is a section which should be interpreted very strictly and with regard to which, in my view, the discretion which has been conferred upon the High Court should be exercised sparingly and only in suitable cases. The sub-section in question reads as follows :

"A High Court acting in the exercise of its powers of revision under s. 439 may allow any person to compound any offence which he is competent to compound under this section."

This sub-section must be read subject to the preceding sub-sections of s. 345 of the Code especially sub-ss. (1) and (2). These sub-sections in col. 3 of the tables annexed hereto set forth lists of persons by whom the offences in col. 1 may be compounded. In other words, the persons mentioned in col. 3 of these tables are the persons competent to compound the offences mentioned in col. 1. It follows, therefore, that sub-s. (5-A) of s. 345 of the Code merely confers jurisdiction on the High Court in the exercise of its powers of revision under s. 439 of the Code to allow the aggrieved persons mentioned in col. 3 of the tables attached to sub-ss. (1) and (2) to compound the various offences mentioned in those sub-sections. This section, however, does not empower the High Court to allow a convicted person to compromise an offence in the absence of the complainant or aggrieved person mentioned in sub-ss. (1) and (2). It would follow therefore that ordinarily the party who seeks to invoke the jurisdiction of this Court under sub-s. (5-A) of s. 345, Criminal Procedure Code, must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence. In any event it

would, in my opinion, not be competent for this Court to allow a compromise to be recorded under sub-s. (5-A) of s. 345, Criminal Procedure Code, unless the aggrieved persons were actually before this Court and had expressly recorded their consent to such a compromise being recorded.

In the case with which we are now dealing, the complainant is not before this Court. The Rule was issued upon the application of the convicted persons and although it would appear that a copy of the rule was served upon the complainant, it is impossible from this fact alone to infer that the complainant wishes to invoke the jurisdiction of this Court for the purpose of recording a compromise under s. 345 (5-A), Criminal Procedure Code. In any event in a case such as that which is now before me, I do not think that the jurisdiction of this Court should be used for the purpose of allowing a compromise to be recorded. It is clear from the record of the case that there was no suggestion that any compromise should be made until six days after the learned Additional Sessions Judge had rejected the petitioners' application for revision and I do not think that where the proceedings before the Courts below disclose no irregularity or impropriety, the exceptional power which has been conferred upon this Court by sub-s. (5-A) of s. 345 should ordinarily be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before that Court passed final orders in the case. Having regard to the considerations set forth above, this Rule must be discharged.

D.

Rule discharged.

PATNA HIGH COURT

Appeals Nos. 62, 63, 64, 69, 139 and 197
of 1935

May 9, 1939

WORT AND AGARWALA, JJ.

KUMAR RAGHAVA SURENDRA SAHI
AND OTHERS—APPELLANTS

versus

BABUI LACHMI KOER AND OTHERS—
RESPONDENTS

Hindu Law—Succession—Mitakshara School—Test of propinquity or nearness of blood, if excluded from consideration—Religious efficacy, when to be considered—Stridhan of maiden—Order of succession, stated—Succession to stridhan of maiden and of woman married in unorthodox form—Widow—Dedication by, powers of—Dedication of husband's property for spiritual benefit only of widow—Validity—Adverse possession—Plea of—If can be entertained in appeal—Will—Bequest to dharma.

The Mitakshara whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood. The test of the right of capacity to offer religious oblations is a test of the Dayabhaga School, whereas in the Benares School, the test is propinquity. Only in competitions between persons of the same class is the matter determined on the footing of religious efficacy. [p. 186, col. 2.]

The *stridhan* of a maiden according to Mitakshara School goes first to her uterine brothers, on failure of them to her mother and if the mother is dead, to her father. After the father's death succession will go to father's heirs determined according to Mitakshara rules regarding succession to a male. A step-mother being an heir of the father according to Mitakshara, is entitled to succeed after father's death. The succession after her death will go to an agnate even if remote and not to cognate even if nearer.

[Case-law discussed.]

The rules relating to the succession to *stridhan* are the same in the case of a maiden who has no brothers and a woman married in an unorthodox form and dying without issue [p. 185, col. 2.]

Under Hindu Law although a widow has power to dedicate a portion of her husband's estate to religious and charitable object, the widow's act must be reasonable, having regard to the value of the estate, and its object must be such as according to the notions prevalent in Hindu society conduce to the spiritual benefit of her husband. Where a widow dedicates a part of her husband's estate for the maintenance of a deity not installed by her deceased husband and it is found that the dedication is *prima facie* for the spiritual benefit of the widow herself and not for that of her husband, the dedication is invalid. *Ram Kawai Singh v. Ram Kishore Das* (28), relied on. [p. 201, col. 2.]

Where the question, of adverse possession was not pleaded nor decided in the Court below, depending as it does on questions of facts, it cannot be entertained in appeal. [p. 191, col. 2.]

A bequest for *dharma* is too vague and uncertain to be given effect to. *Ranchordas Vandrahandas v. Parvatibai* (20), relied on. [p. 201, col. 2.]

As, from the original decrees of the Sub-Judge, Gaya, dated June 5, 1934.

Dr. Dwarka Nath Mitter and Mr. Harnarayan Prasad (in Nos. 62, 63, 64 and 69) and Sir Manmatha Nath Mukherjee, Messrs. P. R. Das, L. K. Jha, S. N. Bose and J. N. Sahai (in Nos. 139 and 197), for the Appellants.

Sir Sultan Ahmad, Messrs. P. R. Das, S. M. Mullick, S. N. Bose, B. N. Rai, Syed Ali Khan, Messrs. A. H. Fakhruddin, S. I. Hasan, S. N. Rai, K. Dayal, Gulam Mohammad and S. S. Rakshit (in Nos. 62, 63 and 64) Sir Sultan Ahmad, Messrs. P. R. Das, S. M. Mullick, S. N. Bose, Syed Ali Khan, Messrs. L. K. Jha, A. S. S. Sinha, S. I. Hasan, Jadubans Sahay, S. S. Rakshit, Ghulam Mohammad, B. N. Roy, D. L. Nandkeolyar, K. Dayal and Ganesh Sharma (in No. 69), Dr. Dwarka Nath Mitter, Messrs. Ganesh Sharma, Harnarayan Prasad, B. N. Rai and Golam Mohammad (in No. 139) and Sir Sultan

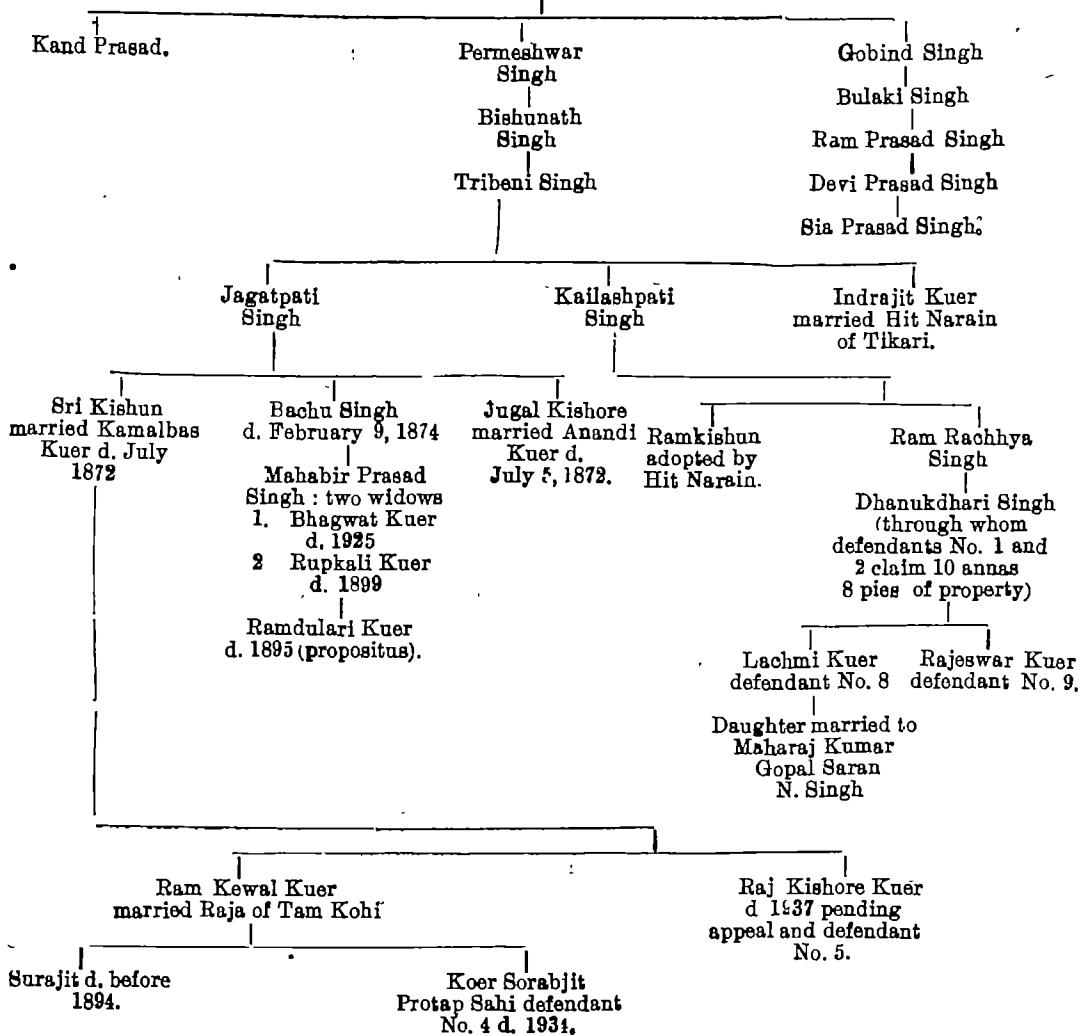
Ahmed, Dr. Dwarka Nath Mitter, Messrs. S. M. Mullick, B. N. Mitter, Gulam Mohammad, Syed Ali Khan, Messrs. B. N. Rai, A. H. Fakhruddin, Ram Chandra Prasad and S. I. Hasan (in No 197), for the Respondents.

Wort, J.—These six appeals arise out of five suits which were brought claiming various interests in certain property, the last male holder of which was one Mahabir Prasad Singh. The genealogical table appended (*see next page*) states the relationship between some of the parties to the suit as found by the learned Subordinate Judge. It appears that Mahabir was the son of one Bachu Singh. Mahabir died on June 21, 1894, leaving him surviving two widows, namely Bhagwat Kuer and Rupkali Kuer, and what has been held by their Lordships of the Judicial Committee in *Bhagwat Koer v. Dhanukdhari Prasad Singh* (1) a vested remainder in favour of a posthumous daughter Ramdulari who died about six months after birth. Ramdulari Kuer, the posthumous daughter died in 1894 and Rupkali died in 1899 and Bhagwat Kuer a co-widow survived till 1925. On the death of Rupkali, Bhagwat came into possession of the whole estate including the vested remainder of Ramdulari. On Bhagwat's death in 1925 the succession opened and disputes arose with regard to the properties. Of the suits brought suit No. 38 of 1932 out of which Appeal No. 69 of 1935 arises, raised all the questions in dispute. But as an order was made on January 21, 1927, attaching the properties in dispute and some of the parties succeeded in obtaining the registration of their names in the land registration department as regards some of the other properties, the various claims were made and six suits in all were brought. In addition to the attachment to which I have referred, defendant No. 1 in the principal suit got his name recorded as *mutwalli* of some of the properties which had been dedicated to an idol by Bachu Singh, the father of Mahabir Singh, and also as regards properties dedicated for religious and charitable purposes by Bhagwat. Defendant No. 8, the daughter of Dhanukdhari Prasad Singh, one of the persons through whom the claim of defendant No. 1 of the principal action was made, got her name recorded with regard to the properties situate in the Saran District. This was in

(1) 48 I A 259, 53 Ind. Cas. 347; A I R 1919 P O 75, 47 O 468; 37 M L J 513; 17 A L J 1036; (1919) M W N 860; 1 P L T 1; 2 U P L R (P O) 27 (P O).

1926. The parties therefore deemed it necessary to start the various suits.

BAKHTOUR SINGH



Some of the parties to these suits do not appear in the genealogical table. They come into the litigation by reason of assignments or other transactions to which reference is decided during the course of this litigation, but after the decision of the Subordinate Judge in the Court below, whose decision on questions of fact is not disputed in this Court, the main question involved in these appeals is the right to succeed to the *stridhan* of Ramdulari Kuer. The other questions are, first as to the validity of certain endowments by Bachu and his daughter-in-law Dulhin Bhagwat Kuer, and secondly, the right to the office of *mutwalli* in respect thereof. The learned Judge has held that the three brothers Srikishun, Bachu and Jugal

Kishore were separate. He has held that the Lakhaipur *mukrarrari* estate was a grant to Bachu Singh alone and to his brothers. He has held that the transactions carried out by the documents of 8th, 9th and January 10, 1921, by which Dulhin Bhagwat Kuer claimed to have obtained an absolute estate in the property were invalid. The suggestion that these transactions could not be attacked as being *res judicata* was not pressed in the Court below and was not urged in this Court. He has held that the *kobala* of 1907 in favour of Ambica Prasad, the deed of gift of July 2, 1907, and the sale deeds of April 10, 1924, were invalid and not binding upon the heirs of Ramdulari's estate. He has held that the properties Nos. 1 to 8 of

Sch. 1-O to the principal suit were not accretions to the estate of Mahabir but were self-acquisitions of Dulhin Bhagwat Kuer and therefore formed a part of her *stridhan*. He has held that the deed of September 8, 1924, in favour of Raghava Surendra Sahi was invalid, and this is not now disputed. As regards the endowments, there was the endowment by Bachu Singh of six villages out of the Lakhaipur *mukarrari* to the deities in the temple at Ajodhya under the deed of September 2, 1873, which endowment was admitted by the parties to be valid. The endowment created by Dulhin Bhagwat Kuer was held to be invalid. He has found that none of the contesting parties to the *mutwalliship* of the properties endowed by Bachu had any rightful claim. The Judge having held that the endowment of Bhagwat Kuer was invalid, the question of *mutwalliship* did not arise.

The principal question of law is whether Sarabjit Protap Sahi who was a near cognate to Mahabir Prasad Singh, the last male-holder, being the great-grandson (through this mother who married the Raja of Tomkoti) of Mahabir Prasad Singh's paternal grandfather, or a distant agnate Sia Prasad Singh, plaintiff No. 1, in the suit, being the great-great-great-grandson of one Bakhtour Singh, the common ancestor of Mahabir Prasad Singh and Sarabjit Protap Sahi, is entitled to succeed to the properties in suit which by the terms of the will of Mahabir Prasad Singh were left to his two widows for life and under which the posthumous daughter Ramdulari Kuer had on a true construction of the will a vested remainder. The question shortly stated is, who is, in the events which have happened, entitled to succeed under the Mitakshara Law to the *stridhan* property of Ramdulari Kuer after the decease of Rupkali, her mother, and Bhagwat Kuer, her stepmother.

The remaining question, so far as defendants Nos. 1 and 2 are concerned, whether Dhanukdhari Singh who was the great-grandson of Tribeni Singh, who was the grandson of Bakhtour Singh is entitled as heir of Mahabir Prasad Singh, depends entirely upon the question whether the co-wife of Mahabir was entitled to inherit after the death of his second wife under the Mitakshara School of Hindu Law. The other question is as to the rights of these defendants who are plaintiffs in Suits Nos. 30/1930 and 41/1930 to be *mutwallis* of the endowments of Bachu and Bhagwat Kuer. This question, so far as it relates to

the *mutwalliship* of Bhagwat's endowments depends upon the validity of these endowments. The relationship disclosed in the genealogical table I should have said has been proved by the plaintiff in the Court below and, after contest with regard to the matter, has been accepted by the trial Judge and not disputed in this Court. The last male-holder of the properties in suit, as I have already said, was Mahabir Prasad Singh. The properties in dispute consist in the first instance of *mukarrari* interest granted by the Maharani Indrajit Kuer of Tikari in the name of Bachu Singh in 1863. This property is known as Goshwara Mahal, Lakhaipur, Lodipur and Saidpur to be described hereafter as the Lakhaipur *mukarrari* property. There are ancestral properties, also some self-acquired properties of both Mahabir and Bhagwat Kuer. It may be stated at once that the Judge in the Court below has held that the properties acquired by Bhagwat Kuer were not accretions to Mahabir's estate but were the *stridhan* properties of Bhagwat.

In the year 1864 separation took place between the branch of the family represented by the three sons of Jagatpati and the other branch represented by Ramacharya. Srikishun, Bachu and Jugalkishore died within a short time of each other: Jugal on July 5, 1872, Srikishun on the 18th of the same month and Bachu on January 26, 1874. Bachu Singh before his death established a temple at Ajodhya in the Fyzabad District and endowed it with six villages out of the Lakhaipur *mukarrari*. This was by a deed dated September 2, 1873, by which he constituted a line of succession to the *mutwalliship*, making himself the first and then his son Mahabir; the succession thereafter was to go to his descendants male and female. In the year 1872, after the death of his two brothers Jugalkishore and Srikishun, Bachu filed an application for succession certificates to the estates of his brothers on the footing that they were joint with him. Ram Kewal Kuer, the daughter of Srikishun objected and filed a counter-application, and Anandi Kuer, Jugalkishore's widow, also objected on the ground that the brothers were separate. Kamalbas Kuer, Srikishun's widow, made no objection. The objections were overruled and Bachu was granted succession certificates. On July 9, 1873, Bachu gave certain villages to Kamalbas Kuer by way of maintenance. Anandi Kuer on May 17, 1874, executed an *ekrarnama* by which she admitted the jointness of the

three brothers. This was some four months after Bachu's death and Bachu's son Mahabir Prasad executed the *ekramnama* with Anandi Kuer. Ram Kewal Kuer, however, filed a suit in 1880 against Bachu's son Mahabir by which she claimed the Lakhaurpur property as belonging to her father. But this suit was ultimately compromised, Sarabjit Protap Sahi, the grandson of Srikishun, joining in the compromise. By this compromise Ram Kewal Kuer obtained three villages out of the Rusbi ancestral estate. Then on March 21, 1881, Mahabir raised funds by sale of six of the villages endowed by his father to the Ajodhya temple: this was while Mahabir was the *mutwalli* of the endowment.

On June 21, 1894, Mahabir died having left a will dated September 26, 1893. On January 5, 1895, Bhagwat Kuer and her co-wife Rupkali Kuer obtained probate of the said will. On October 11, 1894, Rupkali gave birth to a posthumous daughter Ramdulari Kuer who lived for a few months only dying on June 3, 1895. By the will estates for life were given by Mahabir Prasad to his widows and the will was construed ultimately by their Lordships of the Judicial Committee of the Privy Council as giving a vested remainder to the posthumous daughter Ramdulari Kuer. Rupkali, the second wife of Mahabir, died on January 8, 1899. It is to be noted that Bhagwat Kuer, after the death of her husband, acted as the *mutwalli* of the temple instituted by Mahabir's father Bachu. On September 7, 1899, Kamalbas Kuer died and Anandi Kuer died on August 4, 1904. Bhagwat Kuer was therefore in possession of the whole estate commencing in the year 1900. She made endowments six in number to a *pathsala* known as *Bhagwat pathsala* at Ajodhya. These endowments date from March 7, 1900, to September 14, 1925. In the meantime Bhagwat purported to adopt Raghava Surendra Sahi, defendant No. 1 in the principal suit. This was on February 13, 1906. The adoption was eventually held to be invalid by the Judicial Committee of the Privy Council. In 1907 Dhanukdhari (father of defendants No. 8 and 9) claimed to be the nearest agnate of Mahabir and commenced a suit and in February of that year executed a sale of 10 annas 2 pies of the *mukarrari* property and 2 annas 8 pies of the *chapra* property to one Ambica Singh, the father of Maharaj Kumar Gopal Saran Narain Singh of Tikari who was defendant No. 6 in the very suit. The Rusbi and

Maher properties were excluded. The shares of the properties which Dhanukdhari purported to sell by this deed were alleged to belong to Jugal Kishore and Bachu, the contention being that the *mukarrari* properties belonged to the three brothers. Three suits were commenced, namely suits Nos. 198, 199 and 200 of 1907. The first related to 5 annas 1 pie of Mahabir's property which he got from Bachu, the second related to 5 annas 4 pies which Mahabir got from Jugal Kishore, his uncle, and the object of the third suit was to set aside the adoption by Bhagwat of defendant No. 1.

Again in 1911 Sarabjit Protap Sahi who was defendant No. 4 in the principal suit, brought a suit against Bhagwat Kuer claiming one-third share of Mahabir's property as the share of his maternal grandfather Srikishun who, he alleged, separated from his two brothers Bachu and Jugal Kishore. The suit was dismissed eventually by the High Court in 1913 but pending the appeal to the Privy Council there was a compromise by which one-third share of the estate of Mahabir being the share of Srikishun was released. The suit was against Bhagwat Kuer and in 1921 as the result of the compromise Bhagwat and others entered into transactions which the Subordinate Judge in the Court below has held to be invalid, which decision Dr. Dwarka Nath Mitter on behalf of defendants Nos. 1 and 2 contended was wrong; but ultimately it was conceded that the transactions could not be supported. The question relating to them therefore does not enter into our consideration in this case. But the transactions were these.

Dulhin Bhagwat Kuer by an *ekramnama* dated January 3, 1921, released one-third share of Mahabir's property as the share of Srikishun Singh. Rajkishore Kuer then executed by way of gift a deed dated January 9, 1921, by which she gave to Sarabjit Protap Sahi, defendant No. 4 substantially the same property. Sarabjit in his turn made a gift to Bhagwat Kuer of the properties excluding 13 villages which he retained and one which he gave to Rajkishore Kuer the balance being given to Bhagwat Kuer as an absolute estate. Another deed was executed the same time undertaking to abide by the compromise even although the Privy Council did not approve of it. In 1917 Ambica Prasad had made a gift of what he had purchased from Dhanukdhari and two of the suits of 1907 were compromised between Dulhin

Bhagwat Kuer on the one side and Maharaj Kumar Gopal Saran Narain Singh on the other side. Ultimately, on April 10, 1924, Ambica conveyed what he had got from Dhanukdhari on February 8, excepting nine villages to Dulhin Bhagwat Kuer for a consideration of Rs. 1,50,000. Dulhin Bhagwat Kuer in her turn executed a *kobala* in favour of the Maharaj Kumar (defendant No. 6) in respect of 10 annas 8 pies of the property which she obtained under the deed of April 10, 1924, and 5 annas 4 pies of the nine villages the subject-matter of the deed of February 8, 1907, she making a gift of 10 annas, 8 pies in 52 villages, which she got from Maharaj Kumar Gopal Saran Narain Singh and his father Ambica Prasad Singh to defendant No. 2, Surendra Sahi. This was by a deed of July 1, 1924. On September 19, 1924, Dulhin Bhagwat Kuer died. The various transactions to which I referred in the earlier part of my judgment and various orders of the High Court and of the Land Registration Department led to the litigation out of which these appeals arise.

The principal plaintiff is Babu Sia Prasad Singh who, as I have said, claims to be the nearest agnate of Mahabir Prasad through whom succession to the *stridhan* property of Ramdulari Kuer is traced. The principal contesting defendants are defendants Nos. 1 and 2 and defendants Nos. 4 and 17. In the result the main contest is between the plaintiff and defendants Nos. 4 and 17 which depends entirely upon the question of Hindu Law as to who is entitled to succeed to the *stridhan* property of Ramdulari Kuer. As I have already indicated defendants Nos. 1 and 2 also claim the property through various transactions entered into by Bhagwat Kuer to which I have referred but it is unnecessary to trace the title of defendants Nos. 1 and 2 as they have abandoned any personal claim to the property excepting a 10 annas 8 pies interest, title to which they claim through Dhanukdhari by reason of the transaction referred to above, namely the sale in February of 1907 to Ambica Singh and the conveyance by Ambica Singh to Dulhin Bhagwat Kuer as also the gift by Dulhin Bhagwat Kuer to defendant No. 2, Surendra Sahi, and on the assumption that Bhagwat Kuer as co-wife was not entitled under the Hindu Law to inherit the *stridhan* of her step-daughter Ramdulari Kuer and the property of Rupkali through Mahabir. But it is to be noticed shortly that the other

suits were the suit of 1930 brought by defendants Nos. 4 and 6 (4 and 17 of leading suit) out of which Appeal No. 139 of 1935 was preferred. The result of this appeal depends upon the main contest between the plaintiff and defendants Nos. 1 and 2 in the principal suit. Then Suits Nos. 39, 40 and 41 were filed by defendants Nos. 1 and 2 of the leading suit out of which Appeals Nos. 64, 63 and 62 of 1935 arise.

The claim in the principal suit was allowed by the Subordinate Judge subject to the properties acquired by Bhagwat Kuer which had been held not to be accretions to Mahabir's estate; that is in Suit No. 38 of 1932. Sarabjit's Suit (No. 30 of 1930) was dismissed, but in this appeal no claim has been made as regards the properties of Bhagwat Kuer which had been held to be self-acquisitions—Items Nos. 38 to 44 and 48 of Sch. O and the properties which were the subject-matter of Bachu's endowment. Suit No. 39 of 1932 by defendants Nos. 4 and 17 claiming 10 annas 8 pies of the property through Dhanukdhari was dismissed and again suit No. 40 of 1932 claiming 5 annas 4 pies being the claim through Srikishun was dismissed. The same results would obtain in this appeal having regard to the acceptance by the parties of the decision of the learned Judge in the Court below on questions of fact, and the respective claims of the appellants to the estate or portions of it of Ramdulari would be decided against them. As has been seen, certain of the plaintiffs' claims in the suit depend upon the rights of the various parties to whom I shall refer as heirs to Ramdulari Kuer's estate. For the purposes of this appeal, the claims of the latter only will be referred to and not of those claiming under them by reason of assignment or otherwise. Defendants Nos. 1 and 2 claim through Dhanukdhari Prasad now represented by Bhagwat Kuer, his widow, in the litigation. Dhanukdhari's claim depends upon whether Bhagwat Kuer, the first wife of Mahabir Prasad Singh, was entitled to the property after the death of Rupkali Kuer, the second wife of Mahabir Prasad Singh. The respective claims of Sia Prasad (plaintiff No. 1) and Sarabjit Protap Sahi are claims to succeed as the nearest heir to the *stridhan* of Ramdulari admittedly a succession which is traced through her father Mahabir Prasad Singh. The right of Bhagwat Kuer to take a woman's estate in Ramdulari's property after the death of

Rupkali Kuer is admitted by defendant No. 4 Sarabjit Protap Sahi and Sia Prasad and will be dealt with later, but will be disposed of incidentally in discussing the right to succeed as between Sia Prasad and Sarabjit. The learned Judge in the Court below has held that the right of succession to the vested remainder of Ramdulari Kuer's estate is to be traced first through her mother Rupkali Kuer, then Mahabir Prasad, her father, and then to Bhagwat Kuer, the heir of Mahabir. On the death of Bhagwat in 1925, Rupkali, Ramdulari's mother, and Mahabir, Bhagwat's husband, having pre-deceased her, the succession opened. That this is the position is admitted by the respondent to the principal suit as also by the appellants (defendants Nos. 4 and 17), but denied by the other appellants (defendants Nos. 1 and 2) who deny the right of Bhagwat as a co-widow of Mahabir to succeed. The claim of defendants Nos. 1 and 2 which is now limited to 10 annas 8 pies of the property, depends as I have already said upon the right of Dhanukdhari to succeed after the death of Ramkali Kuer to the exclusion of Bhagwat Kuer. This claim in my judgment fails based as it is on exclusion of the co-widow Bhagwat as will hereafter be shown, and on that assumption the way is clear for the disposal of the respective claims based on the one hand upon the right of Sia Prasad, a remoter agnatic relation of Mahabir, and on the other hand on the right of Sarabjit Protap Sahi, a nearer cognatic relation.

Mr. P. R. Das's argument on behalf of Sarabjit shortly stated is that the scheme of succession to the *stridhan* is different from that of succession to males, and that after tracing it through Mahabir (which is admitted on all hands) it goes to the nearest *sapinda*, *sapinda* a generic term being in this connection used in a special sense including agnates up to the 7th degree and cognates to the 5th degree *gotraja sapindas*, *somanodakas* and *bhinna-gotra sapindas*: see West and Buhler, Hindu Law, Mitakshara Verse 53 and *Ram Chandra v. Venayak Venkatesh* (2) at p. 300. It is contended that the word '*sapinda*' has a special meaning and not adopted in the Mitakshara in the case of succession to males where the expression is *gotraja sapindas* and that the Judge in the Court below was in error in relying upon the text (2) 41 I A 290 at p. 300; 25 Ind. Cas. 290; A I R 1914 P O 1; 42 O 384; 10 N L R 112; 18 O W N 1154; 27 M L J 323; 1 L W 831; 16 M L T 447; (1914) M W N 835; 16 Bom. L R 863; 12 A L J 1281; 20 O L J 573 (P O).

of Kamalkara for the solution of this problem, the relevant text regarding a woman's property being as follows:

"Her kinsmen take it if she die without issue (Colebrooke's placitum cxliv-a). "If a woman died without issue that is leaving no progeny, in other words, having no daughter's daughter, etc., the woman's property as above described shall be taken by her kinsmen (*sapindas*), namely her husband and the rest as will be (forthwith) explained. (Colebrooke's Mitakshara, Chap. II, s. 11, para. 9);" and in para. 30 as the statement of Bandyayana given by Vigyaneshwara of the Mitakshara is as follows: "The wealth of a deceased damsel let the uterine brethren themselves take." On failure of them it shall belong to the mother: or if she is dead, to the father (Chap. II, s. 11, verse 30 p. 388 of Colebrooke's translation; Edn. 1-70). The text remains silent as to succession after the father, but Veeramitrodaya, an authority in this School, *Gridhari Lal Roy v. Bengal Government* (3) and *Ram Chandra v. Venayak Venkatesh* (2) at p. 304*, supplies the omission to some extent. It says: "On failure of the mother and the father it goes to the nearest relations" (Gopal Chandra Sarkar's translation, 241). It is clear that the succession to the *stridhan* of a maiden is the same as the succession to the *stridhan* of a woman married in an unapproved form with this difference that in the case of a maiden the uterine brothers come in. In the first place it was argued that the ordinary rule of the Mitakshara that agnatic relations succeed before cognatic does not obtain in the case of *stridhan* and the fallacy upon which the Judge in the Court below has decided the case is that after the succession is traced through the father Mahabir, it proceeds on the same lines as succession to males.

It was contended that Veeramitrodaya used the term 'nearest relation' advisedly, and that other and more technical terms such as '*gotraja*' were used in the case of succession to males (see Setlur's translation, Edn. 1911, Part VII.1 at p. 421) "On failure of brother's sons the (heirs are) the gentiles (*gotrajas*) who are to be taken to be other than the father," and that this being intentional, it must be construed as meaning the nearest in relationship in the ordinary sense. That being so, Sarabjit being admittedly nearer (although cognate) than Sia Prasad (being a *somanodaka*), his claim must prevail. Further, the nearness is not to be determined, as the Judge in (3) 12 M I A 442; 10 W R 31; 2 Sar 332; 2 Suther 159; 1 B L R 44 (P O).

*Page of 41 L. A.—[Ed.]

the Court below has held, by the rules given in the Mitakshara with regard to succession to males as stated by Kamalkara, but by the test of religious efficacy, in other words, the capacity to offer oblations; again, that *sapindaship* in this regard is the same as in the case of ceremonials. Further, it is contended that the rule of religious efficacy is the ability to offer (in this case) oblations to the agnatic ancestor of Mahabir, and that as Sarabjit is the great-grandson (through his mother) of Jugatpati Singh, an agnatic ancestor (grandfather of Mahabir), he could offer two undivided cakes to that ancestor, also undivided cakes to another common ancestor of them both, namely Tribeni Singh, whereas Sia Prasad Singh can only offer divided cakes to an ancestor who was common to himself and Mahabir, being Bakhtour Singh, of whom Sia Prasad Singh is the great-great-grandson, the rule being that to three ancestors undivided cakes may be offered and after that to three more remote ancestors, divided cakes.

It has been decided in the Court below that the Mitakshara being one whole work cannot be taken to have applied different schemes of succession with regard to different subjects unless expressly so, and that therefore there being no enumeration of the heirs in default of the father, the rule as to males in the case of obstructed succession would apply which in this case is the same as succession to *stridhan* in default of enumerated heirs in the case of a woman married in one of the blamed or unapproved forms; this rule depending on the principle that a woman married in an unapproved form remains in the *gotra* of her father as in the case of a maiden. In support of the argument that in using the term *sapinda* the rule that agnatic relations are to be preferred to cognatic is ignored, a solitary passage in the decision of the Calcutta High Court is relied upon. Chitty, J. in dealing with a case in which the contesting parties claiming succession in the properties in suit were sisters of the propositus (father's daughters; and father's brother's sons, asked the question why agnates should be preferred to cognates in the case of succession to a maiden *stridhan*, and stated that there was no authority for that proposition. The judgments in that case both of Chetty and Mukherji, JJ., are in conformity with the view expressed by all the text-book writers of authority. But it is argued that although the decision in that case must be considered right yet the

reasoning was to a great extent *obiter* as the test which the appellants seek to apply in this case was adopted in that case and was sufficient to dispose of the matter. But it is to be remembered that the remark relied upon is limited to the facts of that case in which the rule of propinquity was applied, the successful parties (father's daughters) being in any event the nearest relations: I refer to *Dwarka Nath v. Sarat Chandra* (4). Reliance was placed upon the decision of their Lordships of the Judicial Committee of the Privy Council in *Buddha Singh v. Lattu Singh* (5) at p. 217 for the proposition that the test of religious efficacy applies equally to the Benares as to the Dayabhaga Schools. Their Lordships observe:

"It is well settled by decisions of this Board that under the Mitakshara the *sapinda* relationship arise "between two people through their being connected by particles of one body," namely that of a common ancestor, in other words, from community of blood in contradistinction to the Dayabhaga notion of "community in the offering of religious oblations."

But as it will be shown later on, the Mitakshara whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood. But it is to be observed that their Lordships were applying the rule of religious efficacy to persons of the same class and towards the end of the judgment made this statement in referring to Mitra Misra, the author of *Veeramitrodaya* (Gopal Chandra Sarkar's translation p. 91, Chap. II, Part I, s. 23-a) an authoritative commentary on the Mitakshara which lays down in express terms the rule:

"He says when there are many claimants to the heritage among *gotrajas* and the like, then the fact of conferring benefits on the proprietor of the wealth by means of offering oblations and the like excludes those that do not confer such benefits,"

and later:

"In *Ram Singh v. Ugur Singh* (6), the Board affirmed this rule in the following words: 'When a question of preference arises, as preference is founded on superior efficacy of obligations, that principle must be applied to the solution of the difficulty.'

I think it is clear that the test of the right of capacity to offer religious oblations is a test of the Dayabhaga School whereas

(4) 39 O 319; 11 Ind. Cas. 872; 15 O L J 23; 15 O W N 1036.

(5) 42 I A 208 at p. 217; 30 Ind. Cas 529; A I R 1915 P O 70; 37 A 604; 29 M L J 434; 2 L W 897; 13 A L J 1007; 18 M L T 409; 17 Bom. L R 1023; 20 O W N 1; 22 O L J 281; (1915) M W N 772 (P O).

(6) 13 M I A 373; 14 W R 1; 2 Sar. 566; 2 Suther 330; 5 B L R 293 (P O).

in the Benares School the test is propinquity. Only in competitions between persons of the same class is the matter determined on the footing of religious efficacy. As I have said the Judge in the Court below has relied for decision of the question on the Kamalakara as an authority in the Benares School. In Ghosh's Vivada Tandava of Kamalakara, p. 1142, in dealing with succession to *stridhan* it is stated as follows:

"In default of the husband, the estate is obtained by his near relation beginning with the lawfully married wife and daughter, etc., as prescribed in the text of Yagnavalkya in the rule about succession to sonless men. According to Vijyaneshwara it is taken by the husband's wife, her co-wife's daughter and the maiden daughter of the co-wife."

It is contended by Mr. P. R. Das that Kamalakara has not been correctly understood and that although it would appear that Yagnavalkya's text (which is a text dealing with succession to males) is relied upon, it is for a limited purpose and is not adopted in the case of *stridhan* generally. We are invited to look at p. 1145 of the same work where the final conclusion is arrived at by applying the test of religious efficacy. Again, it is argued that if the rule as stated in p. 1142 is applied it is contrary to the Mitakshara and that being so the Mitakshara must prevail. Again reverting to Veeramitrodaya it is contended that the rule of religious efficacy is the true test as will be seen by reference to s. 14 where cognates are mentioned as heirs (G. Sarkar's Veeramitrodaya, p. 243). But when there is a failure of the above-mentioned heirs of a childless woman's property, Brihaspati ordains:

"The mother's sister, maternal uncle's wife and the paternal uncle's wife, etc., are pronounced similar to mother. If they leave issue of the body, nor son (of a rival wife) nor daughter's son, etc., shall take the property."

Here in the term *aurasa* or "issue of the body" both sons and daughters are included: for they debar all (other heirs) and the order in which they debar others has previously been mentioned; and then explaining what Manu declares, the meaning of the term son as not being in apposition with the term *aurasa*, proceeds:

"Hence on the failure of heirs down to the daughter's son first, the *aurasa* inherits, after him his sons and grandsons. For it is proper that succession should devolve on them inasmuch as they are competent to present *pinda* and are liable to discharge debts, etc."

Apart from the argument on the text, it is contended that the rule of propinquity upon which the plaintiff relies is a rule applicable to the case of succession to males

(and there is no reason to apply it to females) which is admittedly based on *sapindaship*. Mitakshara, Chap. II. Ss. 3 and 4, provides, "Propinquity is the great regulating principle in determining the order of succession among heirs." The rule is based on the following text of Manu: "To the nearest *sapinda* the inheritance belongs." In further development of this argument the contention is that the Mitakshara used '*sapinda*' in one sense only. *Sapinda* relationship arises "between two people through being connected by particles of one body": See *Baddha Singh v. Lattu Singh* (5) at page 217*. But when dealing with the males, the term '*gotraja*' is used. "The wife, daughter, both parents, brothers likewise their sons *gotrajas* (gentiles), bandhu (cognates) a pupil and a fellow student" (Mitakshara, Chap. II Sec. 1, Verse 2, Mandlik's Translation of Institutes of Yagnavalkya p. 220). The Hindu jurists in their text books deal with this question, and in a manner contrary to the argument put forward by the appellant and the learned advocate does no more than to argue that the views which are thus unanimously expressed are mistaken. Mulla's Hindu law, Edn. 8, sec. 147 deals with the matter in these words:

"If there be none of these, in other words, if the woman dies without leaving issue, her *stridhana*, if she was married in an approved form, goes to her husband, after him to the husband's heirs in order of succession to him. But if she was married in an unapproved form, it goes to her mother and then to her father and then to the father's heirs."

If this statement of the law be correct, the matter is concluded against appellant-defendants No. 4 and 17. It also defeats the case of the other appellants-defendants No. 1 and 2, who claim through Dhaunkdari, as it is clear that amongst the heirs of the father would be the co-widow under the text of Mitakshara Chap. II s. 11, placita 8, 9 and 11.

8. A woman's property has been thus described. The author next propounds the distribution of it. 9. If a woman die 'without issue' that is, leaving no progeny, in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely her husband and the rest, as will be (forthwith) explained. 11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated *brahma*, &c. the property of a childless woman goes to her parents, that is to her father and mother."

These passages are taken from Stokes' Hindu Law Books, pp. 460, 461 and were adopted by their Lordships of the Judicial

Committee of the Privy Council in *Bai Kesserbai v. Hunsraj Morarji* (7) at p. 187. This case is a direct authority against appellants No. 1 and 2, the decision in the case being that a co-widow is entitled to succeed to the *stridhan* of a widow dying without issue in preference to her husband's brother or brother's son. Their Lordships agreed with the learned editor of the *Vyavastha Chandrika* and Lord Davey at p. 197* of the Report stated that "the words 'and the rest' therefore must mean, or include, the other relations of the husband or father." The case is also important for our purpose for their Lordships of the Judicial Committee of the Privy Council refer to Kamalakara. As is already pointed out there is no dispute, the problem in this case as to what the nearest relation of the father being the same as the nearest relation of the husband. The author makes this observation at p. 142 of his work :

"When the marriage is in an unapproved form, the *stridhan* goes in default of issue not to the husband and the heirs but to the mother, father, and father's heirs—the succession after the father would be the deceased woman's brother, brother's son, stepmother, sister, sister's son, grandmother, paternal uncle and her father's other *sapindas samanodakas* and *bandhus*."

This statement, it is argued, is incorrect as the Mitakshara uses the word *sapindas* only, and not 'heirs' and Veeramitrodaya as we have seen in the words 'nearest relations.' The Mitakshara in dealing with succession to males provides :

"The wife and the daughters also, both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student. (verse cxxxv). "On failure of the first among these, the next in order is indeed the heir of the estate of one, who departed for heaven leaving no male issue"

This rule extends to all (persons and) classes (verse CXXXVI, Colebrooke, Chap. II, s. 1). Reliance was placed on Sarkar's Hindu Law, Edn. 7, p. 830 where dealing with succession to *stridhan* this statement is made :

"It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitakshara. Hence the relations are to a woman's property in the same order in which they would become heirs to her husband or father or mother: *Janglubai v. Jetha Appaji* (8)."

Again Mulla, Edn. 8, p. 27 in this connection states :

"Under the Mitakshara the right to inherit arises from propinquity that is proximity of relationship."

(7) 33 I A 176 at p. 187; 30 B 431; 3 A L J 424; 1 M L T 211; 16 M L J 446; 10 C W N 802; 8 Bom. L R 446; 4 O L J 9 (P O).

(8) 32 B 409; 10 Bom. L R 522.

*Page of 33 I A—[Ed.]

and relies upon the authority of *Lulloobhoy v. Cassabai* (9) at p. 121. There being no difference in principle between marriage in an approved form or an unapproved form excepting that in the former, succession is traced through the husband, in the latter through the father and therefore raises the same problem as I have just stated. The statement by the same author "that it descends in the same way as if it had belonged to the husband himself" is relied upon; see Sarkar's Hindu Law, p. 832. Again, Shyama Charan Sarkar on *Vyavasta Chandrika*, Vol. II, p. 839, dealing with succession to *stridhan* states :

"So according to his own exposition in the case of the 'women being married in the Brahma, Daivai, Asura, etc. form,' if there be no husband there then such of the above-mentioned heirs as are nearest to her in his family succeed in due order," and

"in the case of her being married in the *asura*, etc., (unapproved forms of marriage) if her father do not exist, then such of the aforesaid heirs as are nearest to her in her father's family succeed in due order."

Likewise, Banerji in his Hindu Law of Marriage and Stridhan (Tagore Lectures, Edn. 5, p. 424) makes this statement :

"In the absence of any provision in the Mitakshara for determining the order of proximity among the husband's (father in the present case) *sapindas*, we turn to the Veeramitrodaya, a work of high authority in the Benares School. But the work does not help much. The order of succession, there is different from that in the Mitakshara as far as there are express provisions in both and where the express enumeration of heirs in the latter treatise stops, Veeramitrodaya does not carry it much further."

Then dealing with succession as to enumerated heirs observes :

"The order of succession is no doubt in accordance with the text of Brihaspati. And there is this additional argument in his favour that it is the same as given in the Vyavahara Mayukha, (Chap. XIV, s. 10 "30") and the Smṛiti Chandrika (Chap. IX, s. 111 "38"). But being in conflict with that indicated by Vigyaneshwara it cannot be accepted as law in the Benares School which recognizes the Veeramitrodaya only when it is not contradicted by the superior authority of the Mitakshara."

Then observing that it would be useless to refer to the Bengal authority for elucidation of the point, as the founder of the Bengal School controverts almost every doctrine of the Mitakshara on the subject, states that according to Kamalakara the "nearness" of *sapindas* in the above rule of Vigyaneshwara is to be determined by the rule given in the Mitakshara for the devolution of the property of a male owner dying without male issue. The same learned (9) 5 B 110 at p. 121; 7 I A 212; 4 Sar. 164; 7 O L R 446 (P O).

author relying upon West and Buhler, Vol. I, at p. 213 quotes this passage :

"This opinion seems to be based on the consideration that as *sapindas* inherit only through the husband, they virtually succeed to property coming from him and that consequently they must inherit in the order prescribed for the succession to a male's estate."

The same learned author is of the opinion that Kamalkara being entitled to be followed as an author in the Benares School when it is not in conflict with that of any higher authority has its further recommendation being simple as it makes the order of succession to *stridhan* correspond after a certain point to that applicable to man's property and if that were not Vigyaneshwara's meaning, and if he had not referred to this known order of succession after the husband, he would, in all probability, have been explicit. The text of Kamalkara has already been referred to in Ghosh's Vol. II, p. 1142 :

"In default of the husband the estate is obtained by his near relation—as prescribed in the text of Yagnavalkya in the rule about succession to sonless men."

The argument that Yagnavalkya was used by Kamalkara merely for the purpose of bringing into the succession the wife and daughter is one which, in my judgment, is not justified and certainly is not supported by authority, although in support of this argument it is contended that Kamalkara does not incorporate the whole of Yagnavalkya but relies upon this for support on the particular point only, and in that sense, has not stated what he is supposed to have stated by certain learned authors including Banerji on Hindu Law of Marriage and *stridhan*. Reliance was also placed upon Mayne's Hindu Law Edn. 9 at p. 979 where the author dealing with this subject observed that in either case (a maiden and woman married in an unapproved form) in default of the specifically enumerated heirs, the estate goes to the *sapindas* of the parents or husband as the case may be. The terms 'nearest relations of the parents' in this context means '*sapindas* of the father,' and proceeds to state "so it was held that a sister (father's daughter) sister's son (father's daughter's son, etc.)" (see table at p. 836-a). It is argued by Sir Sultan Ahmed that if the meaning which is sought to be attached to the word '*sapindas*' by the appellants is adopted, reference to the table at p. 836-a of Mayne's work would be erroneous. Again, Macnaghten deals with the question in the following way at p. 38 of his Hindu Law,

Edn. 2 :

"To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively, and failing those her paternal kinsmen in due order."

As regards the authorities Mr. Das, in the first place in support of his contention that the point is to be tested by the capacity to offer funeral oblations, relies upon the case in *Guru Gobinda Shaha Mandal v. Anand Lal Ghose* (10) where the claim was by a father's brother's daughter's son, and the Full Bench of the Calcutta High Court dealing with the point made this observation at p. 39* of the report :

"We wish to draw particular attention to it as an instance of the extreme solicitude evinced by the author of the Dayabhaga to provide for the spiritual welfare of a deceased proprietor. Again when we come to look at the internal arrangement of each of these classes, so far as the details of such arrangement are actually given in the Dayabhaga, we find that the same principle is always kept in view. Thus among the *sapindas*, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only; and the reason assigned for the distinction is that the first kind of cakes are of superior religious efficacy in comparison to the second. Similarly, those who offer larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description; and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones. The same remarks are equally applicable to *sakulayas* and *samanodakas*."

It is said that is a true rule, but there was an attempted departure from the rule in *Kashee Mohun Roy v. Rai Gobind Chuckerbutty* (11) but the matter, it is argued, was put right in the later Full Bench decision of the Calcutta High Court *Digumber Roy Chowdury v. Moti Lal Bundopadhyaya* (12), where it was held that the brother's daughter's son is a *sapinda* and is therefore a preferable heir to the great-great-great grandfather's great-great-great-grandson. But these cases were cases of Dayabhaga or the Bengal School of the Hindu Law in which admittedly the final test is capacity to offer funeral oblations. Defendants Nos. 4 and 17 gain no support from these cases. In *Nanja Pillai v. Sivabhagayathachi* (13) there was a contest between the daughter of a co-wife of a deceased woman married in one of the approved forms and the *sapindas*

(10) 5 B L R 115; 13 W R 49 (F B).]

(11) 21 W R 329.

(12) 9 O 563; 12 O L R 204 (F B).

(13) 36 M 116; 13 Ind. Cas. 128; 21 M L J 850;

(1911) 2 M W N 168; 10 M L T 494.

*Page of 5 B L R—[Ed.]

of her husband such as his father's brother's son. It was held, relying upon *Kamalkara*, that nearness was to be determined by the rule given in *Mitakshara* in regard to succession to the property of a male who died without descendants and consequently first the wife, i. e. the rival wife of the deceased, succeeds, next the daughter, i. e. the deceased step-daughter and so on. In *Kanakammal v. Ananthamathi Ammal* (14) it was held that the brother's widow, although a *gotraja sapinda* was not entitled to succeed as an heir under the Madras system of inheritance. In a later decision, in *Kamala Bai v. Bhagirathi Bai* (15) it was held that the rule that in the case of succession to *stridhan* property, a daughter inherits as *sapinda* where the succession is to be traced through the father or the husband, applies also to the case of a wife or widow. Sundara Ayyar, J. delivering the judgment of the Court stated:

"We see no reason for not accepting the view of the Bombay High Court in *Tukaram v. Narayan* (16), that the *sapindas*, both of the father and mother, must be understood to mean the same persons as the mother becomes a member of the father's family on her marriage. In this view, the defendant, as the wife of the deceased maiden's father, would be a nearer heir than the plaintiff (the maternal aunt of the deceased maiden").

This is a direct authority against the argument of defendants Nos. 1 and 2 who depend, as I have already stated, on the exclusion of the co-widow Bhagwat Kuer for the purpose of establishing their title to the 10 annas 8 pies through the transactions of Dhanukdhari who claimed to be the next in succession to Ramdulari. It is also indirectly an authority against the other appellants represented by Mr. P. R. Das unless he could successfully contend that *Kamalkara* introduced the rule laid down by Yagnavalkya merely for the purpose of putting in wife and daughter. In *Sundaram Pillai v. Ramasamia Pillai* (17) the conflict was between the father's paternal uncle's son and father's sister. The question discussed was what was the nearest relation? After referring to the text Napier, J. in delivering the judgment of the Court dealt with the argument that

the decision reported in *Kamala Bai v. Bhagirathi Bai* (15) had followed the decision in *Tukaram v. Narayan* (16) and was wrong in doing so as the Bombay High Court had acted upon *Veeramitrodaya*, a work which is not followed in Madras, but pointed out in answer to this argument that the learned Judges of the Madras High Court, although not expressly following the language of *Veeramitrodaya*, which was definite on the subject, proceeded by way of analogy and arrived at the same result.

The argument on behalf of defendants Nos. 4 and 17, as will be seen from the above considerations, has always been rejected. The authorities, so far as they dealt with the specific points, are entirely against the appellants. The argument is supported neither by authority nor by the authoritative authors of the text-books, who are unanimous that *sapindaship* in the case such as we have before us and in the case of succession to males depends entirely upon the same rule. The argument, although attractive in some of its aspects, is one which cannot be accepted. In my judgment, therefore the learned Subordinate Judge in the Court below was right in rejecting it, and the appeal, so far as these defendants are concerned, fails. That disposes of appeal No. 69 of 1935 in favour of the plaintiffs.

The next case is by the appellants who are defendants Nos. 1 and 2 in the action. They do not now press their claim which was given up at the end of the argument accepting the Subordinate Judge's conclusion that the decisions in the suits commencing in 1907 did not operate as *res judicata*, and that the principal property in dispute, the Lakhaipur *mukarrari*, was Bachu's separate property. The remaining claim is as to 10 annas 8 pies share which, as I have already pointed out, depends upon the right of Dhanukdhari to succeed as heir after Rupkali, the junior wife of Mahabir Prasad Singh, to the exclusion of Bhagwat Kuer, the co-widow. One of the contentions is that *Veeramitrodaya* (Sarkar, at para. 15, p. 244) deals with wife and daughter of the propositus and, therefore, the passage could not be of any assistance to those who contend that the co-wife is entitled. But it is to be observed that Ghosh, in his *Principles of Hindu Law*, at p. 1142, expressly mentions co-wife. It is further argued that the mention of "parents" in the *Mitakshara* does not include stepmother. *Kamala Bai v.*

(14) 37 M 293; 25 Ind. Cas. 901; A I R 1915 Mad. 18.

(15) 38 M 45; 16 Ind. Cas. 939; A I R 1916 Mad. 925; 23 M L J 518; 12 M L T 499; (1912) M W N 1186.

(16) 36 B 339; 14 Ind. Cas. 438; 14 Bom. L R 89.

(17) 43 M 32; 52 Ind. Cas. 821; A I R 1920 Mad. 728; 26 M L T 115; (1919) M W N 615; 10 L W 664.

Bhagirathi Bai (15) a case to which I have already referred, this point was expressly decided against the contention now put forward; so also the case in *Krishna Bai v. Shripati* (18) is a direct authority on the point. Also by reason of the decision at which I have arrived as regards the respective claims of *Sia Prasad* and *Kuar Sarabjit Protap Sahi*, the right of *Dhanukdhari Prasad* to exclude *Bhagwat Kuer*, the co wife, is necessarily decided against the contention. This appeal, therefore, so far as it relates to the claim of 10 annas 8 pies share of the property, through *Dhanukdhari*, fails.

The next questions to be disposed of are the endowments of *Bachu* and *Bhagwat Kuer*. *Bachu* during his lifetime in 1873 endowed a temple at *Ajodhya* in *Faizabad* with six villages and also with Rs. 40,000 in cash; this was on September 2 of that year. *Bachu* constituted himself the *mutwalli* and provided for the devolution of the office after his death. *Mahabir Prasad Singh* held the office after the death of his father *Bachu* and on *Mahabir's* death, *Dulhin Bhagwat Kuer* remained in office till her death. Plaintiff No. 1 in the principal suit claimed the office of *mutwalli* as the nearest of kin. There was a further transaction by *Mahabir Prasad* by which he sold six of the villages of the *Lakhaipur mukarrari* estate to the *Thakurji* on March 21, 1884. *Bhagwat Kuer*, when in possession, purporting to act under the provision of the will of her husband, dedicated by six deeds, properties of which she was in possession through the *waqf*. These transactions were of March 7, 1900, May 19, 1905, February 10, 1906, November 3, 1913, and June 29, 1924. This last dedication was, as the Judge in the Court below has pointed out, merely a fictitious endowment for the purpose not of the *waqf* of defendants Nos. 1 to 3. On July 2, 1924, *Dulhin Bhagwat Kuer* purported to change the order of succession to the office of *mutwalli* and provided that after her death defendant No. 1 must be the *mutwalli*. The right of *Bachu* to endow the property is not disputed and the Judge has decided accordingly. As regards the *mutwalliship*, *Mahabir*, it has been pointed out, remained a *mutwalli* during his lifetime. As will be seen from the genealogical table, *Mahabir* was the last of the male line of *Bachu*. The deed of endowment dated September 2, 1873, pro-

vided:

"As long as I live the *tasliat* and management of the *waqf*, properties shall remain vested in me personally and thereafter it shall be vested in my son *Babu Mahabir Prasad Singh*, and after him, it shall continue from generation to generation, to be vested in the eldest son found fit in the line of each of my children one after another, both in the male and female lines."

There was neither male nor female issue surviving and the line of succession laid down by *Bachu* came to an end. The right of management therefore, reverted to the founder or to his heir. *Mahabir Prasad* made appropriate provisions by which the *mutwalliship* should go to his descendants, male and female and *Ramdulari*, therefore, on her birth was entitled to the office. It was the opinion of the Judge in the Court below that that being so, the right again reverted to *Bachu*, the founder, or his heir, and both of them being dead, it devolved upon *Dhanukdhari Prasad Singh*, who, unaware of his right, failed to take action. On the findings at which I have arrived, and in the events which have happened, a right would devolve upon *Sia Prasad Singh*. But again this right was, not exercised by him. No one being nominated nor coming within the line constituted by the founder, the parties in these proceedings can establish no right to the *mutwalliship*. The learned Judge relies upon the deed of gift by *Kuar Sarabjit Protap Sahi* to *Dulhin Bhagwat Kuer* admitting *Dulhin Bhagwat Kuer's* right as *mutwalli* of this endowment and making no claim to the office himself and also upon the fact that defendant No. 1 can only lay claim through *Dhanukdhari*. *Dhanukdhari* did not exercise his powers and again, as there was nothing to show that *Bhagwat Kuer* was nominated, she had no power to nominate defendant No. 1.

One of the points put forward by the appellant, however, is that rightly or wrongly *Dulhin Bhagwat Kuer* was in possession and therefore obtained a right to nominate by adverse possession. She, however, was in possession as executor of the will of her husband and for a limited estate also. This question of adverse possession was not pleaded nor decided in the Court below, depending as it does on questions of fact such as the claim of the persons to whom I have referred either to nominate a line of holders of the office or to claim the *mutwalliship* themselves. In my judgment the contention of adverse possession cannot now be entertained. The learned Judge has disposed of the matter on the conclu-

sion that none of the persons enumerated was entitled to hold the office of *mutwalli* of the properties endowed by Bachu, and, as the claims made in the suits were not claims for appointment to the office by the Court, it was sufficient to hold that none of the claimants were entitled in these suits to succeed.

There remain two other questions to be determined; first as to the validity of the endowment by Dulbin Bhagwat Kuer, and secondly, the claim by defendant No. 1 to the office of *mutwalli*. The Judge in the Court below has held that the endowments were beyond the power of Bhagwat Kuer. The question therefore as to the *mutwalliship* does not arise. It is obvious that if the Judge is right as regards the validity of the endowment, the second question does not arise. These endowments, as I have already said, are of March 7, 1900, May 19, 1905, February 10, 1906, November 3, 1913 and June 29, 1924. Reliance was in the first place placed upon the will of Mahabir Prasad Singh which in para. 5, after referring to the dedication by Mahabir's father of considerable property to Sri Thakurji installed in the temple at Ajodhya provides :

"5: My father has dedicated considerable property to six Thakurji installed at the temple at Ajodhya for purposes of *raj-bhog* and charity and he also has executed a *wakfnama*. It is my wish also to do one or two acts of *dharam* to perpetuate my name and fame, and this is known to my both wives. If I fail to fulfil my desire during my life-time, I authorize my wives who might survive to fulfil this desire of mine as set forth in para 2 and the *wakfnama*, etc., which might be executed by them for this charitable act shall be operative and effectual to the same extent as the one which might have been executed by myself."

The translation before us omits the words "one or two acts of *dahram*" which are taken from the translation by the Subordinate Judge which all parties admit as correct. Under that clause of the will (which I have just read) and by reason of the general law it is contended that Bhagwat Kuer had power to make these endowments. The law on the subject is expressed by their Lordships of the Judicial Committee of the Privy Council in *Sardar Singh v. Kunj Bebari Lal* (19) at p. 394, thus :

"In their Lordships' opinion the Hindu Law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner."

Against the argument in support of the

(19) 49 I A 383 at p. 394; 69 Ind. Cas 36; A I R 1922 P O 261; 44 A 503; 18 L W 871; 31 M L T 253; 37 O L J 383, 44 M L J 766; 27 O W N 653; 25 Bom. L R 648; 2 P W R 1923 (P O).

validity of the endowment, it is contended first that the provisions of the will are too vague: *Ranchordas Vandravandas v. Parvatibai* (20). The first of the documents of March 7, 1900, mentions no less than five acts of charity, and it is contended that if she had power to make the endowments of fractions of the property, she had exhausted that power completely by some of the purposes for which the endowment was made—admittedly about one-tenth of the whole property being the subject of these endowments. Again, in the dedication of 1905 a statement is made "by way of carrying out my husband's wish" In this case the property endowed was of the value of Rs. 40,000 and it is contended that if this was the true purpose, the purpose had already been carried out by the earlier dedication of March 7, 1900. Further in the document of February 1906 Bhagwat Kuer purports to create more endowments on the ground that the properties already endowed were not sufficient to defray all the expenses of the temple and she denied that the two documents of March 1900 and of May 1905 were acts by which she carried out the object of perpetuating the memory of her husband. It would appear that the authority, if it was the authority of her husband upon which she was relying, had long since been exhausted, and it is impossible to contend that the lady was acting under the general rule of the Hindu Law which would entitle her to dedicate a small fraction of the property of her husband for the benefit of his soul. It must be remembered her interest was limited, and no valid reason is put forward to support the transaction to which I have already referred quite apart from the document of 1913 and 1924. It is frankly conceded that the purpose of the 1913 endowment was for a *pathsala* at Ajodhya which she herself had inaugurated. No mention is made of her husband and therefore it is impossible to say that she was continuing to carry out the authority of her husband under the will. The other deed suffers from the same infirmity. Again in this transaction a property of the value of Rs. 40,000 was transferred.

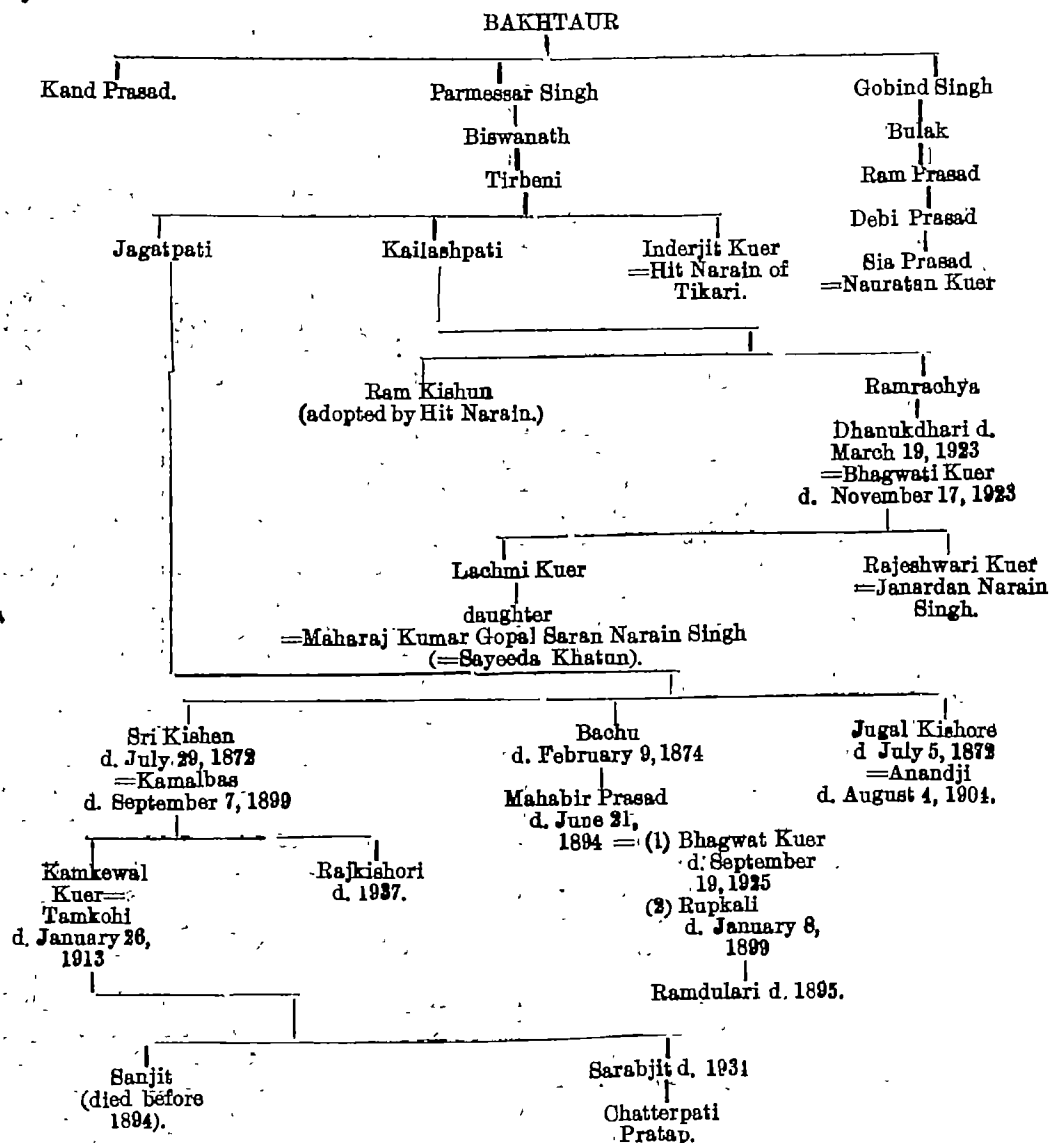
The Judge in the Court below has held that the authority in the will was vague and void for uncertainty and that the endowments were not in accordance with the authority such as it was, given under the will. For that reason it was held that the endow-

(20) 26 I A 71; 23 B 725; 1 Bom. L R 607; 3 O W N 62; 7 Sar. 54 (P O).

ments were inoperative against the plaintiff in the principal action. It is not an unreasonable view held by the Subordinate Judge that the purpose of these transactions was to benefit defendant No. 1 Raghava Surendra Sahi whom she adopted in 1906. In my judgment the learned Judge was correct in this view. The decision on all these points being against the appellants the result is that all the appeals fail and must be dismissed with costs to the respondents being plaintiffs Nos. 1-a, 1-b, 2, 3

and 4 in the principal suit No. 38 of 1932. There will be two sets of hearing fees, one payable by the appellants in Appeals Nos. 62, 63, 64 and 69 of 1935 and the other payable by appellants in Appeals Nos. 139 and 197 of 1935.

Agarwala, J.—These six appeals which have been heard together, arise out of five suits which were tried together by the Subordinate Judge of Gaya. The following genealogical table will explain the relationship of the principal parties :—



In 1863 Inderjit Kuer, daughter of Tirbeni Singh and wife of Maharaj Hit Narain of Tikari, made a grant known as the Lakhaipore mukarrari to Bachu Singh, one of the three sons of Jagatpati Singh, who

was one of her two brothers. At the time the grantee was a member of an undivided Hindu family consisting of himself, his two brothers; Shrikishun and Jugal Kishore and Ramrachya Singh, one of the sons of

Kailaspati, brother of the grantee's father. In 1864 Ramrachya separated from Jagatpati's branch of the family taking with him a half share of the ancestral properties but no share in the *mukarrari*. Jugal Kishore died on July 5, 1872, and Srikishun on the 29th of the same month. Bachu, the grantee of the *mukarrari*, died on February 8, 1874, after obtaining succession certificates empowering him to collect the debts due to his brothers, Jugal Kishore and Srikishun, respectively. Kamalbas Kuer, widow of Srikishun, and Rajkishori Kuer, one of his daughters, had not opposed Bachu Singh's application for a succession certificate in respect of the debts of Srikishun and received from him, the widow a maintenance grant, and the daughter an absolute gift of certain properties. The application, however, so far as the debts of Srikishun were concerned, was opposed by his other daughter, Rani Ramkewal Kuer, and so far as the debts due to Jugal Kishore's estate were concerned, by the latter's widow, Anandi Kuer. They denied that Srikishun and Jugal Kishore were joint with Bachu at the time of their deaths. The matter was decided in favour of Bachu Singh and after the latter's death his son, Mahabir Prasad, made a maintenance grant to Anandi Kuer by a deed dated May 17, 1874. Rani Ramkewal Kuer, however, challenged the decision by instituting Title Suit No. 163 of 1880 against Mahabir Prasad claiming her father's share in the ancestral properties. No claim was then advanced with regard to the *mukarrari* properties. The suit was compromised, Rani Ramkewal Kuer admitting Mahabir Prasad's title and receiving three villages from him. Rajkishori was impleaded in this suit. She and Sarabjit Pratap Sahi, son of Rani Ramkewal Kuer, who was then a minor, and his elder brother, were parties to the compromise. In the result these disputes terminated in the widows of Srikishun and Jugal Kishore, and the descendants of the former, admitting that Srikishun and Jugal Kishore died in a state of jointness with Bachu and that the latter's son had succeeded to the joint family properties. But the Lakhaipore *mukarrari* was not the subject-matter of those disputes.

Mahabir died on June 21, 1894, leaving two widows Bhagwat Kuer and Rupkali Kuer. On October 11, 1891, the latter gave birth to a daughter, Ramdulari Kuer, who died on June 3, 1895. Rupkali died in January 8, 1899. Kamalbas, widow of

Srikishun, died on September 9, 1899. Anandi Kuer, widow of Jugal Kishore, on August 4, 1901, and Bhagwat Kuer on September 19, 1925. Under the will of Mahabir Prasad, his estate was given to his widow successively for life, and his daughter, Ramdulari, on her birth became entitled to the reversionary estate. The various claimants to these properties are the parties to this litigation and the principal question on which they are at issue, is as to who ultimately inherited the estate which Ramdulari obtained under the will of her father, Mahabir. The parties are all agreed that the estate of Mahabir vested in Ramdulari on her birth and that on her death it passed to her mother, Rupkali Kuer. The contention of Raghava Surendra Sahi and his son Hari Surendro Sahi, who are plaintiffs in Title Suits Nos. 40 and 41 of 1932 and defendants in Suits Nos. 30 of 1930 and 38 of 1932 is that on the death of Rupkali Kuer the estate of her daughter Ramdulari passed to Dhanukdhari, who was at that time the nearest reversioner to Ramdulari's father, Mahabir, the latter's senior widow, Bhagwat Kuer, being excluded from inheriting the estate of her step-daughter. This contention was challenged by Sia Prasad who instituted Title Suit No. 38 of 1932 and by Sarabjit Pratap was the plaintiff in Title Suit No. 30 of 1930. Both these persons have since died. Sia Prasad's widow, Nauratan Kuer, was substituted in his place and Sarabjit's son Chatterpati in his place. The contention of the plaintiff in Title Suit No. 30 of 1930 is that at the time of Bhagwat Kuer's death he was the nearest kinsman and heir of Mahabir although he was a cognate and not an agnatic relation. Sia Prasad's claim was based on the Mitakshara text that cognates do not succeed until other classes of heirs are exhausted.

As between the claim of Sia Prasad, who instituted Title Suit No. 38 of 1932, and the claim of Sarabjit Pratap, who instituted Title Suit No. 30 of 1930 (and whose representative is the appellant in First Appeals Nos. 137 and 19 of 1935) the right to succeed to the *stridhan* property of Ramdulari on the death of her stepmother, Bhagwat Kuer, depends on the question whether the claim of a remote agnate is to be preferred to that of a less remote cognate. The parties are agreed, and it is clear, that in the case of a maiden, the heirs to her *stridhan* are, first, her uterine brothers, secondly her mother, and thirdly, her father. After this, it is con-

tended by Sir Sultan Ahmad in support of Sia Prasad's claim, that the heir to the deceased maiden's *stridhan* is the same as the heir to her father's property. In support of the claim of Sarabjit Prctap however, Mr. Das contends that the next to the *stridhan* is not the father's heirs but his nearest relation. Mr. Das founds his contention on the text of Manu, Chap. IX, verse 187; "The property of a near *sapinda* shall be that of a near *sapinda*," as explained by the Privy Council in *Ram Chandra v. Venayak Venkatesh* (2), at p. 297*, and in the commentary of Viramirodaya. The mitakshara divides *sapindas*, or blood relations, into two classes, *gotraja sapindas* and *bhinna-gotra sapindas* or *bandhus*. The Privy Council pointed out that while the Mitakshara uses the word *sapinda* in its wider sense to include all blood relations (i. e. all persons having particles of the same body as the deceased) it lays down rules for the limitation of the *sapinda* relationship which confines it to blood relations within seven degrees on the male side and five degrees on the female side. In *Ram Chandra v. Venayak Venkatesh* (2), their Lordships of the Privy Council rejected the contention that the Mitakshara uses the word *sapinda* in its narrower sense only in relation to marriage, impurity and exequial rites and not in relation to inheritance. They approved of the observations of the Full Bench in *Umaid Bahadur v. Udai Chand* (21), at p. 126, with reference to the meaning of *sapinda* in the Mitakshara:

"Having taken great pains in accurately defining the word '*sapinda*' in the beginning of his work, and having once said in clear words in the passage in question that 'one ought to know that wherever the word *sapinda* is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent', it is hardly reasonable to suppose that the author used the word in another part of the work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated."

With regard to the succession to *stridhan* property, the Mitakshara cites a text of Yagnavalkya that if it be the property of a woman married in one of the orthodox forms, it will go to her daughters, and, in default of them, to her husband. In the case of a woman married in an unorthodox form her *stridhan* goes to her father and mother on failure of her own issue. It is

common ground that the rules relating to the succession to *stridhan* are the same in the case of a maiden who has no brothers and a woman married in an unorthodox form and dying without issue. A text of Baudhayana is cited in the Mitakshara as regulating succession to the *stridhan* of a maiden:

"The wealth of a deceased maiden let the uterine brothers themselves take; on failure of them, it shall belong to the mother; or if she be dead, to the father."

Viramirodaya, who was a commentator on the Mitakshara, after referring to this text, says: "On failure of the mother and father, it goes to their nearest relations." The question on which the parties are at issue is whether "relations" (*sapinda*) is here used in the sense *sapindas* generally or whether it is confined to the meaning defined in the Mitakshara. Mr. Das contrasts the word '*sapinda*' in the commentary of Viramirodaya with reference to succession to *stridhan* with the term '*gotraja sapinda*' used in the text of Yagnavalkya cited in the Mitakshara in speaking of succession to the property of a male dying without issue. With regard to the latter Yagnavalkya's text is:

"The wife and the daughters also, both parents, brothers likewise and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil and a fellow student. On failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no lineal male descendant (*putra*)."

The Mitakshara, Chap. II, s. 5, after referring to the order of succession among the *gotrajas* says:

"If there be none such, the succession devolves on *samanodakas*, and they must be understood to reach the seven degrees beyond *sapindas*, or also as far as the limit of the knowledge and name extend. Accordingly Virhat Manu says. 'The relation of the *sapinda* ceases with the seventh person, and that of *samanodakas* extends to the 14th degree, or, as some affirm, it reaches as far as the memory of birth and name extends'. This is signified by *gotra*."

Mr. Das contends that since the word *sapinda* in the Mitakshara is to be used in the same sense throughout and since in describing the succession to *stridhan* the word used is *sapinda* and not *gotraja sapindas* as in the case of succession to the property of a male, the author of the Mitakshara must be taken to have intended to indicate that the two lines of succession were not the same, that is to say, whereas in the latter case *gotraja sapindas* and *samanodakas* have preference over *bhinna gotra-sapindas*; in the case of *stridhan* they have no such preference and the heir must be ascertained from among the *sapindas* generally by applying the test of reli-

(21) 6 O 119 at p. 126; 6 O L R 500 (F B).

*Page of 41 L. A.—[Ed].

gious efficacy. He referred to Viramitrodaya, Chap. V, Part 2 (Setlur), for the purpose of shewing that this writer also held that the lines of succession in the two cases are different. In s. 9, the author explains that the case of a woman married in an unorthodox form, in default of issue, her *stridhan* goes first to her mother and then to her father, although the text mentions only father. In s. 14, the author says:

"But when there is a failure of the above-mentioned heirs to a childless woman's property, Brihaspati ordains..... (here follows a list of persons pronounced to be similar to a mother, whom some writers call secondary mothers); if they (secondary mothers) leave no issue of the body, nor son (of a rival wife) nor daughter's sons, nor their sons, the sister's son and the rest shall take their property."

It is then explained that the term '*aurasa*' or 'issue of the body' includes both sons and daughters, and that 'their sons' relates to the terms 'issue of the body' and 'son (of a rival wife)' and not to the term daughter's son "because the son of a daughter is not competent to offer oblations." The author proceeds:

"Hence on failure of heirs down to the daughter's son, first the '*auras*' inherits, after him his sons and grandsons. For, it is proper that the succession should devolve on them, inasmuch as they are competent to present the *pinda*..... In their default, the son of a rival wife, his son and grandson (become heirs in their order) by reason of their being, under circumstances, the giver of the *pinda*..... Hence on failure of these, the sister's son and the rest alone, in spite of the *sapindas*, such as the father-in-law are, by virtue of the text (of Brihaspati) which is not reconcilable in any other way, entitled to succeed, according to their comparative propinquity to the property of their mothers, sister and the rest."

Here, contends Mr. Das, Viramitrodaya shews that the heir is to be found by applying the doctrine of religious efficacy to *sapindas* in general for among the "secondary sons" enumerated in the text of Brihaspati are persons who are cognates. It is to be remembered that, historically, until Yagnavalkya's text recognized the claims of cognates to succeed to the property of a male, in default of agnates, cognates had no right of inheritance at all. Yagnavalkya having, in the case of the property of a male, postponed them to agnates, it is contended that Viramitrodaya, who was commenting on and explaining the text of Yagnavalkya, intended to place them on the same footing as agnates in relation to the property of a woman. In Ohap. III, Part 1, relating to the succession to the property of a separated male, Viramitrodaya states, in s. 3:

"But in fact when a person in whom rights vested dies, it is proper that the property should be inherited by his nearrelations..... when the owner of any property is dead, then if he leave no male issue, his

property is inherited by his relations such as his wife, etc."

There the author is clearly referring to the text of Yagnavalkya: "The wife and the daughters also, both parents, brothers uterine, and their sons, gentiles (*gotrajas*) cognates (*bandhus*)....." in support of his proposition that "When a person in whom right vested dies, it is proper that the property should be inherited by his near relations." In s. 9 of Part 2, Chap. I, relating to women's property the author explains:

"It goes to the mother in the first instance, and after her to the father, according to the principle set forth while explaining the term "parent" in the text (of Yagnavalkya), "the wife and the daughters also, the parents, etc." there being no other text against the application of that principle to the present case."

Sir Sultan Ahmed contends that the citation of Yagnavalkya's text in this context indicates that what Viramitrodaya meant was that on failure of the mother, the father gets the property and on failure of the father it goes to the other persons mentioned in the text of Yagnavalkya in order there given. Apparently, the rival claims of a near *bandhu* and a more remote agnate to succeed to the *stridhan* of a maiden have never been directly in issue before; but the opposing views presented, respectively, by Mr. Das and Sir Sultan Ahmed in these appeals have been advanced in many reported cases and have been the subject of discussion by many text-book writers, and the view now supported by Mr. Das has not been accepted. The text of Brihaspati on which Mr. Das relies has been cited by commentators whose works are authorities in the Bombay, Madras, Mithila and Benares Schools, respectively; but no text-book writer has accepted it in the sense contended for by Mr. Das, and no Court has construed it in that sense: see *Bai Kesserbai v. Hunsraj Morarji* (7); *Nanja Pillai v. Sivabhagyathachi* (13); *Kana Kammal v. Ananthamathi Ammal* (14); *Kamala Bai v. Bhagirathi Bai* (15); *Sundaram Pillai v. Ramasamia Pillai* (17); *Kamla Prasad v. Murli Manohar* (22) and *Dwarka Nath v. Sarat Chandra* (4). In all these cases the text of Yagnavalkya with regard to succession to the property of a male was applied to the *stridhan* property of a woman and no instance has been cited in which that text was not applied. In *Nanja Pillai v. Sivabhagyathachi* (13) the text of the Mitakshara (Ohap. II,

(32) 13. Pat. 560; 152 Ind. Cas. 446; A I R 1934 Pat. 398; 15 P L T 715; 7 R P 190,

Sec. xi, pl. 11) that on the failure of the husband of a woman married in an orthodox form the property "goes to his nearest kinsmen (*sapindas*)" was under consideration. The then learned Chief Justice said :

"The meaning of the above text is plain; it means that the *stridhan* property of a woman married according to an orthodox form who has left no issue will devolve on her husband, and on failure of the husband, the property will go to his *sapindas* in the order laid down in the Mitakshara with reference to succession to the property of a male. That is to say, we have to ascertain the person who would succeed to the property as the nearest *sapinda* of the husband if the property belonged to him. And that is the interpretation which has been placed upon the text whenever it has had to be considered."

This view was reiterated in *Kana Kammal v. Ananthamathi Ammal* (14) where the learned Judges after citing the passage quoted above, went on to say :

"No authority has been quoted for the suggestions of the learned vakil for appellant that the term *sapinda* in Mitakshara, Chap. II, s. 11, pl. 11, should be understood in a different sense to that in which it would be used in reference to inheritance from a male."

Again Phillips, J. in *Sundaram Pillai v. Ramasamia Pillai* (17), at p. 33* said :

"I am unable to accept the contention based on the single sentence of the judgment in *Kamala Bai v. Bhagirathi Bai* (15), that the father's *sapindas* in a case when the property of a female is concerned, are different to the *sapindas* in the case of a male's property. In the absence of any rule to the contrary, the *sapindas* must always be the same."

The true construction of the text of Brihaspati was decided by the Privy Council in *Bai Kesserbai v. Hunsraj Morarji* (7) in which it was held that the text is merely illustrative, enumerating some of the heirs entitled to succeed to the *stridhan* of a woman on failure of her husband, in the case of a woman married in an orthodox form, and of her father, in the case of a woman married, in an unorthodox form, and that the order of succession is not indicated in that text. Mr. Das does not accept that decision as authority for the proposition that the proper order, in the case of succession to the *stridhan* property of a woman is the same as in the case of the property of a male. He relies on the fact that the claim which the Privy Council upheld in that case was the claim of a co-widow and he contends that even on the view which he has presented, the co-widow would exclude all other *sapinda* because she is the nearest *sapinda* of her deceased husband. He referred to s. 15 of Part 2 of Chap. V of Viramitrodaya (Setlur) as authority supporting the co-widow's rights. In that section the author is commenting on Manu's text disinheriting woman and

mentions that the only exception is in favour of those women "whose right of succession has been expressly mentioned in texts such as 'The.....wife and the daughters, also, etc.'" Mr. Das admits that the author is actually applying the text of Yagnavalkya to *stridhan*, for he relies on s. 15 to defeat the claim of Dhanukdhari to succeed in preference to Bhagwat Kuer, the stepmother of Ramdulari, but he contends that in para. 15 Viramitrodaya has not applied to *stridhan* the whole of Yagnavalkya's text relating to the property of a male but only a part of it namely "the wife and the daughters also." It is true that the text is being cited merely to illustrate the rule that only specially mentioned women have a right to inherit and therefore in s. 15 the commentator cannot be held to have cited it for anything more than in support of the claims of certain women. In s. 9, however, the same commentator cites the same text of Yagnavalkya in discussing succession to the property of a childless woman married in an unorthodox form. In such a case, according to the Mitakshara the property goes "to the father." In s. 9 Viramitrodaya explains that by "father" is here meant parents and goes on :

"Amongst them also, it goes to the mother in the first instance, and after her to the father, according to the principle set forth above while explaining the term 'parents' in the text 'the wife and the daughters also, the parents, etc.,' there being no other text against the application of that principle for the present case."

Mr. Das's comment on the fact that Yagnavalkya's text is quoted in this context is that it is an instance in which Viramitrodaya has cited in support of his own conclusions a text which is inapt for that purpose and therefore that it should not be read as incorporating into Viramitrodaya's discussion of the succession to a maiden's property; Yagnavalkya's rule regarding succession to the property of a male. That, however, is not the view taken by Kamalakara in his Vivada Tandava or by other commentators. Discussing succession to the *stridhan* of a woman married in an orthodox form Kamalakara says :

"In default of husband the estate is obtained by his near relation belonging with 'the lawfully wedded wife and the daughter, etc.,' as prescribed by the text of Yagnavalkya in the rule about succession to a sonless man."

By this passage it has been generally understood that in Kamalakara's view the succession to *stridhan*, in default of husband in the case of a woman married in an orthodox form, and in default of

father in other case, was that the heirs of the husband or father succeeded in the order laid down in Yagnavalkya's text relating to succession to the property of a male. West and Buhler (Edn. 4, p. 485) say :

"The opinion (of Kamalakara) seems to be based on a consideration that, as the *sapindas* inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's estate."

They then refer to the view now presented by Mr. Das and continue :

"But, the identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems on the whole consonant with it, whereby precedence in heritable relation to him gives a like precedence and order of succession to his widow. Such appears to be the rule, too, which custom has preferred in this part of India."

See also Vyavastha Chandrika (Shyama Charan Sarkar, Vol 2 p. 539). Sir Gooroodass Banerjee in his Tagore Law Lectures on the Hindu Law of Marriage and Stridhan (9th Lecture, Edn. 4, pp. 383, 389) refers to the discussion of the subject by West and Buhler and says :

"In this conflict of authority it is not easy to say which view is correct. But Kamalakara's opinion is entitled to be followed as authority in the Benares School when it is not in conflict with that of any higher authority ; and in the present instance, the rule based upon his opinion has the further recommendation of being simple, as it makes the order of succession to *stridhan* correspond, after a certain point, to that, to that appealable to a man's property."

Another eminent Hindu Jurist, Gopalchandra Sarkar Sastri (Hindu Law, Edn. 6, pp. 730, 731) after citing Viramitrodaya's comment on Baudhayana's text . . . "On the failure of the mother and the father, it goes to their nearest relations" says :

"It seems that a maiden's status is similar to that of a woman married in a disapproved form of marriage, both being under the *patria potestas* of their father. The term 'their nearest relations' must be the father's relations, in the first instance inasmuch as they are also the mother's relations, so the term is not to be used distributively ; and in default of such relations, the relations of the mother alone become heirs It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitakshara, hence the relations are to take a woman's property in the same order in which they would become heirs to her husband or father or mother."

Mr. Das' comment on these writers is that they all misunderstood the text of Kamalakara because they made the mistake of directing their attention to one passage of his work and failed to notice what he said later on, and that to accept their view is to give *samanodakas* preference over *bandhus* which, he contends, is directly contrary to the Mitakshara rule that the heir to maiden's *stridhan* is to be

looked for among the *sapindas* in the sense in which that word is defined in the Mitakshara. His contention is that Kamalakara's final conclusion is that in default of husband or father, the heir is to be found by applying the doctrine of religious efficacy to the *sapindas* generally without reference to the particular class of *sapindas* to which they may belong. It is a startling suggestion that so many eminent Sanskrit scholars and jurists should have missed what is so obvious to Mr. Das. in *Dwarka Nath v. Sarat Chandra* (4) the question of succession to the *stridhan* of a woman married in an unorthodox form was considered and although the issue did not arise between a cognate and an agnate, the texts relevant to the latter point were fully discussed by Chatterjea, J., who said :

"So that, according to Kamalakara, the nearness of kinsmen in the rule laid down in the Mitakshara is to be determined according to the well-known text of Yagnavalkya relating to the succession to male owner dying without issue."

The decision in this case was followed in *Nanja Pillai v. Sivabhagyathachi* (13) which has already been referred to. In this state of judicial *dicta* and the comments of the learned Sanskrit scholars and jurists, I have no hesitation in rejecting the contention of Mr. Das in support of the claim, that Sarabjit is to be preferred as an heir to Mahabir in preference to Sia Prasad. Even if the texts and commentaries are capable of being construed in the sense for which he contends, I should hesitate to adopt that construction for it would inevitably have the effect of upsetting titles long founded on the contrary view.

Certain other facts must now be stated in order to understand the claims of Raghava Surendra and his son, who are the appellants in the principal appeal (First Appeal No. 69 of 1935, arising out of Title Suit No. 38 of 1932). By an *ekranama* of February 12, 1906, Bhagwat Kuer proclaimed that she had adopted Raghava Surendra Sahi as son to her deceased husband. Thereupon, on February 8, 1907, Dhanukdhari Singh, son of Ramrachya, executed a sale deed in favour of Ambica Prasad Singh of Tikari purporting to convey a two thirds share of the Lakhaipore *mukarrari* and a 2 annas 8 pies share of certain of the ancestral properties. The sale deed recited that the Lakhaipore *mukarrari* had belonged jointly to Srikishun, Bachu and Jugal Kistore and that they had separated from each other; that on the death of the widows of Srikishun and Jugal

Kishore the shares of the two latter had devolved on Dhanukdhari, who on the death of Ramdulari, also inherited the estate left her by Mahabir Prasad, and that in order to raise money to finance litigation for the purpose of recovering the properties from Mahabir's widow, Bhagwat Kuer, who was in illegal possession of them, the vendor was obliged to sell the shares of Jugal Kishore and Bachu in the *mukarrari*, amounting to two-thirds, and the half share of Jugal Kishore in the other properties. The vendor and the vendee then instituted three suits. Title Suit No. 198 of 1907 was to recover the one-third share of Bachu which devolved on his son Mahabir; Title Suit No. 199 of 1907 was to recover the one-third share of Jugal Kishore, and Title Suit No. 200 of 1907 was to obtain a declaration that the adoption of Raghava Sahi was invalid. The last suit succeeded. The other two were finally dismissed by the Privy Council in 1919.

In the meantime, Sarabjit Protap, son of Rani Ramkewal Kuer, instituted Title Suit No. 153 of 1911 to recover the one-third share of his maternal grand-father Srikishun although he and his brother had signed the compromise entered into by his mother which admitted that Srikishun had died in estate of jointness with his brothers. While the suit was pending in appeal to the Privy Council, the parties entered into what they called a family arrangement, for the purpose of settling their disputes. The arrangement is evidenced by three deeds. By the first, dated January 8, 1921, Bhagwat Kuer purported to release the one-third share of Srikishun in favour of the latter's daughter Rajkishori. By the second deed, dated January 9, 1921, Rajkishori purported to surrender this one-third share to Sarabjit Protap, son of her sister, Rani Ramkewal Kuer. By the third deed, dated January 10, 1921, Sarabjit Protap purported to transfer to Bhagwat Kuer absolutely, by way of gift, most of the properties included in the one-third share. One of the properties, however, was given to Rajkishori and the remainder were retained by Sarabjit Protap himself. Dhanukdhari died on March 19, 1923, and his widow on November 12 in the same year.

While an application by Bhagwat Kuer for mesne profits against the plaintiffs of Suit No. 199 of 1907 was pending, a compromise was arrived at on February 10, 1924, between Bhagwat Kuer on one

side and Ambica Prasad Singh and his son, Maharaj Kumar Gopal Saran Narain Singh to whom he had made a gift of the two-third share in the *mukarrari* properties purchased from Dhanukdhari on February 8, 1907, on the other side. Ambica Prasad and his son executed a *kobala* in favour of Bhagwat Kuer by which they sold to her their rights in the two-third share, except nine villages, and Bhagwat Kuer executed a *kobala* in favour of the Maharaj Kumar in respect of the one-third share of the aforesaid nine villages and a deed of surrender in respect of the remaining two-third shares. On July 2, 1924, Bhagwat Kuer made a gift of 52 villages out of the two-thirds share to Hari Surendro Sahi, son of Raghava Surendra Sahi. She died on September 19, 1925. Lachmi Kuer, a daughter of Dhanukdhari, was then recorded in Register D as proprietress in respect of some of the ancestral properties. As a result of dispute with respect to the Gaya properties, all the latter were attached by the District Magistrate under s. 146, Criminal Procedure Code.

With regard to the two-thirds share which Dhanukdhari purported to sell in 1907 and which the vendee conveyed to Bhagwat Kuer, it is necessary for these appellants to establish that the estate of Ramdulari was inherited by Dhanukdhari and not by her stepmother Bhagwat Kuer. It is contended that a stepmother never, in any circumstances, inherits the *stridhan* property of her stepdaughter. In support of this proposition reference was made to three cases, none of which, however, is directly in point. In *Julessur Koor v. Uggur Roy* (23) the rival claimants were the *gotraja sapindas* and the sister of the last male owner, respectively. The claim of the sister was rejected on the ground that she is not one of the heirs enumerated in the Mitakshara. In *Tahaldai Kumri v. Gaya Prasad Sahu* (24) the rival claimants to the estates of two deceased brothers were their father's sister's sons and their stepmother, respectively. The latter's claim was disallowed. The third case is *Ramanand v. Surgiani* (25) in which it was held that a stepmother, not being one of the females expressly named in the Mitakshara and not being included under the term "mother" in Chap. II, s. 3, cannot inherit from her deceased step-son.

(23) 9 O 725; 12 O L R 460.

(24) 37 O 214; 5 Ind. Cas. 135; 11 O L J 538; 14 O W N 443.

(25) 16 A 221; A W N 1894, 17.

The point which falls for decision in these appeals, namely, the right to inherit *stridhan* property was considered in *Kamala Bai v. Bhagwati Bai* (15) and decided in favour of the stepmother. There the contest was between the maternal aunt and the stepmother of a deceased maiden. The aunt's claim was disallowed. It is true that this case arose in the Madras Presidency but we have not been referred to any authority holding that in respect of *stridhan* property, the Hindu Law of inheritance as administered in this Province differs from that of Madras. It was, however, contended that the Madras case did not refer to the text of Viramitrodaya relating to succession to the *stridhan* of an unmarried girl. It is argued that when the succession to *stridhan* has been traced as far as the father of a deceased maiden, the property then passes to the heirs of the father as if it were the property of a male. Accordingly, it is contended, it cannot be inherited by a female agnatic relation, unless she be one of those expressly mentioned as heirs of a male and a stepmother is not so mentioned. But in discussing succession to *stridhan*, Viramitrodaya (Setlur, Chap. V, Part 2, s. 15) expressly introduces the text of Yagnavalkya: "The wife, and the daughters also, both parents brothers likewise, and their sons....." as an instance of certain women being specifically mentioned as heirs and there seems to be no reason why this particular text should have been cited in that context if at least the relevant portions of it were not to apply to the *stridhan*; that is to say, if it were not cited as an instance of certain women being heirs to *stridhan*. Bhagwat Kuer was the wife of Mahabir, the father of Ramdulari, and hence is mentioned in Viramitrodaya as one of the heirs. The claim of Raghava Surendra Sahi and his son, so far as it is based on Dhanukdhari's right of inheritance, therefore fails. This disposes of their claim to the two-third share which was the subject-matter of Dhanukdhari's sale to Ambica Prasad Singh, which was subsequently purchased from the latter's son by Bhagwat Kuer from whom the appellants claim.

With regard to the one-third share which belonged to Sri Kishun, these same claimants make an alternative case. They contend that in the litigation initiated by Dhanukdhari in 1907 which was determined in the Privy Council in 1919, it was decided that each of the three brothers, Srikishun,

Bachu and Jugal Kishore separated, and that each had a one-third share in the property; that Bhagwat Kuer put Srikishun's daughter Rajkishori in possession by the deed of release of January 8, 1921; that Rajkishori surrendered it to Srikishun's grandson, Sarabjit Protap on January 9, 1921, and that the latter conveyed it absolutely to Bhagwat Kuer from whom the appellants obtained it by a deed of gift on January 10, 1921. It is argued that the decision of the litigation of 1907 operates as *res judicata* as to Srikishun's right to one-third of the *mukarrari*. The transaction of 1921 were relied upon as a family arrangement by which were settled the disputes between Bhagwat Kuer on the one hand and those interested in the estate of Srikishun on the other.

The Subordinate Judge overruled the plea of *res judicata* and held that the *mukarrari* grant was to Bachu alone, that there was no real dispute to be settled in 1921 and that if such a dispute existed, the settlement was not *bona fide* for the protection of the estate of which Bhagwat Kuer was in possession as a life tenant, but a device to convert her life interest in the one-third share into an absolute estate for the purpose of enabling her to convey it to Raghava Surendra Sahi. It was not contended that the Subordinate Judge's finding that the *mukarrari* was granted to Bachu alone is wrong in so far as it is based on the evidence in this case. The finding was at first challenged on the ground that the matter was concluded by the decision in the litigation of 1907 and a considerable amount of time was taken in discussing this question, both by the appellants and the respondents. In his reply, however, Dr. Dwarka Nath Mitter, the learned Advocate for the appellants in F. A. 69 of 1935, stated that he accepted the conclusion of the Subordinate Judge on the question of *res judicata* and also his finding that the transactions of 1921 did not amount to a family arrangement by way of settlement of a dispute.

The next question is as to the validity of endowments made by Bhagwat Kuer. They were all challenged both by Sia Prasad and Sarabjit Protap and by Lachmi Kuer, a daughter of Dhanukdhari Prasad. Raghava Surendra claimed them to be valid. With regard to two deeds of endowment executed in 1906 and 1906, respectively, he sought for a declaration of their validity in Title Suit No. 41 of 1932. In 1873 Bachu Singh conveyed six villages

out of the Lakhaipore *mukarrari* to the deities installed by him in a temple at Ajodhya to whom he also assigned Rs. 40,000 owing to him by debtors. After his death this money was re-paid by the debtors to Bachu Singh's son, Mahabir, who, however, instead of handing it to the *shebait* of the temple, conveyed another six of the *mukarrari* villages to the deities in lieu of it. The validity of these endowments is not in question. In 1900, after the death of Mahabir, his widow, Bhagwat Kuer, purporting to act under his will, conveyed certain properties valued at Rs. 60,000 for the maintenance of a Sanskrit School at Ajodhya and a temple at Chapra. In 1905 she dedicated other properties valued at Rs. 40,000 to a temple which she herself founded at Ajodhya. Further properties valued at Rs. 32,000 were dedicated to this temple in 1906 and to the school in 1913. On June 19, 1924, Bhagwat Kuer dedicated to the temple at Chapra her deceased husband's residential house at Chapra with the out-houses and land appurtenant to it valued at Rs. 40,000 as a residence for the *mutwalli* of the endowed properties. She herself was the *mutwalli* at the time. The deed stated that on her death Raghava Surendra, and after him Hari Surendra, would be the *mutwalli*. The relevant portions of Mahabir's will are as follows:

"1. I have two wives. If by the grace of God one or both of them get issues, they shall, on my death, enter into possession and occupation of all my movable and immovable properties, ancestral as well as acquired, so that the name of my ancestors may be perpetuated and the expenses on charity and temple, etc., which have been met from the time of any ancestors down to the present time, as well as the expenses thereon to be provided for by me hereafter may continue to be defrayed exactly in the same manner as has (hitherto) been done, so that charitable acts may continue to be done in the family.

2. If my children are minors at the time of my death, the senior wife and on her death the junior wife who are both very intelligent, possessed of administrative ability and pious, shall act as their guardian till they attain majority, and manage the estate, giving training to the boys, and carry out the orders of the *hakims* for the time being.

5. My father has dedicated considerable property to Sri Thakurji installed at the temple at Ajodhya for purposes of *rajbhog* and charity and he has also executed a *wagfnama*. It is my wish also to do one or two acts of *dharm* to perpetuate my name and fame, and this is known to my wives. If I fail to fulfil my desire during my lifetime, I authorize my wives who might survive to fulfil this desire of mine as set forth in para. 2, and the *wagfnama* which might be executed by them, for this charitable act shall be operative and effectual to the same extent as the one which might have been executed by myself....."

The reference in para. 5 to 'para. 2' is apparently a mistake. It seems that

para. 1 was meant. The phrase "one or two acts of *dharm*" is taken from the translation of the will by the learned Subordinate Judge which is admittedly accurate. In *Ranchordas Vandrawandas v. Parvatibai* (20), at p. 80* the Privy Council held that a bequest for *dharm* was too vague and uncertain to be given effect to. In *Vaidayanatha Aiyar v. Swaminatha Ayyar* (26), on the other hand, the charity to be benefitted was a *chattram*, a known and certain charity. It was contended in the present case that the phrase 'known to my wife' explains and amplifies the phrase "one or two acts of *dharm*." The acts of *dharm* are indicated with sufficient certainty to be enforced. The learned Subordinate Judge has found that there is no reliable evidence as to what, if any, were the acts of *dharm* which the testator had communicated to his wives and nothing has been said in these appeals which leads me to reject his conclusion on this point.

Apart from the will, however, it is contended that Bhagwat Kuer had power under the Hindu Law to dedicate a portion of her husband's estate to religious and charitable objects. That a widow has such a power is not contested but the widow's act must be reasonable, having regard to the value of the estate, and its object must be such as according to the notions prevalent in Hindu society conduce to the spiritual benefit of her husband; see *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (27). The value of the dedicated properties according to the deeds is Rs. 1,72,000. In the course of the argument Dr. Mitter in supporting the dedications admitted that they amounted to a tenth of the estate. The object of the endowments has been found by the learned Subordinate Judge to be for the material benefit of Raghava Surendra and, if any spiritual benefit was in view, it was the spiritual benefit of Bhagwat Kuer herself. This circumstance of the case support the conclusion arrived at by the Subordinate Judge. She first attempted to adopt Raghava Surendra as the son of her deceased husband. When

(26) 51 I A 282; 82 Ind. Cas. 204; A I R 1924 P O 221; 47 M 884; 47 M L J 381, 35 M L T 189; (1924) M W N 749; 10 O & A L R 1076; 26 Bom. L R 1121; 20 L W 203; 22 A L J 983; 40 O L J 454; 39 O W N 154; 26 P L R 1; L R 6 A (P O) 17; 1 O W N 817 (P O).

(27) 45 A 596; 76 Ind. Cas. 922; A I R 1923 P O 180; 50 I A 265; 26 O O 257; (1923) M W N 591; 9 O & A L R 746; 21 A L J 777; 33 M L T 355; 10 O L J 513; 47 M L J 260; 29 O W N 86 (P O).

*Page of 26 I. A.—[Ed].

this failed, she conveyed part of the estate to him and the balance, except the dedicated properties, to his son. She appointed him as *mutwalli* of all the dedicated properties and even put him in possession of the family residential house. None of the dedications was for the benefit of the deity installed by her husband's father at Ajodhya. In this respect the facts are similar to those in *Ram Kawal Singh v. Ram Kishore Das* (28) where a widow alienated a part of her deceased husband's estate for the maintenance of a deity which had not been installed by him and the dedication was found to be *prima facie* for the widow's own spiritual benefit and not that of her husband. Mr. Das who challenged the dedications on behalf of Sarabjit Pratap, contended that under the Hindu Law a woman in possession of a life estate is entitled to dedicate part of the estate for the spiritual benefit of the last full owner only and therefore in the present case all alienations not for the spiritual benefit of Ramdulari are void. He relied on an observation of their Lordships of the Privy Council in *Sardar Singh v. Kunj Behari Lal* (19), at p. 394*:

"In their Lordships' opinion the Hindu Law recognizes the validity of the dedication or alienation of a small portion of the property of a Hindu female for the continuous benefit of the deceased owner."

In that case the deceased owner was a male. It is not necessary to discuss this aspect of the matter because in my view of the facts the alienations of Bhagwat Kuer were intended neither for the spiritual benefit of Ramdulari Kuer nor Mahabir. For the same reason it is not necessary to discuss further the validity of the provisions of the will under which Bhagwat Kuer purported to act although it was contended that Mahabir having bequeathed a vested *zamindari* to Ramdulari the subsequent provision empowering the widows to use a part of the estate for acts of *dharm* were void. In the result, therefore, the only dedications of Bhagwat Kuer which can be held to be valid are those of her own *stridhan* properties. Of these latter, she appointed Raghava Surendra the *mutwalli* and her right to do so is not challenged. With regard, however, to the endowments made by Bachu Singh and the six villages transferred to the temple at Ajodhya by Mahabir, the right to the *mutwalliship* was claimed in the suits by Nauratan Kuer, widow of Sia Prasad, (28) 22 C 508.

*Page of 49 I. A.—[Ed.]

Sarabjit Pratap, Lachmi Kuer, daughter of Dhanukdhari and Raghava Surendra. The Subordinate Judge rejected the claims of all of them and only the last-mentioned appeals. His claim is based on a deed of management of all the dedicated properties executed by Bhagwat Kuer in his favour on September 8, 1924, on the strength of which he succeeded in having himself recorded in Register D as *mutwalli*. In the deed of endowment executed by Bachu Singh in 1873, he appointed himself as the first *mutwalli* and his son Mahabir as his successor and confined the succession thereafter to the eldest and worthy son of his own descendants, male or female. The male line of Bachu Singh terminated with the death of Mahabir and the latter's only daughter, Ramdulari, died when only a few months old. The line of succession laid down by the founder of the endowment having thus come to an end and the founder having died, the right of management reverted to the latter's heir, Mahabir. The latter, by his will, provided that the *mutwalliship* should go to his descendants, male or female, and therefore it passed to Ramdulari. On her death it again reverted to the founder's heir, who at that time was Dhanukdhari. Dhanukdhari never assumed the duties of the office or nominated a successor. On Dhanukdhari's death the founder's next heir was Sia Prasad, who also failed to nominate a successor. None of the claimants is a descendant of the founder or his son and none of them has been nominated by any heir of the founder. The same applies to Bhagwat Kuer. She was not the legally constituted *mutwalli* and had no power to nominate a successor. Her appointment of Raghava Surendra is, therefore, inoperative. It was contended that Bhagwat Kuer acquired a title to the office of *mutwalli* by adverse possession. The argument is that on the death of Ramdulari the *mutwalliship* devolved on Dhanukdhari but Bhagwat Kuer remained in possession for more than twelve years before appointing Raghava Surendra. No such case was made in the pleadings or at the trial. She took over the management of the dedicated properties as executrix of her husband's will and there is no indication in the evidence that on the death of Ramdulari she asserted a title to the *mutwalliship* hostile to the legal claimant. I agree that all the appeals be dismissed with costs as proposed.

S.

Appeals dismissed.

BOMBAY HIGH COURT

Criminal Appeal No. 119 of 1939

June 18, 1939

BROOMFIELD, Ag. C. J. AND SEN, J.

BAPTIST DE SOUZA—ACCUSED—

APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Bombay Prevention of Gambling Act (IV of 1887), ss. 4, 5, 6—Evidence of bogus punters—Value of—Statements of Police long after event—Value of—Finding of marked coins and slip of paper with figures, when sufficient for conviction—Warrant in name of Sub-Inspector—Arrest by constable, Sub-Inspector being nearby—If vitiates warrant.

The bogus punters are usually very unsatisfactory witnesses. It does not much matter whether they are called accomplices or spies or Police agents. No doubt, it is very difficult to get better evidence and the Police may have to make use of such people, and if their evidence is corroborated and fits in reasonably well with the prosecution case, the Court may be justified in relying on it. But if the punter is called as a witness and does not support the prosecution case, it is obviously worse than if he was not called at all. [p. 201, col. 2.]

The Court cannot possibly be expected to rely on the mere statements of the Police Officers long after the event without any independent corroboration [p. 205, col. 1.]

The mere fact of the finding of the marked coins and the slip of paper with figures on it in the room is sufficient to justify the conviction only if the evidence makes it perfectly clear that these articles were instruments of gaming. [ibid.]

Where a warrant is in the name of a Sub-Inspector and he is present near the room used for gambling purposes but the accused is actually arrested by his constable who had already entered the room, the irregularity is not such as would vitiate the warrant or the proceedings in any way.

Or. A. from conviction and sentence passed by the Presidency Magistrate, Third Court, Mazgaon, Bombay.

Messrs. G. C. O'Gorman and V. N. Chhatrapati, for the Accused.

Mr. R. A. Jahagirdar, Government Pleader, for the Crown.

Broomfield, Ag. C. J.—This is an appeal by one Baptist De Souza who has been convicted of offences under ss. 4 (a) and 5, Bombay Prevention of Gambling Act. The appellant, who has described himself as a motor mechanic, lives in room No. 25 in Bombay Development Department Chawl No. 17 at Worli. Sub-Inspector Tonpe of the Delisle Road Police Station, having reason to suspect that he was using this room for gambling purposes, obtained a warrant for the search of the premises. He then followed the procedure which has come to the common form in these cases. He marked some coins, gave them to one

Jairam Mahadev, a bogus punter, and instructed him to lay bets on certain figures at the place of the accused. The Sub-Inspector and the punter and some constables then proceeded to the chawl. The punter was sent upstairs with one of the Police constables and the Sub-Inspector waited below. After a few minutes the punter returned and said that the bet was laid. The Sub-Inspector then went upstairs and found the appellant and another person who was accused No. 2 in the case, in room No. 25. It appears that before the Sub-Inspector entered the room, the Police constable, who had gone up with the punter, had entered it and arrested the appellant who, according to him, was writing something on a piece of paper. A *panchnama* appears to have been made in the presence of *panchas*, but they have not been examined as witnesses. According to the evidence of the Sub-Inspector, the following things were found in the room. The other accused had seven annas and a pencil with him. In the corner where the appellant was standing, on a shelf there were several coins, including the marked coins, and also a small slip of paper with some figures and names written in pencil in the Marathi language. The last figures appearing on this piece of paper are figure 5, 2 and 9, which, according to the Sub-Inspector, are the figures on which the punter was told to bet. There is also a name which may possibly correspond with the first part of the name of the punter but is hardly legible. There is some inconsistency between the evidence of the Sub-Inspector and that of the constable with regard to this piece of paper. The constable says that when he entered the room, the appellant crumpled up the piece of paper and threw it on the floor. The Sub-Inspector says, on the other hand, that it was found on the shelf. The failure to examine the *panchas* and to produce independent evidence as to what was found at the raid is a serious omission in this case for reasons which will appear in a moment.

A point has been taken on behalf of the appellant that the proceedings were irregular because the warrant was in the name of the Sub-Inspector; it was he who was empowered to enter the room, and before he did so, one of his constables had already entered and arrested the accused. But it cannot be suggested that the Sub-Inspector is required to arrest everybody with his own hand. If he had not been present at all, there might have been something in the

point. But as he was present, although not actually on the first floor, where the room is situated, and as he himself entered the room almost immediately afterwards, we do not think it can possibly be argued that the irregularity, such as it was, vitiates the warrant or the proceedings in any way. If this were the only point in this case, we would have no difficulty in confirming the conviction.

There is, however, a serious, and, in our opinion, a vital defect in the prosecution case. The evidence produced for the prosecution is completely inconsistent as to the place where the alleged gaming took place and as to the person with whom it took place. The punter has deposed that he laid his bet on the figures 5, 9 and 2 in the passage on the first floor and not in any room and that he laid his bet with a fat Christian. The appellant is a Christian, but he is not fat, and the punter has expressly stated that he did not lay his bet with him. The other accused was not a Christian. The evidence of the Police constable who entered the room before the Sub-Inspector is that the punter entered the room and laid his bet with the appellant who was inside the room. In the course of his evidence this witness has stated that he actually saw the punter giving money to the accused, *i.e.* the appellant. He explained that by saying that he meant that he heard the jingling noise of the coins as they fell into the appellant's hand. Then he went on to say that the punter was counting out the coins to the appellant and then he saw them. The Magistrate went to view the scene of offence with Counsel in the case and it appears from his inspection notes that it was not possible for the constable to see anything of what happened inside from the place where he was.

It appears from the judgment that the Magistrate did not believe the punter and in effect he has discarded his evidence. If that is done, the question obviously arises whether there is sufficient evidence to justify the conviction of the accused. It is clear that the Police cannot have it both ways. These bogus punters are usually very unsatisfactory witnesses. It does not much matter whether they are called accomplices or spies or Police agents. They are usually without employment or business of any kind. The punter in this case says that he is a millhand, but he admits that he has been without work for seven or eight months, on account of illness, as he says. In fact they are usually rather disreputable people.

No doubt, it is very difficult to get better evidence and the Police may have to make use of such people, and if their evidence is corroborated and fits in reasonably well with the prosecution case, the Court may be justified in relying on it. But if the punter is called as a witness and does not support the prosecution case, it is obviously worse than if he was not called at all. In a case like the present, the Court is really asked to rely implicitly on the evidence of the Police Officers and on the strength of their evidence to assume that things did not happen in the way the punter says but quite differently. The Sub-Inspector was downstairs and can have no personal knowledge of what happened. The constable followed the punter and was standing some little distance from the room, but as I have said, it was impossible for him to see what happened inside the room and there is no doubt that in his evidence he has pretended to have seen much more than he actually did.

It is quite likely that the unsatisfactory character of the punter's evidence may be due to the delay in disposing of the case. The failure to produce the *panchas* to prove the *panchanama* is obviously due to that delay. Only the other day we had to comment on the time taken in the disposal of these gambling cases and this is an even worse example. The date of the offence was July 16, 1936. The case was commenced on July 27, 1936. There were then no less than thirty postponements, mostly for want of time. Not one of these postponements was at the instance of the accused, on September 2, 1938, the case was postponed again, the only reason given being that the Police wanted time. Even after that there were several more postponements, some owing to the illness of the Sub-Inspector and some for want of time. The first hearing of the case was on December 2, 1938. The extraordinary thing is that apparently it never occurred to anybody that there was anything scandalous or oppressive in this state of things. I presume that the accused had to attend the Court on every occasion, and so also the witnesses, except when they stayed away. When they stayed away, the case was automatically postponed for that reason. Everybody knows that the Presidency Magistrates are very busy and it may be impossible to avoid postponement of a case occasionally because the Court is occupied in other work. But when a case is dragging on for months and years, it must be some-

body's duty to see that it is fixed on a date when it can certainly be taken up and disposed of without fail. We trust that the Magistrates concerned will pay serious attention to what we can only regard as a scandal.

Returning to the circumstances of the present case, we do not think that the Court can possibly be expected to rely on the mere statements of the Police Officers so long after the event without any independent corroboration. The learned Government Pleader argued that the mere fact of the finding of the marked coins and the slip of paper with figures on it in the room is sufficient to justify the conviction of the appellant. That could only conceivably be so if the evidence made it perfectly clear that these articles were instruments of gaming. In our opinion, the evidence produced in the present case does not establish that. We therefore allow the appeal and set aside the conviction. The fine, if paid, must be refunded. Out of the money ordered to be credited to Government, eight annas to be returned to the appellant.

a.

Appeal allowed.

RANGOON HIGH COURT

Criminal Appeals Nos. 388, 389 and 390
of 1939

June 20, 1939

MYA BU AND DUNKLEY, JJ.

AH PHUT AND OTHERS—APPELLANTS

versus

THE KING—OPPOSITE PARTY

Evidence Act (I of 1873), ss. 118, 30—Child witness—Duty of Court—Oaths Act (X of 1873), ss. 5, 6, 13—Oath, if compulsory—Omission in case of child—Whether renders evidence inadmissible—Confession of co-accused—Value of.

When a young child is called as a witness, the first step for the Judge or Magistrate to take is to satisfy himself, by questioning the child that the child is a competent witness within the meaning of s. 118, Evidence Act. [p. 205, col. 2.]

Under ss. 5 and 6, Oaths Act, 1873, every person who is examined as a witness shall make an oath or affirmation and there is no exception in the case of a child of tender years. Therefore if the child is adjudged to be a competent witness, an oath or affirmation must be administered to the child before he is examined. [*ibid*]

The word "omission," as used in s. 13, Oaths Act, includes any kind of omission and is not restricted to accidental or negligent omissions. Hence, although a child must be either sworn or affirmed before giving evidence, nevertheless if the child gives evidence without making an oath or affirmation his evidence is still admissible; but, it is for the Court to decide what weight may be given to such unsworn testimony; and, the evidence of a child must always be received with great

caution. *Deya v. Emperor* (1), not followed. [p. 208, col. 2.]

(Case-law referred to.)

The confession of a co-accused cannot be the main evidence in a case. It is the weakest possible kind of evidence, which can only be taken into consideration against the co-accused by reason of the provisions of s. 30, Evidence Act. It is not given upon oath and it is not tested by cross-examination. A statement in such a confession cannot alone be held sufficient to justify a finding of guilty of so grave an offence as that under s. 396, which is punishable with death. *Ngà Mya v. The King* (11), followed. [p. 208, col. 1.]

Or. Apps. from the order of the Sessions Judge, Mergui, dated May 15, 1939.

Mr. U. Kyaw Zan, for the Appellants.

Mr. U. Tun Byu, the Government Advocate, for the Crown.

MYA BU, J.—The three appellants have been convicted by the learned Sessions Judge of Mergui of an offence under s. 396, Penal Code, and the appellants Ah Phut and Lan Taung have been sentenced to death and the appellant Sa Khon has been sentenced to undergo seven years' rigorous imprisonment. At the beginning of the hearing of these appeals, the learned Counsel for the appellants urged that the evidence of Ma Shwe Tun May (P. W. No. 3), a child aged eight years, was not admissible because she had not been sworn or affirmed, and it is clear that the learned Sessions Judge deliberately refrained from administering an oath or affirmation to Ma Shwe Tun May on the ground of her tender years, and it is therefore necessary that we should make some observations for the guidance of the learned Sessions Judge regarding the manner in which a child of tender years, who has been called as a witness, should be treated by the Court. Under s. 118, Evidence Act

"All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

Consequently, when a young child is called as a witness, the first step for the Judge or Magistrate to take is to satisfy himself, by questioning the child that the child is a competent witness within the meaning of s. 118, Evidence Act. Under ss. 5 and 6, Oaths Act, 1873, every person who is examined as a witness shall make an oath or affirmation and there is no exception in the case of a child of tender years. Therefore if the child is adjudged to be a competent witness, an oath or

affirmation must be administered to the child before he is examined. In the present case the learned Counsel for the appellants in submitting that the evidence of Ma Shwe Tun May is inadmissible on the ground that she was advisedly neither sworn nor affirmed, relied upon the case in *Deya v. Emperor* (1) the head-note of which reads as follows:

"Section 6, Oaths Act (X of 1873), imperatively requires that no person shall testify as a witness except on oath or affirmation, and notwithstanding s. 13 of the same Act, the evidence of a child is inadmissible if it has advisedly been recorded without any oath or affirmation."

In coming to this decision the learned Judges professed to follow two decisions of the Allahabad High Court, namely *Queen-Empress v. Maru* (2) and *Queen-Empress v. Lal Sahai* (3). With the greatest respect the second case is no authority for the proposition advanced for all that was decided in that case was that the evidence of a child could not be recorded without administering to him an oath or affirmation. The decision in *Queen-Empress v. Maru* (2) has been overruled in *Emperor v. Dhani Ram* (4). In our opinion, the provisions of s. 13, Oaths Act, are so plain as to admit of no misunderstanding. They are as follows:

"No omission to take any oath or make any affirmation... shall invalidate any proceeding or render inadmissible any evidence whatever."

The word "omission" is used in the section without any qualification and, consequently, it must be held to include any omission whether that omission was deliberate or inadvertent. This is the view of the law which is now taken by all the High Courts: see *The Queen v. Sewa Bhogta* (5), *Emperor v. Sashi Bhusan* (6), *Queen-Empress v. Shava* (7), *China v. Venkadu v. Emperor* (8), *Fatu Santal v. Emperor* (9) and *Budha v. Queen-Empress* (10). It is therefore clear that the word "omission," as used in s. 13, Oaths Act, includes any kind of omission and is not restricted to accidental or negligent omissions. Hence,

although a child must be either sworn or affirmed before giving evidence, nevertheless if the child gives evidence without making an oath or affirmation, his evidence is still admissible; but, as learned Counsel for the appellants has pointed out, it is for the Court to decide what weight may be given to such unsworn testimony, and the evidence of a child must always be received with great caution. We do not propose to place any reliance on the evidence of Ma Shwe Tun May in this case. The appellant Sa Khon made a confession, and in the course of his judgment the learned Sessions Judge said:

"The main evidence for the prosecution is that contributed by the accused Sa Khon in his confession recorded by the Second Additional Magistrate, Mergui, on December 12, 1938."

How the confession of a co-accused can be the main evidence in a case we are unable to understand. It is the weakest possible kind of evidence, which can only be taken into consideration against the co-accused by reason of the provisions of s. 30, Evidence Act. It is not given upon oath and it is not tested by cross-examination. The correct view of the confession of a co-accused has been laid down by Mackney, J. in *Nga Mya v. The King* (11) the head-note of which is as follows:

"Section 30, Evidence Act, provides that the Court may take the confession of a co-accused person into consideration against the other co-accused, that is to say, that the Court can only treat a confession as lending assurance to other evidence against a co-accused."

Consequently, the confession of Sa Khon can, in this case, can only be used for the purpose of corroborating the evidence given by the witnesses upon oath. For that purpose the confession of the appellant Sa Khon is, in our opinion, practically valueless. It is only necessary to read the confession to see that Sa Khon has made it in such a way as to exculpate himself, as far as possible, and for this reason its truth is open to the gravest doubt. The robbery in connection with which the appellants have been convicted occurred at Manoron village on the night of November 21, 1938. During that day three Siamese, who were unknown in the village, arrived at the house of Maung Shwe Myat and Ma E in the early afternoon and spent the rest of the day there. Before their arrival the appellant Sa Khon who belongs to that village, had visited Shwe Myat's house, and according to his confession, he had gone there as a spy of the robbers. On that day

(1) 9 L B R 88; 43 Ind. Cas. 86; A I R 1918 L B 22; 19 Cr. L J 54.

(2) 10 A 207, A W N 1888, 86.

(3) 11 A 183, A W N 1889, 65.

(4) 38 A 49; 31 Ind. Cas. 1015; A I R 1915 All-437; 16 Cr. L J 829; 13 A L J 1072.

(5) 14 Beng. L R 294; 23 W R 12 (F B).

(6) 24 C W N 767; 58 Ind. Cas. 817; A I R 1920 Cal. 414; 21 Cr. L J 817; 32 O L J 31.

(7) 16 B 359.

(8) 38 M 550, 22 Ind. Cas. 737; A I R 1914 Mad. 293; 15 Cr. L J 161.

(9) 6 P L J 147; 61 Ind. Cas. 703; A I R 1921 Pat. 109; 23 Cr. L J 417; 2 P L T 288.

(10) 31 P R 1389 Cr.

(11) (1938) Rang. 30; 174 Ind. Cas. 947; A I R 1938 Rang. 98; 10 R Rang. 449; 39 Cr. L J 481.

Ma Shwe Kyo Hla (P. W. No. 4) and her daughter Ma Shwe Tun May happened to be spending the day with Shwe Myat and Ma E. In the evening, after lamps had been lighted, the visitors suddenly attacked Maung Shwe Myat and Ma E. When they arrived they were carrying weapons, two of them a *da* each and one an axe, but in this wild country there was nothing unusual in that. However, after night had fallen one of them cut Maung Shwe Myat on the head with his *da* and when Ma E tried to take the *da* away she received a blow from the visitor who was carrying the axe. Immediately Ma Shwe Kyo Hla and Ma Shwe Tun May ran away into the jungle. Ma Shwe Kyo Hla says that she hid in the garden at some little distance from the house and she saw the three men going past her, taking Maung Shwe Myat and Ma E with them. Ma Shwe Kyo Hla and her daughter hid in the jungle until daybreak and then the former returned to the house, and on her way she came upon the dead body of Ma E which was lying inside the garden. At some further distance away she also found the dead body of Maung Shwe Myat. In the first information report, which was given by Saw Ba Thein (P. W. No. 9), it is stated that the body of Shwe Myat was lying close to a hole which had been dug in the ground and at the mouth of the hole there was a rusty *da*, but so superficial was the conduct of the prosecution that this important fact has not been brought out in evidence. It shows that, in all probability, Maung Shwe Myat had been compelled by the robbers to point out the place where he had buried his valuables and that the valuables had been dug up and taken by the robbers.

From the very first Ma Shwe Kyo Hla told the villagers, and subsequently she told the headman and the Police Officers, that she would be able to identify the three Siamese who came to Shwe Myat's house and who of course were obviously the robbers, and there is every reason why she should be able to identify them because she was in Shwe Myat's house at the same time as these three robbers for at least four hours and also for a considerable period while it was still daylight. For some reason of which there is no evidence, due to the extremely summary manner in which the Investigating Officer was examined, suspicion fell upon the appellant Sa Khon and he was arrested, and he then made a statement, in consequence of which he was

taken to Siam and he pointed out the two appellants, who were arrested on his information on December 1. On December 12, all the three appellants were sent before a Magistrate to have their confessions recorded but the appellants Ah Phut and Lan Taung declined to make confessions and only Sa Khon made a confession. As has already been pointed out, his confessional statement is a suspicious statement, but it does amount to an admission that he acted as guide for the robbers and received a sum of Rs. 10 as his share of the booty. This money was found by the Police in his house when it was searched. It was handed over to the Police by his wife Ma Ni (P. W. No. 6). She says that when she received this money from her husband it was tarnished as if it had been buried, and this is in accordance with Sa Khon's confession. So far as Sa Khon is concerned, his complicity in this robbery is clearly established by his confession, which is corroborated by the recovery of the money from his house and by the evidence of his own wife.

Against the appellants Ah Phut and Lan Taung, there is also sufficient evidence to justify their convictions for participation in the robbery. Leaving aside the evidence of the child Ma Shwe Tun May, who was able to pick out the appellant Lan Taung only at an identification parade, there is the evidence of Ma Shwe Kyo Hla, who identified both Ah Phut and Lan Taung at this parade, which was held at Bokpyin Police Station on December 8. As we have already pointed out, Ma Shwe Kyo Hla had ample opportunity of identifying the three Siamese who came to Shwe Myat's house. Naukachok (P. W. No. 5) supports her evidence because he says that when he was returning from school at about 4 p. m. on the day of the robbery, he saw a Siamese sitting near Maung Shwe Myat at the entrance of Shwe Myat's house, and he identifies this Siamese as the appellant Lan Taung whom he picked out at the identification parade. Ma Ni (P. W. No. 6) says that three or four days before the robbery the appellants Ah Phut and Lan Taung came to her house and stayed one night, and they returned on the fifth day afterwards and took away her husband Sa Khon with them, and late on that same night her husband returned and gave her ten tarnished rupees. There is other evidence to show that Sa Khon was seen in the company of Siamese, who were not identified by certain witnesses on the

day of the robbery and also evidence to show that Ah Phut and Lan Taung and some other Siamese were brought to Manoron from Nandaung village in Siam in a boat about 15 days before the robbery, and that after the robbery Ah Phut and Lan Taung returned to Siam and then Lan Taung appeared to have plenty of money. Apart from this somewhat doubtful evidence, the identification of the two appellants by Ma Shwe Kyo Hla, supported by their identification by Naukachok and Ma Ni is sufficient to establish beyond any reasonable doubt that Ah Phut and Lan Taung must have taken part in this robbery.

The learned Sessions Judge has held that the offence committed was a dacoity in the course of which murder was committed by one of the dacoits, so as to bring the offence within s. 396, Indian Penal Code, but beyond the bare statement of the appellant Sa Khon in his confession there is no evidence whatever on which it can be held that five or more persons took part in this robbery. We have already dealt with the value of the confession of a co-accused as evidence, and a statement in such a confession could not alone be held sufficient to justify a finding of guilty of so grave an offence as that under s. 396, which is punishable with death. Moreover, on this point Sa Khon's confession is obviously untrustworthy. He admits that only three of his confederates went to the house of Shwe Myat and Ma E, and he gives their names as Ah Phut, Lan Taung and Ah Chein. Then, further on, he says that some time afterwards he and one dacoit Bo and two other Siamese proceeded to Shwe Myat's house but remained outside. He does not say where he met this dacoit Bo and the other two Siamese, nor does he give their names. A vague statement of this kind could not be acted upon even if it was made in the course of a sworn deposition, and it is worthless when contained in the confession of a co-accused. Consequently, the evidence in the case establishes only that four persons took part in this robbery. Hence the appellants cannot be held responsible for the murder of Shwe Myat and Ma E unless it is shown either that they actually committed the murders or one of them, or that they were parties to a common intention to commit them. On the first point, there is no evidence at all. On the second point there is also no evidence, and, in fact, the only statement appearing

in evidence, which bears upon this question of common intention, tends to show that the appellants Ah Phut and Lan Taung had no intention at the time of the robbery of injuring either Shwe Myat or Ma E seriously, for Ma Shwe Kyo Hla says in her evidence that when these two appellants were taking Shwe Myat and Ma E from their house she heard one of them enquire of Ma E whether she had been hurt much and she replied that she had only been hurt a little, and she heard Shwe Myat telling these two appellants to walk with care or they would fall off the bridge.

Consequently, the responsibility of the appellants Ah Phut and Lan Taung for these murders has not been brought home to them, and equally it is clear that Sa Khon did not commit an offence under s. 396. The section of the Penal Code which is applicable is s. 394. We, therefore, alter the convictions of all the three appellants to convictions of an offence under this section, and we reduce the sentence passed upon the appellants Ah Phut and Lan Taung to sentences of seven years' rigorous imprisonment each. The sentence of seven years' rigorous imprisonment passed by the learned Sessions Judge on Sa Khon will stand.

D.

Sentences reduced.

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Case No. 288 of 1939

September 12, 1939,

MIR AHMAD, J. O. AND SOOFI, J.

GUL ZAMAN MIR ZAMAN—ACCUSED—

APPELLANT

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), s. 302—Conviction for murder on circumstantial evidence—Whether should not be visited with extreme penalty—Criminal trial—Revision—Sentence—Practice.

The Judge is either satisfied that the accused is guilty or he is not. There can be only two positions. If he is satisfied, the accused must get the normal punishment; if he is not, the accused must be acquitted. There is no middle course at all in judging the guilt of the accused. It is wrong to say that an accused convicted of murder merely upon circumstantial evidence should not be visited with extreme penalty. *Abdul Wahad v. Emperor* (1), Overruled.

As a rule, the High Court is reluctant in interfering in the sentence passed by the trial Court.

Cr. Case from an order of the Additional Sessions Judge, Peshawar, dated July 3, 1939.

Sardar Bahadur Raja Singh, for the Crown.

Mir Ahmad, J. C.—Gulzaman was married to *Musammât Zewar Nissa* for about three years. They lived in village Mangal Doga which is situated within the Phulra State and is under the control of the Mansehra Police Station (Hazara district). On the morning of January 9, 1939, Faqir Mohammad of the same village was passing by the house of Gulzaman. He smelt the burning of clothes. He looked into the house and saw smoke coming out of it. On further examination he found that *Musammât Zewar Nissa* was lying near the hearth and her clothes were on fire. He raised a hue and cry and went to the *hujra* where he found Gulzaman and Aziz Mohammad Khan, the Gurarakhor of the village. Gulzaman had, according to Aziz Mohammad Khan, gone to the *hujra* to inform him that his mother-in-law was forcibly taking away his wife and to ask for his intervention. Aziz Mohammad Khan had sent a servant to the house and the servant was on the way when Faqir Mohammad raised a hue and cry. Faqir Mohammad informed Gulzaman what he had seen. Aziz Mohammad Khan and the other persons sitting in the *hujra* therefore hastened towards the house of Gulzaman. Gulzaman was with them and when they had reached midway he cried out that his mother-in-law had killed his wife. In the meantime his mother-in-law, *Musammât Jan*, came out of her house which was on the way and the whole party entered the house. There they found *Musammât Zewar Nissa* wounded and her clothes burnt. It appears that the females who had reached earlier had put out the fire.

There was a charge and counter-charge. The mother-in-law charged Gulzaman with the offence of murder and Gulzaman alleged that it was his mother-in-law who had killed his wife. Aziz Mohammad Khan therefore detained both of them and sent information to Kalandar Shah, the officer-in-charge of that *ilaga* under the Khan of Phulra. Kalandar Shah arrived. He found a blood-stained dagger behind a corn-bin in the room of Gulzaman. He also took his clothes into his possession: they were blood-stained. He submitted the information to the Khan of Phulra and the Khan then apprised the officer-in-charge of the Mansehra Police Station of what had occurred. The Police took up the case and sent up Gulzaman. He was committed to the Court of Session and tried there under s. 302, Indian Penal Code.

The prosecution story set out above was given by Faqir Mohammad, Aziz Mohammad Khan, *Musammât Jan* and Kalandar Shah. The following witnesses were also examined at the trial: The doctor, *Musammât Karam Jan*, *Musammât Amir Jan*, Ghulam Haidar, and Shah Baz Khan, Sub-Inspector. The doctor described the wounds on the deceased as follows: 1. An incised wound on the right side of the head (parietal region) cutting the scalp and the bone beneath. The wound was $7\frac{1}{2}" \times \frac{1}{2}" \times 6\frac{1}{2}"$. 2. An incised wound on the left side of the chest $3" \times 2" \times \frac{1}{4}"$. 3. Marks of burn on the inner side of the left thigh, knee and leg. 4. Marks of burn on the inner side of the right thigh. Death was due to the injury to the brain.

Musammât Karam Jan, a girl of 11 years, stated that she was going out to answer the call of nature when she heard a noise in the house of the accused. She locked in and saw the accused dragging *Musammât Zewar Nissa* and throwing her behind the door. Then the accused left the house and the girl also went away. On her return, she heard Faqir Mohammad crying that *Musammât Zewar Nissa* was on fire. *Musammât Amir Jan* was an earlier visitor to the house. *Musammât Zewar Nissa* was the sister of her husband. She had gone to ask for some soup. The accused and the deceased were quarrelling with each other. She had some soup and returned home. At the trial she said that the accused had a dagger in his hand at the moment but she admitted when confronted with her statement to the Police, that she had not said this in her Police statement: she had said there that the dagger was lying on the hearth. Ghulam Haidar is the brother of *Musammât Zewar Nissa*. He alleged that on the day of occurrence the accused had after his arrest, given out that he suspected a liaison between his wife and one Sikandar, his neighbour. He identified the dagger to be the property of the accused. S. I. Shahbaz Khan sent the dagger and the shirt of the accused to the Chemical Examiner and Imperial Serologist who reported that they were stained with human blood. The accused denied the charge. He said that he did not own the dagger. He admitted that his shirt was blood-stained but he said that he had touched the body of the deceased when picking up his child and had thus stained his shirt. He did not produce any defence. The three assessors

who assisted at the trial returned a verdict of guilty. The learned Additional Sessions Judge convicted the accused under s 302, Indian Penal Code, and sentenced him to transportation for life. The accused has appealed from jail.

On a careful consideration of the case we see no reason to differ from the conclusion arrived at by the learned Additional Sessions Judge. According to the statement of *Musammam Amir Jan*, the husband and wife were quarrelling early in the morning. *Musammam Karam Jan* has proved the fact that the husband was dragging the wife and threw her behind the door. *Faqir Mohammad* saw the woman on fire and raised a hue and cry. At that moment the accused had carried a false tale to *Aziz Mohammad Khan* that his mother-in-law was trying to take away his wife from his house. Then the accused feigned that his mother-in-law had killed his wife and made an outcry to that effect when the party was on the way to his house. A blood-stained dagger, which was identified by *Ghulam Haider* to be the property of the accused was found behind a corn-bin in the room of the accused and there was blood on the shirt of the accused. The plea of the accused that the shirt was stained when he was picking up his child is idle because he was arrested on arrival in the house, and there is no evidence that he went near the deceased on his return from the *hujra*. The allegation of *Ghulam Haider* that the accused gave out his suspicion with regard to the conduct of the deceased provides the motive. In our opinion, a conclusive case has been made out against the accused for murder. We therefore maintain the conviction under s. 302, Indian Penal Code. In giving the lesser sentence the learned Judge has made the following remarks :

"Regarding sentence the act of the accused is a brutal one. There are no mitigating circumstances, there is no provocation and the action of the accused, in trying to conceal his act by going to the *hujra* and making up a false story against his own mother-in-law makes his case still worse. At the same time my attention has been drawn to a ruling, *Abdul Wahab v. Emperor* (1), a judgment of an eminent Judicial Commissioner of the Province, that in cases of purely circumstantial evidence extreme penalty should not be inflicted. I am therefore constrained to pass the lesser sentence and accordingly holding the accused guilty under s. 302, Indian Penal Code, sentence him to transportation for life."

We have carefully examined the ruling referred to by the learned Additional Sessions Judge. The head-note runs thus :

"The proof must be more cogent in criminal cases
(1) 78 Ind. Cas. 97; 25 Cr. L.J. 97.

than in civil cases, but the ultimate test can only be the personal and mental attitude of the person whose duty it is to consider the evidence before him. Purely circumstantial evidence, however overwhelming and convincing it may be, has the character which must leave some loophole for the contingency, however remote and infinitesimal, of possible errors. Although it is wholly illogical in case of a trial for murder to accept facts as proved for the purpose of conviction and to throw any doubt on such proof in considering the question of sentence, yet this is an illogicality which has been fully and consistently recognized by the Courts. An accused convicted of murder merely upon circumstantial evidence should not be visited with a sentence which is irrevocable. The Court is reluctant to launch a person into eternity except in case of exceptional strength."

The learned Judge has not quoted any authority in the text for the view that the illogicality has been recognized by Courts. With due respect to the eminent Judge who delivered that judgment we beg to differ from him in this view of law. It amounts to a compromise with one's conscience. There can be only two positions. The Judge is either satisfied that the accused is guilty or he is not. If he is satisfied, the accused must get the normal punishment. If he is not, the accused must be acquitted. We do not see any middle course at all in judging the guilt of the accused. We therefore overrule the authority referred to and direct that it should not be followed in this respect. We have given our anxious consideration to the question whether we should enhance the sentence. As a rule, the High Court is reluctant in interfering in the sentence passed by the trial Court. We do not think that we should depart from this practice in this case. We, therefore, dismiss the appeal.

D.

Appeal dismissed.

NAGPUR HIGH COURT

First Appeal No. 36 of 1937

February 23, 1939

STONES, C. J. AND BOSE, J.

B. L. CHOUDA AND OTHERS—APPELLANTS
versus

B. K. RAI AND ANOTHER—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 66—

Object of—Section, if draws distinction between purchase by person in name of stranger and one by father in name of son—Person purchasing at Court auction in his own name though on behalf of somebody else—S. 66 (1), if deals with such case—Evidence Act (I of 1872), s. 32—Cancelled will, when can be used in support of statement made by testator.

The object of s. 66, Civil Procedure Code, is to put a stop to benami purchases at execution sales, [p. 213, col. 1.]

There is no difference between purchases by A

in the name of B where A and B are strangers and where A and B are closely related as in the case of father and son. Section 66, Civil Procedure Code, therefore, applies also to purchases by father in the name of the son *Gopeekrist Gosain v. Gungapershad Gossain* (2), *Guran Ditta v. Ram Ditta* (3) and *Sura Lakshmiiah Chetty v. Kothandarama Pillai* (4), explained; [p. 212, col. 1]

Section 66 (1), does not deal with a case where A has purchased at Court auction property in his own name though he purchased on behalf of somebody else. The section deals with a case where "any person" has made the purchase "on behalf of the plaintiff." [p. 213, col. 1.]

A cancelled will is admissible under s. 32, Evidence Act, if it is used in support of a statement made by the testator in the interest of other persons, his sons, and against his own interest. *Guran Ditta v. Ram Ditta* (3), distinguished.

F. A. from a decree of the Court of the Additional District Judge, Saugor, dated October 17, 1936, in Civil Suit No. 6-A of 1935.

Rai Bahadur D. N. Choudhary, for the Appellants.

Messrs. R. N. Padhye and W. B. Pendharkar, for Respondents Nos. 1 and 2, respectively.

Judgment.—This is a plaintiffs appeal from a judgment dismissing the suit. The plaintiffs are three executors under the will of a gentleman who was in his lifetime a member of the English Bar but obviously towards the end of his life had shed those ideas which sometimes come with education in Europe. He died a man of considerable property leaving a small sum of money (Rs. 30 a month) to his widow, some small presents to friends and nothing to his two sons and daughter. Most of his will is concerned with directions with regard to certain religious and charitable purposes which appear to be designed to secure him favourable reception in the world to come. This is the kind of will which the Romans treated as an inofficious will which a dependant could upset. It is a kind of will that does not look well unless there are grave reasons for disinheriting those who have some claim upon the author of their being. However, with those considerations we are not in this case concerned because in this case we are not concerned with whether this is a good or a bad will but whether a particular item of property belonged to the testator at all. If it did, then he has disposed of it under this will. If it did not, the will and any other dispositions of the testator have nothing to do

with the passing of title. This is not a case of a beneficiary being put to his election.

The property in question is a somewhat valuable one, a bungalow occupied at the present moment by the European Club, Saugor, and a property which was purchased sometime ago for a sum of Rs. 15,000. The question is: Did it belong to the testator so as to now form part of the testator's estate or does it belong to his sons? The learned Judge has found that it belongs to the sons. He has founded that conclusion on two different grounds: (1) the conclusive presumption created by s. 66 of the Civil Procedure Code, and (2) the facts of the case, (assuming that presumption does not arise).

On March 30, 1919, the subject-matter of this suit was sold in a Court auction. The persons mentioned in the sale certificate as the purchasers are the defendants, B. K. Rai and B. P. Rai. The case of the executors is, however, that the true purchaser was the deceased, the defendant's father. At the time of the purchase the defendants were minors and it is said that the testator has, in his will, declared it to be his property and that there is abundant evidence to show that the purchase price was paid out of the money standing to his credit with his bankers, Bansilal Abirchand. It is therefore urged that this is a case of a purchase by a father with that father's money in the name of his sons; in other words it is a *benami* transaction. All the property of the testator is to be treated as his self-acquired property. The sons are not to be regarded as members with him of a joint Hindu family. We proceed on the basis therefore that all his property was self-acquired and that we are dealing with a father and two children who are not joint.

The applicability and construction of s. 66, Civil Procedure Code, are the first points that arise. That section, in sub-s. (1), provides as follows:—

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The argument addressed to us would involve reading that sub-section as follows:

"No suit shall be maintained against a stranger."

claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made [by the person certified as the purchaser] on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

We have placed in square brackets the words which it is said should be read into this section. It is said that there is a big difference in these *benami* matters, including cases that fall within s. 66 between purchases by A in the name of B where A and B are strangers and where A and B are closely related as in the case of father and son: *Gapal v. Keshosa* (1), *Gopeekrist Gosain v. Gungapershad Gossain* (2) and *Guran Ditta v. Ram Ditta* (3) are referred to. In our opinion there is no difference at all between such purchases. In *Gopeekrist Gosain v. Gungapershad Gossain* (2) an endeavour was made to draw a distinction between them. The argument that was then addressed to their Lordships of the Judicial Committee was to the following effect:—

In English Law if A pays the purchase price for the conveyance of Blackacre which is taken in the name of B, a resulting trust arises whereby B becomes trustee for A and therefore, where it is once established that the price has been paid by A, the presumption arises that the title is in A although it appears to be in B. This in India is reflected in the law relating to *benami* transactions so that if one finds in India a transfer taken in the name of B and the purchase price supplied by A, then the presumption is that the title, despite the fact that the transferee is B, is in A. The argument was then advanced that in India, as in England, different considerations arise when A and B are so related as to raise a presumption, in such circumstances, that A paid that money, not with a view to get a title in himself but, with a view to the advancement of B. Such circumstances arise in England in the case of a child or in the case of a wife. *Gopeekrist Gosain v. Gungapershad Gossain* (2) was a case of a child and *Guran Ditta v. Ram Ditta* (3) was a case of a wife. In both cases (see also *Sura Lakshmiiah Chetty v. Kothanda-*

rama Pillai (4) their Lordships of the Judicial Committee upheld the Courts in India, came to the conclusion that Indian social conditions did not attract that particular rule of advancement and that there was no presumption of advancement in such circumstances in India. Therefore their Lordships decided that even where A was a father and B was a son or a wife still the rule, that the purchase is *benami*, holds good. But although that be so, the person alleging that the transaction is *benami* would have to give evidence in the first place to show that the deed did not speak the truth. In the most common case he would discharge that burden if he established that he supplied the consideration. If he established that the burden of proof would shift. It would then be for the person in whose name the transfer was taken to show that it was not a *benami* transaction. That burden is not discharged by merely proving that he is a son.

In this present case the converse was argued in an endeavour by *Rai Bahadur Choudhari* to get us to read for "any person" "a stranger". It was said that a difference exists in the case of strangers and in the case of father and son. This difference, it was said, was so deep as to make it necessary to limit the cases that s. 66 is concerned with to two cases other than those where a father purchases in the name of a son, or a husband in the name of a wife. In developing that argument, he relied on a further series of Privy Council cases, that is to say, *Ganga Sahai v. Kesri* (5), and the earlier Privy Council case therein referred to at p. 555 (*Bodh Singh Dodhoria v. Gunesh Chunder Sen*) (6), together with two more decisions one of which purports to follow *Ganga Sahai v. Kesri* (5), that is to say, *Patrachariar v. Ramaswami* (7) and *Jai Kishan v. Parmeshri Das* (8). The last named case decided that on the facts there present s. 66 did not apply and accordingly the *benami* nature of the

(1) I L R. (1936) Nag. 65; 165 Ind. Cas. 350; A I R 1936 Nag. 185; 9 R N 80.

(2) 6 M I A 53; 2 Suther. 13; 4 W R 46; 1 Sar. 493 (P O).

(3) 55 C 944; 109 Ind. Cas. 723; A I R 1928 P O 172; 55 I A 235; 32 O W N 817; 29 P L R 429; 28 L W 66; 48 O L J 119; 5 O W N 668; I L T 40 Lah. 144; 30 Bom. L R 1384; 55 M L J 651; (1928) M W N 917 (P O).

(4) 48 M 605; 88 Ind. Cas. 327; A I R 1925 P O 181; 52 I A 266; 23 A L J 662; 49 M L J 109; 42 O L J 8; 27 Bom. L R 1076; 29 O W N 1013; 3 Pat. L R 290; 23 L W 138; (1925) M W N 717 (P O).

(5) 37 A 545 at p. 555; 30 Ind. Cas. 265; A I R 1915 P O 81; 42 I A 77; 19 O W N 1175; 18 M L T 203; 29 M L J 329; 2 L W 837; 13 A L J 999; 17 Bom. L R 998; 22 O L J 508; (1915) M W N 713 (P O).

(6) 12 B L R 317; 19 W R 356; 3 Sar. 253 (P O).
(7) A I R 1919 Mad. 942; 49 Ind. Cas. 734; 9 L W 276; (1919) M W N 693.

(8) A I R 1937 Lah. 471; 171 Ind. Cas. 856; 39 P L R 152; 40 R L 240.

transaction could be gone into. *Ganga Sahai v. Kesri* (5), as we read it, is a case in which it was found that a fraud had been perpetrated and is a case quite different on its facts from the present. The fact that their Lordships of the Judicial Committee founded their view on fraud is seen when their observations at p. 555* are read.

That leads us to the second alteration in the wording of the section which it is said should be made if one is to arrive at a true construction of s. 66 (1), that is to say, after the words "was made" should be added "by the certified purchase". That, however, in our opinion is a hopeless construction because that would mean that we are not dealing with *benami* transactions at all but are dealing with cases in which A has purchased at Court auction property in his own name though he purchased on behalf of somebody else. That is not the kind of case that s. 66 (1) is dealing with. It is dealing with a case where "any person" has made the purchase "on behalf of the plaintiff". In such a case if the person in whose name the purchase is taken is certified as the purchaser, the plaintiff cannot maintain a suit against him claiming title on the ground that the purchase was made on his behalf. The most important case is where the purchaser is the plaintiff and where he has taken a transfer in the name of another who is the person certified as the purchaser. The reason why such a distinction has been made between Court auction sales and private sales is brought out in Sir Dinshah Mulla's notes to s. 66. As he observes the object of the section is to put a stop to *benami* purchases at execution sales. Of course these provisions, like other provisions, are not permitted by Courts of law to operate so as to work a fraud, but where is the fraud in the present case?

In the present case the facts are as follows: The testator attended this auction sale and bought this property in the name of his two sons. He paid off the purchase price by a cheque drawn on his bank. He fed the bank from a variety of sources, partly from his business, and round about the time of this sale undoubtedly from the sale of property which was equally undoubtedly his. But he has himself made it quite clear, in a document that we shall refer to later, that he was

buying this property not on his own behalf but on behalf of his sons. He was not buying it on behalf of his sons by way of advancement out of his own money but he was buying it on behalf of his sons with the sons' own money, only the sons' money had been used by him in the past and he was not, in effect, re-paying them out of his own money. That is, as we understand this case, the truth of the matter. We derive that from the documents. Before we come to the documents it is desirable to make one or two preliminary observations.

This gentleman made at least two wills. The one was made in 1927 and will be referred to as the cancelled will and the other in 1929, the effective will. He was at the time of his death well advanced in years, as things go in the East, and, between those two dates, whether it was due to declining mental powers or to other reasons, he appears to have entirely changed his attitude not with regard to one of his dependants only but with regard to them all. In the earlier cancelled will there is the following statement:

"List of property which is separately owned by respective persons is not included in mine; for it was separately purchased with their amounts.

Club bungalow (the suit property) which at present fetches a rent of Rs. 100 per month. It was purchased in the names of Bhairo Prasad and Balkrishna (the two defendants) only with the amount accumulated, of all the four sons. Money used always to be given to them in their early life since their birth by way of presents which was laid by in a Savings Bank and led to profit being invested into the business. As for the way in which the rent of the same should be distributed....."

If reference is made to Ex. D-1 one finds a corroboration of the defendants' story that in addition to the sums which came to them by way of gift in the manner stated in the cancelled will they also obtained substantial sums from their mother. Exhibit D-1 refers to two sums, one of Rs. 3,000, and another of Rs. 2,300, which appears as credited to Bhairo Prasad and Bal Krishna, respectively. There is also an entry: "His mother paid from ornaments, etc. Hence credited to him". All these moneys would appear to have been mixed by the testator with his own moneys.

After this purchase was concluded one finds in the testator's books the following entries: Under date March 28, 1921; Rs. 90 credited on account of rent of the Club House of Bhaiya Bhairo Prasad Bal Krishna for the month of February". Similar

entries are to be found under dates—June 28, 1921, August 2, 1921, September 30, 1921 and November 5, 1921. On December 7, 1921, we have this entry; "Credited to the *khata* of Bal Krishna Bhairo Prasad on account of rent of the Club House for the month of October 1921". The last entry of this kind that we have is under date February 1, 1922. It will be observed that in the entry dated December 7, 1921, a reference is made to the *khata* of these two sons "on account of the rent of the Club House". If Ex. P-6 is referred to we find "*khata* Not 1. *khata* of the Club House...from of October 24, 1919", then certain credits and debits are given. Altogether a sum of Rs. 1,534-2-0 is credited and that shows not only that those payments were put into a separate *khata* of the Club House but, read in with the entry that we have mentioned under date—December 7, 1921, that that *khata* was the *khata* of the two sons. There is also the oral evidence of the son who went into the witness-box and gave evidence to the effect that he was 11 when this property was purchased for him and therefore was then told what had been done for him. Putting that quite on one side it seems to us that the documentary evidence is all one way until we come to the last will of the testator. The last will of the testator is obviously made either after a quarrel or, what appears more probable, after he had commenced to lose his mental faculties. We incline to the latter alternative because a son is disinherited apparently because he was active in causing an ailing sister to go into hospital and undergo an operation which probably saved her life. We are not to be taken as saying that the testator was of non-testamentary capacity, but the will does bear on its face the signs of being made by a man who had lost all regard for his dependants. That is a state of mind that does occasionally afflict people who are not well. In his last will unquestionably he treats the suit property as property belonging to him, property that he bought *benami* in the name of his sons, and he claims to exercise full disposing power over it. But we do not in any way regard the evidence supplied by this last will as comparable with the evidence supplied by the cancelled will. The cancelled will has no force or effect as a will and *Rai Bahadur Choudhari* argued that it has no evidentiary value

at all founding himself on *Guran Ditta v Ram Ditta* (3). But the reason their Lordships of the Privy Council treated the will there as being of no evidentiary value was because the cancelled will was there being used in support of a statement made by the testator in his own interest. Here the statement is being made by the testator in the interest of other persons, his sons, against his own interests, and is accordingly admissible under s. 32 (2) of the Evidence Act.

We observe that in this case we are sitting as an Appellate Court and the learned Judge, who had the advantage of seeing the witnesses, has arrived at a certain conclusion of fact which ends the matter if upheld. That is to say, the question under s. 66 does not arise if his finding of fact is correct. We looking at the cold record, at a very early stage in this appeal arrived at the same conclusion of fact. That is enough to dispose of the appeal. Accordingly the appeal is dismissed with costs.

We observe that the costs in the lower Courts have been given against the plaintiffs without in any way indicating that they are to come out of the estate. There has been no appeal from this part of the decree but the respondents leave the matter to us to deal with according to equity and bearing in mind what is usual in executors' cases. We have no reason to think that this is litigation undertaken maliciously or with the sole desire to cause trouble to the defendants, but we think that the executors really considered, acting under legal advice, that the case was one that should, in the interests of the testator's estate and the charities, be filed. In such cases it is not usual to impose the burden of costs on executors or trustees personally. Accordingly the costs throughout will be paid by the plaintiffs to the defendants out of the estate.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Suit No. 1882 of 1937

March 15, 1939

PANCKRIDGE, J.

R. EZEKIEL—PLAINTIFF

versus

THE PROVINCE OF BHNGAL—

DEFENDANT

Criminal Procedure Code (Act V of 1898), s. 88

(b-d)—Suit to establish title to attached property—Claim under sub-s. (b-a), if should first be filed—Securities Act (X of 1920)—Government promissory note, transfer of, how made—Contract Act (IX of 1872), ss. 114, 160—Company depositing as security in respect of warehouse Government promissory note—Position of Government is of bailee—Return of note—Interest of third party in note, effect of.

Sub-s. 6 (d) of s. 88, Criminal Procedure Code, does not prevent a person from filing a suit to establish his title to attached property without first filing a claim or objection under sub-s. 6 (a). (p. 216, col. 1.)

Government promissory note can only be transferred by endorsement on the note itself. (p. 216, col. 2.)

Where Government accepts a Government promissory note deposited by a company with the excise authorities as a security in respect of a private warehouse, the Government becomes under s. 114, Contract Act, the bailee and must return the note to the bailor without demand after the termination of the license. The fact that some third person has interest in the note cannot be a ground for refusal to return it.

Messrs. Carden Noad, N. C. Chatterjee and H. N. Sanyal, for the Plaintiff.

Mr. S. M. Bose, Standing Counsel, for the Defendant.

Judgment.—The facts of this case are as follows: There was a company, named Davidsons, Limited, which carried on business as importers of wines and spirits. For the purposes of this business they owned a private bonded warehouse, and as a condition of owing it, they were required by the excise authorities to secure the liability, which would arise from time to time to pay duty in respect of dutiable liquors imported by them. On September 20, 1933, the company wrote to the Collector of Excise enclosing a Government promissory note in the five per cent. loan, 1945—55 of the face value of Rs. 10,000. The company in their letter to the Collector describe the note as

"deposit money in connection with the establishment of a private warehouse by us at 6, Cooper's Lane in lieu of executing a hypothecation bond."

This Government promissory note has never been endorsed to the company. The last endorsement is as follows: "Pay David Ezekiel and Mrs. Ezekiel either or survivor or order," the endorser being the Imperial Bank of India. On January 9, 1934, the Collector acknowledged receipt of the promissory note, which he described as

"deposit by you in connection with the establishment of a private warehouse at 6, Cooper's Lane in lieu of executing a hypothecation bond required for this purpose."

There is a document of November 11, 1934, whereby the Collector certifies that the com-

pany have deposited the bond in connection with the establishment of a private warehouse and that the bond is lying in the Collector's custody. It appears from a letter of May 28, 1935, that on March 18, 1935, the company had written to the Collector stating that they desired to withdraw the note and to deposit in lieu thereof either cash or other Government securities. This letter is of no particular importance, except as evidencing the date when the company first attempted to recover possession of the note. On July 23, 1936, the company's solicitors wrote to the Commissioner of Excise saying that, as the company's excise licenses have been cancelled and they have been prevented by the excise from selling their goods, they have been instructed to ask for the return of the note. This letter failed to elicit a reply and in a reminder of September 1, 1936, the solicitors again ask for the promissory note and point out that as their clients' excise license has been suspended and they are not permitted to sell the goods lying in their bond, their security has been automatically discharged, and they are entitled to the refund of their deposit. A further reminder was sent on October 2, 1936.

On October 16, 1936, the Commissioner wrote to the company's solicitors stating that the security deposit could not now be refunded. At this time a prosecution for offences under the Excise Act and the Indian Penal Code was pending in the Magistrate's Court at Alipore against David Ezekiel, who was an endorsee of the note and was also interested in Davidsons, Limited. On December 16, 1936, the Police Inspector, who was in charge of the prosecution, at the instance of the Excise Department, applied to the trying Magistrate to order attachment of the note. The trying Magistrate endorsed on the Inspector's written application an order that the note should be attached, and that it should remain with the Collector of Excise, who was not to part with it or deal with it in any way without the permission and authority of the Court.

The formal order addressed to the Commissioner of Police, requires him to attach the right, title and interest of David Ezekiel in the note, and all interest that had accrued, or is hereafter to accrue on it. The order of attachment was made on the ground that David Ezekiel was absconding, and in making it the Court purported to exercise the power conferred on it by s. 88, sub-s. 3 (c), Criminal Procedure Code, which prescribes, as one of

the methods of attaching movable property, an order in writing prohibiting delivery of such property to a proclaimed person or to anyone on his behalf. Meanwhile the plaintiff Mr. Ezekiel David's wife, as a debenture-holder in Davidsons, Limited, had instituted a suit to enforce her security, and in June, 1936, this Court had appointed the Official Receiver, Receiver of the property and assets of Davidsons, Limited, with power to get in and collect the same and to bring suits in his own name. On December 8, 1937, the Official Receiver instituted the present suit. While it was pending, that is to say, on April 11, 1938, Mrs. Ezekiel obtained a decree for foreclosure which provided for the discharge of the Official Receiver and declared that Mrs. Ezekiel was entitled to the assets of the company. The decree gave Mrs. Ezekiel liberty to realize the assets and proceed with pending suits, which had been instituted by the Official Receiver. Consequential amendments to the plaint were made on June 22, 1938, in accordance with which Mrs. Ezekiel has become plaintiff in the place of the Official Receiver. The reliefs sought include a declaration that the note is a part of the assets of Davidsons, Limited, return of the note with all interest thereon, or its value, and damages. The written statement of the Province of Bengal was filed on February 16, 1938. Under s. 88 (6-a), Criminal Procedure Code, any person who claims to have an interest in property attached under the section can make a claim within six months of the attachment. Sub-section 6 (d) provides that if a claimant's claim or objection is disallowed in whole or in part that person may within a period of one year from the date of such order institute a suit to establish the right which he claims in respect of the property in dispute, but subject to the result of such suit, if any, the order of the Magistrate shall be conclusive.

No proceedings were taken either by the Official Receiver or by the present plaintiff under sub-s. 6 (a). It is not disputed that sub-s. (d) does not prevent a person from filing a suit to establish his title to attached property without first filing a claim or objection under sub-s. 6 (a), but I understand it to be suggested that an attachment is a bar to a claim for relief other than by way of declaration of title and the reliefs consequent thereon. It was suggested by the learned Standing Counsel that the note was deposited not by Davidsons, Limited, but by David

Ezekiel. That suggestion was based upon the language of an entry in the ledger of Davidsons, Limited, which, it is true, lends some support to the submission. However, the point as to the identity of the depositor is not taken in the written statement, and in view of the correspondence it is, to my mind, perfectly clear that it was the company that deposited the note, and that the Collector throughout has treated it as a deposit made by the company.

With regard to the company's title the position appears to me to be as follows: The books of Davidsons, Limited, satisfactorily prove that the company gave consideration for the promissory note by crediting David Ezekiel on January 31, 1934, with Rs. 11,300 which was then the market value of the note. Some difficulty is caused by the fact that there has been no endorsement in favour of the company by David Ezekiel and the plaintiff, or by either of them, nor has there been any assignment by a separate document, such as would satisfy the provisions of s. 130, Transfer of Property Act, assuming that transfers, effected as laid down in that section, are valid in respect of Government securities. In any event, however, I consider that there has not been a transfer, which is effectual to vest the property in the note in the company, because in my opinion that can only be done by endorsement on the note itself, and in this connection I would refer to s. 5, Securities Act, 1920, which provides that notwithstanding anything in s. 15, Negotiable Instruments Act, 1881, no endorsement shall be valid on a Government promissory note unless made by the signature of the holder inscribed on the back of the security itself. Therefore the note is not and has never been, strictly speaking, a part of the assets of Davidsons, Limited. This, however, is very far from saying that Davidsons, Limited, have no rights whatever to the note.

In my opinion when the note was deposited with the Collector on December 20, 1933, and accepted by him in his letter of January 9, 1934, the Government of Bengal became the bailees of the note within the meaning of s. 114, Contract Act. It follows that under s. 140 of that Act, the Government were under a duty to return it without demand as soon as the time for which it had been bailed had expired, or the purpose for which it had been bailed was accomplished. I do not think it is a matter of much importance whether the license is more properly described as having been cancelled or as having been suspended, because I

am told that it is an annual license and expires at the end of a year. It is not suggested that Davidsons, Limited, were under any liability to Government in respect of the bonded warehouse, and so even without demand, the Government were under an obligation to deliver the note according to the direction of Davidsons, Limited, at least as early as the expiry of 1935. I have read the subsequent correspondence which contains an unequivocal demand for the note by Davidsons, Limited, and unequivocal refusal to part with the note on the part of the Government. I do not think any useful purpose would be served by insisting on an amendment of the plaint setting out these facts. In my opinion it was the duty of the Government to return the note, and that, under the well-known principle which is embodied in s. 117, Evidence Act, being bailees, they were not at liberty to refuse to return it on the ground of some interest which they allege still subsists in David Ezekiel.

I also consider that the Government cannot after their refusal improve their position by obtaining *ex parte* an order under s. 88, Criminal Procedure Code, and they cannot buttress their position by the direction contained in the order that they are not to part with the note without the authority of the Criminal Court.

I am not concerned with the position which would have arisen if the note were no longer in the possession of the Government of Bengal through the Collector of Excise, nor what the measure of damages in those circumstances would be, having regard to the fact that the title of Davidsons, Limited, has not been perfected by the endorsement of the holders or either of them. In my opinion Davidsons, Limited, as bailors have been throughout entitled to obtain the return of the note from the bailees, and I also hold that the order of attachment which the Government have obtained in the Courts is no bar to my directing its return. I accordingly make a decree in terms of prayer 2 of the plaint with costs.

S.

Suit decreed.

PRIVY COUNCIL

Appeal from the Calcutta High Court
October 10, 1939

LORD MACMILLAN, SIR GEORGE RANKIN AND
MR. M. R. JAYAKAR

PROBODH KUMAR DAS AND OTHERS —
APPELLANTS

versus

THE DANTMARA TEA CO., LTD. AND
OTHERS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 53-A—Right under—Confers no right of action on transferee in possession under unregistered contract of sale—Available only by way of defence—India Tea Control Act (XXIV of 1933)—Export quota rights are assignable.

The amendment of the Transfer of Property Act, effected by the enactment of s. 53-A confers no right of action on a transferee in possession under an unregistered contract of sale. The right conferred by s. 53-A is a right available only to the defendant to protect his possession. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee.

The export quota rights obtained from the Tea Licensing Committee are assignable and are of value.

Sir Thomas Strangman, K. C. and Mr. Charles Bagram, for the Appellants.

Messrs. A. M. Dunne, K. C., L. P. E. Pugh, K. C. and J. M. Pringle, for Respondent, Nos. 1 and 7.

Lord Macmillan.—This appeal relates to a tea garden in the District of Chitragong, known as the Kaiyacherra Tea Estate, which at one time belonged to the Kaiyacherra Tea Company, Limited. The estate was mortgaged to Messrs. Gillanders, Arbuthnot & Co. of Calcutta who in 1930 obtained an order for the compulsory winding-up of the Tea Company. Thereafter the estate was put up to auction by the liquidators and purchased by Messrs. Gillanders, Arbuthnot & Co. Without obtaining any conveyance in their favour Messrs. Gillanders, Arbuthnot & Co. on October 10, 1931, by an interchange of letters of offer and acceptance agreed to sell the estate to one S. N. Roy, who paid the first instalment of the price and entered into possession. No conveyance was ever executed in pursuance of this contract of sale but the plaintiffs in the present suit, now the appellants, claim to have acquired at least in part the purchaser's right under it. The estate has been the subject of a complicated series of transactions which it is fortunately not necessary to detail for the purpose of deciding the only question argued before their Lordships. These

transactions are fully set out in the judgments of the Subordinate Judge and the High Court and account for the varied assortment of defendants to the suit.

The first defendants and respondents, the Dantmara Tea Company, Limited, to whom alone it is necessary to refer, claim on the other hand to be the proprietors of the estate under (1) a duly registered deed of assignment in their favour by the partners of Messrs. Gillanders, Arbuthnot & Co., dated June 1, 1934, which narrates *inter alia* the failure of S. N. Roy to complete the contract of sale of October 10, 1931, and (2) a duly registered deed of sale, also dated June 1, 1934, by the Kaiyacherra Tea Company, Limited, and the liquidators of that company and by the partners of Messrs. Gillanders, Arbuthnot & Co.

The position accordingly is that the plaintiffs have no title to the estate of which they are at least partly in possession, but rely on the contract of sale of October 10, 1931, while the defendants, the Dantmara Tea Company, Limited, have a duly completed title to the estate but are not in possession of it.

The real bone of contention between the parties is the right to the export quota under the India Tea Control Act (XXIV of 1933), which was passed *inter alia* to regulate the export of tea from India. By s. 3 of that Act an Indian Tea Licensing Committee was set up and under other provisions of the Act, it was entrusted with the task of determining the total quantity of tea, termed the "export quota," which the owner of each tea estate should be permitted to export, and of issuing export licences. These quota rights are assignable and are of obvious value. The Licensing Committee in 1933-34 issued the export quota rights for the Kaiyacherra estate to the plaintiffs or to them and S. N. Roy. In 1934-35 the Committee, having become aware that the title to the estate was in dispute, declined to issue any export quota rights in respect of it. Subsequent to the execution and registration of the conveyance of the estate to the defendants, the Dantmara Tea Company, Limited, the Licensing Committee have recognised them as entitled to the export quota rights of the estate. Thus the plaintiffs have in part at least possession of the estate but have no export quota rights, while the defendants, the Dantmara Tea Company, Limited, hold the export quota

rights of the estate but have not possession of it.

It is in these circumstances that the plaintiffs brought the present suit in which they seek to have it declared that the Dantmara Tea Company, Limited, and others have no right or title to the estate and are debarred from enforcing any right to the estate, including the right to sell tea under the export quota allotted to it or to transfer the quota rights to any person. They also seek an injunction.

The defendants challenged the right of the plaintiffs to bring the suit and maintained that they had no title to sue. The Subordinate Judge rejected this plea and decided generally in favour of the plaintiffs but on appeal the learned Judges of the High Court were of opinion that the suit was not maintainable and dismissed it.

It was conceded by the appellants at their Lordships' bar that, apart from s. 53-A which was added by amendment in 1929 to the Transfer of Property Act, 1882, they had no case. But they contended that, notwithstanding that they had not chosen to sue for specific performance of the contract of October 10, 1931, and notwithstanding that they had taken no steps to complete their title, they were nevertheless entitled under s. 53-A actively to assert the rights of a proprietor in virtue of the contract of October 10, 1931, and their possession.

The position of the law under the Transfer of Property Act, 1882, before the addition to it of s. 53-A has on more than one occasion been expounded by their Lordships and reference may be made to the case of *Pir Bakhsh v. Mahomed Tahar* (1), where the subject was fully discussed. It is clear that the appellants were well-advised in conceding that if they could not invoke s. 53-A they were out of Court.

In their Lordships' opinion the amendment of the law effected by the enactment of s. 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mr. Justice Mitter in the High Court that "the right conferred by s. 53-A

(1) 61 I A 338; 151 Ind. Cas. 326; 7 R P O 60; A I R 1934 P O 235; (1934) A L J 912; 11 O W N 1145; 40 L W 492; (1934) M W N 1037; 18 R D 469; 39 O W N 31; 1931 A L R 894; 36 Bom. L R 1195; 60 C L J 370; 67 M L J 865; 16 P L T 1; 58 B 650; (1934) O L R 769 (P O).

is a right available only to the defendant to protect his possession." They note that this was also the view of their late distinguished colleague, Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act at p. 262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act.

It was suggested that by obtaining the export quota rights from the Licensing Committee the Dantmara Tea Company, Limited, as persons claiming under the transferors, were enforcing a right in respect of the property against the appellants as persons claiming under the transferee, and could be enjoined at the appellant's instance from so doing, but in their Lordships' view there has been no enforcement within the meaning of the section of any right against the appellants.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed. Separate printed cases were presented on behalf of the respondents, the Dantmara Tea Company, Limited, and the respondents, the Chandranagar Tea Company, Limited, who claimed to have acquired an interest in the estate, and were separately represented at their Lordships' bar, but the appellants will pay only one set of costs to the respondents.

a.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. *Callingham Ormond & Maddox*.

Solicitors for Respondents Nos. 1 and 7:—Messrs. *T. L. Wilson & Co.*

PRIVY COUNCIL

Appeal from the Patna High Court

October 10, 1939

LORD ROMER, SIR GEORGE RANKIN AND
MR. M. R. JAYAKAR.

CHANDAN MULL INDRA KUMAR
AND OTHERS—APPELLANTS

versus

CHIMAN LAL GIRDHAR DAS PAREKH
AND ANOTHER—RESPONDENTS

Civil Procedure Code (V of 1908), O. XXVI, rr. 9, 10—Commissioner's report—Principles to be adopted in dealing with—Practice—Privy Council—Relief claimed solely on ground that defendant worked coal under particular portion of land—Allegation failing—Defendant found to have taken coal from different portion—Plaint not amended to include

relief in this respect—Claim cannot be allowed in appeal to Privy Council.

The principle to be adopted in dealing with the Commissioner's report is that there should be no interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task is proved by his report, and who has not blindly adopted the assertions of either party. *Ranee Surut Soondree Debea v. Baboo Prosonno Coomar Tagore* (1), referred to. [p. 222, col. 2.]

Where the plaintiff has only alleged in his plaint that the defendant had worked some coal under land comprised in plaintiff's underlease in a particular direction, and has claimed relief solely on this ground but has failed to prove the allegations, and it has been found that the defendants had taken coal to a small extent from under land in different direction and no application to amend the plaint was however made at any stage of the proceedings so as to include relief in respect of such working, the plaintiff cannot be heard to claim such relief in appeal to the Privy Council.

Messrs. *L. L. Cohen, K. C.* and *W. W. K. Page*, for the Appellants.

Messrs. *A. M. Dunne, K. C.* and *J. M. Pringle*, for the Respondents.

Lord Romer.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated April 1, 1937, which reversed a judgment and decree of the Subordinate Judge of Dhanbad dated February 21, 1933, and dismissed the appellants' suit.

The question for decision is whether the appellants or some of them are entitled to recover damages from the respondent by reason of the respondents having cut and removed coal under a certain area of land which will be described later.

The appellants' claim to the coal in question is founded upon a lease or rather a sub-lease dated July 17, 1908 (hereinafter called the sub-lease) whereby there was demised to the Phularitand Coal Company, Limited (hereafter called the Phularitand Company) coal under the land described in the 3rd Schedule thereunder written and also delineated and described in the map or plan thereto annexed and thereon coloured blue. Amongst the land described in the 3rd Schedule was land situate in the *Mauza Ganeshpur* and described therein as being bounded on the north by the *Mauzas Buddora and Kenduadhi*. On the plan there is shown lying between what is marked as *Ganeshpur* on the south and what is marked as *Kenduadhi* on the north a streamlet or jore. The plan would seem to indicate that no part of this jore was situate in *Ganeshpur* inasmuch as it is not coloured blue thereon. So far as the

plan is concerned, therefore the northern boundary of that part of Ganeshpur which abuts on Kenduadhi is indicated as being the southern bank of the jore. The blue colour on the plan extends to that bank but no further.

In the month of March, 1926, the Phularitand Company went into voluntary liquidation with a view to effecting an amalgamation with the Baraboni Coal Concern, Limited (hereinafter called the Baraboni Company) by means of a sale to them of all its assets. On June 30, 1927, accordingly by an agreement of that date the liquidators of the Phularitand Company agreed to sell to the Baraboni Company as from April 1, 1926, the whole of the assets of the Phularitand Company. According to this agreement the liquidators were to retain possession of the assets until completion of the sale which did not take place until much later. It is alleged, however, by the appellants that the Baraboni Company was in fact put into possession of the assets upon April 1, 1926.

On January 29, 1928, the Baraboni Company who are the appellants No. 2 discovered that the respondents who were leaseholders of the coal under the western part of Kenduadhi were or had been working a seam of the coal under the jore. In the belief that for the reasons hereinafter stated such coal was included in the sub-lease they in conjunction with the appellant No. 1 Chandan Mull Indra Kumar instituted on August 29, 1930, the present suit against the respondents claiming a declaration of title, an injunction, and damages. The appellant last mentioned had in the year 1928 purchased some of the assets of the Baraboni Company and was under the impression that his purchase included the coal under Ganeshpur. In this he was mistaken. It is now conceded, that he had no interest in that coal and he need not be further considered. Nor at the date of the institution of the suit had the Baraboni Company any property in the coal inasmuch as their purchase of the assets of the Phularitand Company had not been then completed. They based their claim to relief, however, upon their alleged possession of the demised coal since April 1, 1926, and merely brought in the Phularitand Company as formal defendants. But by order dated August 12, 1932, the Phularitand Company were struck out as defendants and added as plaintiffs and are now the appellants No. 3.

In view of what has been stated about

the plan attached to the sub-lease, it would not appear at first sight that the appellants Nos. 2 and 3 could have any right to complain of the working by the respondents of coal under the jore. Their claim to do so, however, was set out in their plaint founded upon the following allegations. They said in effect that the true boundary between *Mauza* Ganeshpur on the south and *Mauza* Kenduadhi on the north was the jore as shown on the Revenue Survey map of 1862; that the said jore had since then gradually shifted its course towards the south with the result that it was now wholly within the boundaries of *Mauza* Ganeshpur; that the respondents had no right to any coal lying to the south of the old jore as depicted in the Revenue Survey map; that the coal lying under the strip of land described in Sch. B to the plaint was, therefore, the property of the appellants; and they claimed a declaration to that effect. Such Schedule so far as material was as follows:

Boundary of the disputed strip of land as referred to hereinbefore.
North. By the jore (streamlet) as it is existing in the Revenue Survey map to the midland (*sic*).
South. By the present jore (streamlet.)

It is to be observed that in this Schedule the northern boundary of the coal claimed by the appellants is the "midland" (which is no doubt a misprint for the "midline") of the jore as shown on the Revenue Survey map; whereas in the body of the plaint it is merely alleged that the respondents have no right to the coal lying to the south of the jore. But however this may be, their Lordships are satisfied on a careful examination of the map that the boundary line between the two *mauzas* in question is therein shown to be the south bank of the jore. A similar conclusion was come to by the learned Pleader and Commissioner Hem Chandra Roy whose position in the matter will be stated hereafter. In the course of giving evidence at the trial of the suit he said: "According to the Revenue Survey map the jore is within the limits of *Mauza* Kenduadhi." No reference is made in the plaint to the fact that on the map annexed to the sub-lease the jore purports to be shown and is not coloured blue. Now it might be contended that the jore there shown was intended to be the jore in the position it occupied at the date of the sub-lease; in which case, in order to establish their right to the coal under the jore in the position it occupied at the time of the

respondents alleged wrongful workings, the appellants would have had to prove a shifting of the jore's position since 1908. It seems, however, far more probable that the plan merely intended to record the fact that the northern boundary of Ganeshpur was the northern boundary of the coal demised and that such boundary was the southern bank of the jore as it had been shown to be on the Revenue Survey map, and was in no way concerned with the question whether the jore had altered its position since 1862.

A written statement was filed by the respondent No. 2 in which a great number of defences were raised. Of these the only one that need be referred to is the allegation that the jore in the position it then occupied was the true boundary between Ganeshpur and Kenduadhi and that if that position differed from the one shown on the Revenue Survey map, the Revenue Survey map was wrong.

On July 24, 1931, the first two appellants (the then plaintiffs) petitioned the Court for the appointment of a Commissioner with directions to him (amongst other things) (a) to prepare a map of the locality (b) to find out the intermediate boundary line between the plaintiffs' land and that of the defendants' by reference to the Revenue Survey map and title deeds of the parties (if necessary) (c) to ascertain the encroachment, if any, made by the defendants on the plaintiffs' land with reference to such intermediate boundary line, as also the quantity of coal cut therefrom. This petition was successful and on August 5, 1931, Babu Hem Chandra Roy, Pleader, to whom reference has already been made, was appointed Commissioner for the purposes above-mentioned.

The Commissioner in due course made a careful survey of the *locus in quo* and embodied the result of such survey in a map on the scale of 16 inches to the mile. On this map he indicated the then position of the jore and also its position as indicated on the Revenue Survey map of 1862. He found himself able to ascertain the latter position (as he explained to the Court in his first report of September 14, 1931) in the following way: He was in possession of the Revenue Survey map and of the Revenue Survey field book. On that map were indicated two tri-junction pillars marked U and O and the Commissioner was satisfied that these corresponded practically with the two survey stations on his own map marked 1 and 20. Now the position

of what may be called the Revenue Survey jore so ascertained by the Commissioner and indicated on his own map by a red line is a substantial distance to the north of the present position of the jore. It is plain, therefore, that any working of the coal to the south of that red line was a wrongful act on the part of the respondents unless (1) the Commissioner was wrong in his identification of his survey points 1 and 20 with the points U and O on the Revenue Survey map or (2) the position of the jore in 1862 was not accurately shown on the Revenue Survey map.

At the date of his first report the workings of the respondents to the south of the position of the Revenue jore as shown on his map had long since been discontinued and the site of those workings was full of water and could not be surveyed by him. The mine was accordingly pumped dry by the appellants at a considerable cost and the Commissioner then made an inspection of the workings. The result of his inspection was embodied in a further report dated April 16, 1932, and illustrated on a second map. He calculated that 15,753 tons of coal had been removed by the respondents to the south of the Revenue jore as shown upon his first map. It would appear from this second report of the Commissioner that the appellants had changed their views as to the way in which the position of the Revenue jore had shifted to the south. They no longer contended that the jore had gradually shifted its course but "that the present jore is nothing but a diverted course caused by the colliery proprietors and the village cultivators only during the recent years."

It was in these circumstances that this suit came on for hearing before the Subordinate Judge of Dhanbad in the month of August 1932. A great number of issues had been framed for trial of which the only ones material for the present purpose were substantially these:

"(9) What is the correct intermediary boundary between *Mauza* Ganeshpur and Kenduadhi? (10) Is the property described in Sch. B of the plaint included within the property described in Sch. A of the plaint? (i. e., the property described in the underlease). (12) Have the defendants wrongfully extracted the plaintiffs' coal, and if so, what is the quantity?"

At the trial the appellants sought to discredit the accuracy of the Commissioner's maps particularly in so far as they indicated the position of the jore as shown on the Revenue Survey map. They contended (amongst other

things) that the Commissioner was wrong in thinking that the survey points 1 and 20 on his first map corresponded to the points O and O on the Revenue Survey map. If they were right in this contention it is obvious that the position of the Revenue jore as shown on the Commissioner's map could not be relied upon. The learned trial Judge in his judgment of February 21, 1933, considered this as well as the other objections urged by the appellants against the accuracy of the Commissioner's maps and reports in great detail and with the greatest care. The Commissioner had himself given evidence at the trial and the learned Judge made an able and exhaustive analysis of that evidence and of the evidence of other witnesses. In the result, he found that the intermediate boundary between Kenduadhi and Ganeshpur and therefore the boundary between the coal of the appellants and the respondents was the Revenue jore as depicted on the Commissioner's maps. He accepted the Commissioner's findings as to the amount of coal extracted and decreed to the respondents damages at the rate of Re. 1-14-0 per ton of such coal.

The learned Judge does not appear to have considered the question whether the Revenue Survey of 1862 could itself be relied upon as showing accurately the position of the jore at that time.

The respondents thereupon appealed to the High Court at Patna where it came on for hearing before Sir Courtney-Terrell, C.J. and James, J. In the result, the appeal was allowed.

The Chief Justice thought that the sub-lease indicated quite clearly that the northern boundary of the present appellant's coal was the southern bank of the jore as it existed in 1903, and that as there was no evidence that the jore had shifted its position since that time, the suit should have been dismissed. He thought that it was quite immaterial what was the boundary between Kenduadhi and Ganeshpur for the purpose of the Revenue Survey of 1862.

Their Lordships find themselves unable to regard this as a satisfactory solution of the question in dispute. In their opinion the sub-lease included the coal under Ganeshpur up to the true northern boundary of that *mouza* as fixed by the Revenue Survey—that is to say up to the southern bank of the jore in the position that it occupied at the date of the Revenue Survey. The only question is whether that position was the same as

the position that the jore now occupies. That was the view of the matter taken by James, J. He pointed out that no witness had deposed to any alteration having taken place in the course of the jore. He also gave his reasons for thinking that no such change as was alleged by the appellants could have taken place in that district without a convulsion of nature. In those circumstances he said there were two alternatives neither of which he thought impossible (1) that the Commissioner was unable to find the fixed points of the Survey of 1862 or (2) that the boundary was incorrectly plotted in that Survey. The first of these two alternatives had been rejected, and in their Lordships' opinion, rightly rejected, by the Subordinate Judge. He had said:

"It has been laid down that interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task was proved by his report and who had not blindly adopted the assertions of either party."

This, in their Lordships' judgment, is a correct statement of the principle to be adopted in dealing with the Commissioner's report. It is substantially the principle already laid down by this Board in the case of *Ranee Surut Soondree Debea v. Baboo Prosonno Coomar Tagore* (1).

Nor indeed did James, J. proceed upon the first of the two alternatives propounded by him. He proceeded exclusively upon the second and did so in these terms:

"It appears to me clear from examining the Revenue Survey Map that the delineation of the course of the *nala* shown therein is to be regarded with suspicion. The work of the Revenue Survey so far as it consisted of triangulation was certainly of the first class; but we are here concerned not with the question of whether the traverse survey then made was correct, but of whether the Amin who plotted the boundaries, working from the traverse lines, surveyed them correctly. The map is on a small scale; but it would, on the face of it, appear that the Amin did not survey the boundary at all, but merely sketched it in by hand.....I do not consider that it can be held to be proved that the *nala* ever flowed elsewhere in its present position."

He then adverted to the facts that in his survey of the respondent's workings the Commissioner had found that they had extended slightly beyond the southern bank of the jore. This encroachment the learned Judge considered to be quite

(1) 13 M I A 607 at p. 617; 6 B L R 677; 15 W R 20; 2 Buth. 393; 2 Sar. 633 (P O).

negligible and one that need not be taken into account.

With this judgment of James, J. their Lordships find themselves in substantial agreement.

In the first place there is no single witness who deposes to a shifting of the position of the jore. On the contrary: the only four witnesses who dealt with that question all asserted quite definitely that the jore had never shifted its position during the time that they had known it. They were giving their evidence in the year 1932 and seem to have been familiar with the neighbourhood for about 20, 28, 14 and 16 years, respectively. It is inconceivable that, if the jore had gradually shifted its position as stated in the appellants' plaint, or had been suddenly diverted by some colliery proprietors or village cultivators in recent years as they stated, to the Commissioner, these four witnesses should have been ignorant of the facts. The truth of the matter would seem to be that the idea of this shifting of the jore first occurred to the appellants in the year 1927, when the same Commissioner, in making a survey of the present position of the jore for the purpose of litigation concerning another colliery situate to the east of the appellants' colliery, had discovered that the position of the jore as delineated on the Revenue Survey map was to the north of its present position. It is plain that the appellants' contention was not based upon any evidence but solely upon the map that the Commissioner prepared in 1927. The appellants in other words are relying simply and solely upon the position of the jore being accurately delineated in the Revenue Survey map.

In their Lordships' opinion the map cannot be trusted in this respect. If this map be accurate, the jore must have shifted its position considerably since 1862. There is, however, no evidence to show that any change of position of a stream was either probable or even possible in that locality: and there is the oral evidence, to which reference has already been made, that no such change as alleged has taken place during recent years. There cannot, therefore, have been any gradual change of the stream or any change made in recent times by any cultivator or colliery owner and no other kind of change has been suggested by the appellants. It appears, moreover, from the evidence of the Commissioner given at the trial that the

revenue field book does not contain the offsets of the line of the jore. It is therefore at least possible, and in view of all the circumstances of this case, it seems to their Lordships highly probable that the Amin did not in 1862 survey the position of the jore at all, but in the words of James, J. merely "sketched" it in.

This being so, the appellants have failed to discharge the onus that lies upon them of showing that the respondents have worked coal comprised in the appellants' underlease. It is true that the Commissioner's survey of the respondents' workings indicates that to a small extent the respondents have taken coal from under land lying to the south of the jore. But no reference to any such working is to be found in the appellants' plaint. All that they alleged was that the respondents had worked some coal under the land described in Sch. B to the plaint, and it was only in respect of the coal under that land that they sought a declaration of title and damages. Now the land described in Sch. B did not extend further south than the jore. No application to amend, however, was made at any stage of the proceedings, and in their Lordships' opinion it would be quite wrong to give to the appellants any relief in respect of the respondents' comparatively small workings to the south of the jore. Had the appellants been correctly informed as to the true northern boundary of the coal comprised in their sub-lease, this lengthy and very expensive litigation would never have been undertaken by them. They ought not to be allowed to avail themselves of the fact that in the course of their unsuccessful endeavour to establish their title to the coal under the land comprised in Sch. B, they have discovered that a small quantity of coal to the value of little more than Rs. 2,000 has been extracted by the respondents to the south of that land. They did not, in their plaint, claim any relief in respect of such coal and they cannot be heard to claim it now.

For these reasons their Lordships are of opinion and they will humbly advise His Majesty that the appeal should be dismissed. The respondents' costs of the appeal must be paid by the appellants.

s. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. T. L. Wilson & Co.

Solicitors for the Respondents:—Messrs. Hy. S. L. Polak & Co.

ALLAHABAD HIGH COURTCriminal Reference Nos. 477 and 478
of 1939

July 7, 1939

MULLA, J.

B. SOHAN LAL—APPLICANT

*versus*M. MUBARAK ALI KHAN—OPPOSITE
PARTY*Criminal Procedure Code (Act V of 1898), s. 197*
—Member of non-City Municipality, whether can
claim protection of s. 197.

A member of a non-City Municipal Board is removable by the Commissioner under s. 40, U. P. Municipalities Act, and hence cannot be described as a person not removable from his office save by or with the sanction of a Local Government or some higher authority. He cannot, therefore, claim protection of s. 197, Criminal Procedure Code. At the stage when the Magistrate has to decide whether he can take cognizance of the offence or not, the question whether the offence with which the Municipal Commissioner is charged is one for which the Commissioner would or would not eventually have the power to remove him does not arise at all.

Cr. Ref. made by the Additional Sessions Judge, Aligarh at Etah, dated May 10, 1939.
Mr. B. S. Darbari, for the Applicant.

The Assistant Government Advocate, for the Crown.

Order.—These are two connected references by the learned Additional Sessions Judge of Aligarh at Etah which give rise to the same question of law for decision and can therefore be conveniently disposed of together. The facts out of which the question of law arises may briefly be stated as follows: One Babu Sohan Lal in whose behalf the reference has been made, is a member of the Municipal Board of Jalesar. The Chairman of that Board is one Mr. Mubarak Ali Khan. It appears that in his capacity as a Municipal Commissioner, Babu Sohan Lal was entrusted with certain public moneys. The Chairman has made two separate complaints against him for having dishonestly misappropriated these moneys and he is charged under s. 409, Indian Penal Code, because he is a public servant as defined by s. 21, Indian Penal Code. The Magistrate before whom the complaints were made took cognizance of the two offences and issued summonses to Babu Sohan Lal. In both cases an objection was taken on behalf of Babu Sohan Lal that in view of s. 197, Criminal Procedure Code, the Magistrate was not authorized to take cognizance of the offences. It was contended in each case that Babu Sohan Lal was a public servant who was not removable from his office save by or with

the sanction of the Local Government and as he was accused of an offence alleged to have been committed by him while acting in the discharge of his official duty, no Court could take cognizance of such an offence except with the previous sanction of the Local Government. It is admitted that no sanction of the Local Government has been obtained in this case. When the Magistrate took cognizance of the case, Babu Sohan Lal made an application in revision to the learned Additional Sessions Judge who has made these references. The learned Judge has accepted the contention on behalf of Babu Sohan Lal and has consequently recommended that the Magistrate's order summoning Babu Sohan Lal in each case should be quashed.

Upon a careful consideration of the facts, I find that I am unable to agree with the view taken by the learned Additional Sessions Judge. The decision obviously turns upon the interpretation of the words "not removable from his office save by or with the sanction of a Local Government" contained in s. 197, Criminal Procedure Code. The simple point is whether this description rightly applies to Babu Sohan Lal so that he can claim the protection afforded by s. 197, Criminal Procedure Code. In order to decide this point, reference must be made to s. 40, U. P. Municipalities Act, which provides for the removal of a Municipal Commissioner. That section draws a clear distinction between City Municipalities and non-City Municipalities. In the case of City Municipalities, the Local Government alone has power of removing a Municipal Commissioner. In other cases even the Commissioner can remove a Municipal Commissioner under s. 40 for any one of the reasons mentioned therein. Now the Municipality of Jalesar of which Babu Sohan Lal is a Commissioner is admittedly a non-City Municipality so that the Commissioner has the power of removal in respect of the Commissioners of that Municipality under s. 40, U. P. Municipalities Act. It necessarily follows that member of the Jalesar Municipal Board who is removable by the Commissioner under s. 40, U. P. Municipalities Act cannot be described as a person not removable from his office save by or with the sanction of a Local Government or some higher authority. The learned Additional Sessions Judge has given a rather curious reason for arriving at the finding that Babu Sohan Lal is a person not removable from his office save by or with the sanction of a

Local Govt. or some higher authority. The reason is that the offence of criminal breach of trust with which he is charged is not an offence for which the Commissioner can remove any member of the Jalesar Municipal Board. This argument is obviously unsound. At this stage when the Magistrate has to decide whether he can take cognizance of the offence or not, the question whether the offence with which Babu Sohan Lal is charged is one for which the Commissioner would or would not eventually have the power to remove him does not arise at all. It is only when Babu Sohan Lal is convicted of the offence with which he is charged that the question of his removal can possibly arise. At this stage all that the Court is concerned with is the interpretation of the words "not removable from his office save by or with the sanction of a Local Govt. or some higher authority." For the reasons which I have already given, it is perfectly clear that Babu Sohan Lal does not fulfil that description and he cannot therefore claim any protection under s. 197, Criminal P. O. The result, therefore, is that I reject the reference made by the learned Additional Sessions Judge.

S. *Reference rejected.*

BOMBAY HIGH COURT

Second Appeal No. 168 of 1937

March 22, 1939

BHAUMONT, C. J.

BASAPPA CHANBASAPPA CHEKKI

AND OTHERS—DEFENDANTS Nos. 1 to 3—

APPELLANTS

versus

HANMAPPA RAMAPPA MANAUR—

PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 64, O. XXXVIII, r. 10—Contract of sale before attachment of property before judgment—Subsequent conveyance if prevails over attachment—Attachment—Before judgment—Provisional order coming for being made absolute—Court directing defendant to furnish security, and on failure, property would be attached—Effect of.

Section 64 and O. XXXVIII, r. 10, Civil P. O., must be read together. Section 64 applies to an effective attachment, and under O. XXXVIII, r. 10, attachment before judgment is not effective as against rights subsisting at the date of the attachment. Hence a conveyance of a property, executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail over the attachment. 34 Ind. Cas. 953 (2), approved.

Where at the time when the provisional order for attachment before judgment has come before the Court for being made absolute, the Court directs the

defendant to give security and says "failing which the property will be attached," all that the Court means is that the attachment on the property will be continued, that is to say, the Rule will be made absolute unless the security is furnished within time allowed in which case the attachment will be discontinued.

S. A. from the decision of the Assistant Judge, Dharwar, in Appeal No. 208 of 1935.

Mr. A. G. Desai, for Appellant (Defendant No. 1).

Messrs. G. P. Murdeshwar and R. A. Mundkar, for the Respondent.

Judgment.—This is a second appeal from a decision of the Assistant Judge of Dharwar. The facts giving rise to the suit are these. On May 27, 1921, defendants Nos. 1 to 3 agreed to sell five survey numbers to the plaintiff. That sale was carried out by a conveyance on September 26, 1922, but in the meantime, namely on September 6, 1922, one Sitaram commenced a suit against the defendants for a sum of money and obtained an order for attachment before judgment of the property, or part of the property included in the plaintiff's sale. On November 8, 1922, when the provisional order for attachment, which Sitaram had obtained, came up to be made absolute, the Court refused to make the Rule absolute and cancelled the attachment. Sitaram appealed against that order, and on March 1, 1923, an order was made by the then District Judge of Dharwar, the effect of which is said to be to restore the attachment. The true construction of that order is one of the questions with which I have to deal. On April 4, 1923, the property was attached, and subsequently Sitaram got a decree against the defendants, and under that decree the attached property was sold by the Court in execution, and Sitaram purchased with the leave of the Court for Rs. 1,581. That sum was applied in discharge of Sitaram's debt, and the balance of Rs. 331 was paid to the plaintiff, and on October 18, 1930, an order was made in execution giving possession to Sitaram and ousting the plaintiff from possession. The plaintiff's case in this suit therefore is that he got no title to the property, which was subsequently sold to Sitaram, and claims damages against the vendors for breach of their covenants of title implied under s. 55 (1) (a) and (2), T. P. Act.

Two points are taken on this appeal. The first is that the order of March 1, 1923, did not have the effect of restoring Sitaram's attachment but created a new

attachment which was after the date of the sale to the plaintiff. The order is not very happily worded. It states that the appellant's Pleader is content if the respondent gives security for Rs. 4,000, and the learned Judge says: "This seems reasonable. I order the respondent to give security within fifteen days, failing which, the property will be attached." It is obvious that that order is not correctly expressed. The learned Judge had no power to order the respondents to give security. What he was really doing was providing that the attachment should continue unless the respondents gave security. He was giving them an option, and I think when he directs them to give security and says "failing which the property will be attached," all that he means is that the attachment on the property will be continued, that is to say, the Rule will be made absolute unless within fifteen days the security is furnished, in which case, the attachment will be discontinued. That seems to me to be the effect of the order, and that is the view which is taken in both the lower Courts.

The second point taken has undoubtedly more substance in it. It is argued that, in point of fact, the plaintiff got a perfectly good title from the vendors, and therefore they are not liable for breach of their covenants for title, and reliance is placed on O. XXXVIII, r. 10, Civil P. C., which says that attachment before judgment shall not affect the rights, existing prior to the attachment of persons not parties to the suit. Now, the plaintiff was not a party to Sitaram's suit, and, undoubtedly, before Sitaram obtained attachment before judgment, the plaintiff had acquired a right under the contract of sale. It is true that a contract for sale in India does not, as in England, confer any equitable estate on the purchaser, but undoubtedly the purchaser has a right to have the contract carried out, and that right is not merely, as Mr. Murdeshwar argued, a right to sue for specific performance. It is not necessary to sue for specific performance, if the vendor is willing to carry out his obligation, and I think undoubtedly the plaintiff had a right to require the vendors to carry out their contract, and as it has been proved that the plaintiff had no notice of the attachment, he would be entitled to pay his purchase money to the vendors. Mr. Murdeshwar argues that that is inconsistent with s. 64, Civil P. C., which provides that where attachment has been made, any private transfer or delivery of the property attach-

ed or of any interest therein shall be void. But one must read s. 64 and O. XXXVIII, r. 10 together. Section 64 applies, I think, to an effective attachment, and under O. XXXVIII, r. 10, attachment before judgment is not effective as against rights subsisting at the date of the attachment. Therefore, I think, there is a good deal of force in the contention of the present appellant that the plaintiff did get a good title. Mr. Murdeshwar relies on *Taraknath Mukherji v. Sanatkumar Mukherji* (1), but that case is opposed to an earlier decision of the Calcutta High Court in *Madan v. Rebati* (2), in which the Court held that a conveyance of a property, executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail over the attachment. I think that decision is right, and I prefer it to the later decision of the Calcutta High Court, which I must confess I have some difficulty in understanding.

The question then arises whether the appellant is entitled to take this point now. It was not apparently taken in either of the lower Courts, but, apart from that, the point ought to have been taken at the time when the plaintiff was dispossessed. The plaintiff was dispossessed in execution proceedings at the instance of Sitaram, and the present appellant as judgment-debtor was a party to those proceedings, though he did not put in an appearance. In those proceedings, to which the appellant was a party, the Judge held, rightly or wrongly that the plaintiff was not entitled to retain the property as against Sitaram, and it seems to me that the appellant is not entitled to dispute that finding. It is *res judicata*, the principle of which, it is well-settled, applies in execution proceedings. If the appellant is not entitled to affirm that the plaintiff got a good title against Sitaram, then I think he has no answer to the plaintiff's claim for damages for breach of the covenants for title. The appeal, therefore, fails and must be dismissed with costs.

S.

Appeal dismissed.

(1) 57 C 274; 122 Ind. Cas. 637; A I R 1929 Cal. 494; 33 C W N 205; Ind. Rul. (1930) Cal. 269.
(2) 23 C L J 115; 34 Ind. Cas. 953; A I R 1916 Cal. 937; 21 C W N 158.

LAHORE HIGH COURT

Letters Patent Appeal No. 110 of 1933

November 8, 1938

ADDISON AND RAM LALL, JJ.

Sheikh NOOR AHMAD—PLAINTIFF

versus

Sayed MAHMUD ALI—DEFENDANT

Stamp Act (II of 1899), Art. 35 (a) (i), (viii)—Lease of house on monthly rental—Term not fixed—Tenancy terminable on month's notice—Lease held does not fall under Art. 35 (a) (i) but under (viii)—"Lease," definition of, in Stamp Act is wider than that given in Transfer of Property Act (IV of 1882), s. 105.

A lease may be from month to month and yet be for an indefinite period. The language of the Stamp Act is perfectly clear and it is only when a term of less than 12 months' duration is specified that a lease can be said to purport to be for such a period and therefore chargeable as such. Where no term is fixed, the document is *ex facie* one for an indefinite period.

Even if a document is such that it could not be deemed to be a lease within the meaning of s. 105, T. P. Act, it would still come within the Stamp Act because the definition of "lease" in the Stamp Act is wider and more comprehensive than the definition of it in the T. P. Act. The two Acts are not complementary of each other and where the language employed in one Act is perfectly clear, the Courts should not go to another Act for interpreting the term used in that Act.

A lease of a certain house was granted on a monthly rental of Rs. 30. The instrument did not fix a term but it was stated that either party could terminate the tenancy on giving one month's notice:

Held, that the lease was one which did not purport to be for a definite term. It did not therefore fall under Art. 35 (a) (i) but under (viii) of Stamp Act. 51 Ind. Cas. 221 (1), explained and not approved.

L. P. A. filed by Collector of Delhi against an order passed by Mr. Justice Skemp, J. in C. R. No. 28 of 1937, dated April 25, 1938.

Mr. M. Sleem, Advocate-General, for the Collector, Delhi.

Mr. Azim Ullah, for the Plaintiff.

Ram Lall, J.—A lease of a certain house in Delhi was granted on a monthly rental of Rs. 30. The instrument did not fix a term but it was stated that either party could terminate the tenancy on giving one month's notice. In a suit for rent the above-mentioned document was produced and the Small Cause Court Judge who was trying the case, holding that it was a lease for a term of less than one year and therefore chargeable under Art. 35 (a) (i) of Sch. I, Stamp Act, charged a duty of Rs. 3 and a penalty of Rs. 30 before admitting it into evidence. The Chief Revenue Authority, Delhi, made a reference to the High Court under s. 61 (1), Stamp Act, urging that the instrument in question was chargeable under Art. 35 (a) (viii), together with

penalty, amounting in all to a sum of Rs. 247-8-0. This reference was disposed of by a learned Single Judge who by his order dated April 25, 1938, held that the proper section applicable was Art. 35 (a) (i) on the authority in *A. M. Amolia v. Ibrahim Ishak* (1), and on a consideration of the language of s. 105, T. P. Act. The Chief Revenue Authority has come up in appeal, urging again that the document is a lease for an indefinite period and chargeable to duty as such.

On a general consideration of the language of the Article it appears to me that the contention of the appellant must prevail. Section 35 (a) makes a distinction between leases which purport to be for a fixed term and those which do not specify a term. In the present case the tenant would continue in possession till his tenancy was put an end to by notice. Neither party could know beforehand at what moment of time such a notice would be given and so such a lease might continue for an indefinite number of years. It appears to me therefore that the present lease is clearly one which does not purport to be for a definite term.

Turning to decided cases, the only decision that supports the contrary contention is *A. M. Amolia v. Ibrahim Ishak* (1). In that case the agreement was to pay Rs. 60 per month as rent and to pay it at Rs. 2 per day. There was no stipulation for terminating the tenancy by notice and it might easily be construed that the intention of the parties was that after the first month the tenant would be allowed to hold over. It was held that such a contract would be deemed to be a lease from month to month in accordance with s. 105, T. P. Act, but without further discussion it was stated that the duty chargeable would be under s. 35 (a) (i), Stamp Act. This case appears to me to be decided rather on the admissions of Counsel as to whether or not a monthly tenancy existed and not on any consideration of the question whether the contract was one for a definite period or not. Mulla and Pratt, in their learned commentary on the Stamp Act (at p. 239, Edn. 3), point out that the failure of the Court in the Calcutta case to assess duty on a contract of lease for an indefinite period was "evidently an oversight."

In a Full Bench decision of the Allahabad High Court, reported as *In the matter of Burmah Shell Oil Storage and Distri-*

(1) 46 C 804; 51 Ind. Cas. 221; A I R 1919 Cal. 200; 23 O W N 398.

buting Co., India, Ltd. (2), same railway land was given to an oil company and a monthly payment was to be charged for the use of this land. The company was to construct certain permanent structures and in case of breach of any of the conditions specified, the transaction could be cancelled by giving seven days' notice to the company and in any other case on three months' notice by either side. The lease in question expressly provided that no tenancy was being created. The question arose whether this document was a licensee or a lease and with what duty it was chargeable. It was held that it was a lease and further that the definition of 'lease' as contained in the Stamp Act was wider than that contained in the T. P. Act. It was held, therefore, that even if this document did not amount to a lease under s. 105, T. P. Act, it was nevertheless a lease for the purposes of the Stamp Act. Regarding the duty chargeable, it was held that the document was a lease which did not purport to be for a definite term. Though the Calcutta decision mentioned above was not specifically referred to, the conclusion arrived at by the Full Bench was contrary to that stated in the Calcutta case. In a very recent decision reported in *Mangal Puri v. Baldeo Puri* (3), the matter was more directly in issue and the Calcutta case referred to above (and on which the learned Single Judge mainly based his judgment) was specifically disapproved. In this case a lease had been granted with a stipulation, as in the present case under discussion, that the owner could get the house vacated by giving one month's notice. A Division Bench held that a monthly tenancy within the meaning of s. 105, T. P. Act, had been created but it did not follow that the document in question was a lease for less than one year. The learned Judges went on to say :

"A lease for less than one year means a lease for some specified period which is less than 12 months. In the present case the lease is for an indefinite period: in other words, it 'does not purport to be for any definite term.'"

Referring to s. 105, T. P. Act, the learned Single Judge observed that it would be anomalous if a lease which contained no clause as to notice, should be a lease from month to month, whereas a lease which contained a clause making the tenancy terminable by one month's notice should be a lease for an indefinite period. It appears (2) 55 A 674; 145 Ind. Cas. 674; A I R 1933 All. 735; 1933 A L J 749; 6 R A 145 (F B).

(3) A I R 1938 All. 301; 175 Ind. Cas. 313; I L R (1938) All. 481; 1938 A L J 324; 1938 R D 495; 10 R A 680; 1938 A L R 409.

to me that this argument does not touch the real question in issue. I am quite clear in my mind that a lease may be from month to month and yet be for an indefinite period. The language of the Stamp Act is perfectly clear and in my opinion it is only when a term of less than 12 months' duration is specified that a lease can be said to purport to be for such a period and therefore chargeable as such. Where no term is fixed, the document is *ex facie* one for an indefinite period. Further, as pointed out in the Full Bench decision of the Allahabad High Court referred to above, even if a document is such that it could not be deemed to be a lease within the meaning of s. 105, T. P. Act, it would still come within the Stamp Act because the definition of "lease" in the Stamp Act is wider and more comprehensive than the definition of it in the T. P. Act. The two Acts are not complementary of each other and where the language employed in one Act is perfectly clear, I can see no reason for going to another Act for interpreting the term used in that Act. For these reasons, I would accept this appeal, but having regard to all the circumstances of the case, I would make no order as to costs in the High Court. Learned Counsel for the respondent pointed out that the penalty which his client would have to pay was very heavy indeed, having regard to the subject-matter of the suit. While we may entertain sympathy for the respondent in this matter, it appears to me that we have no power either to reduce or to remit the penalty imposed and the only remedy lies in a representation to the Chief Revenue Authority.

Addison, J.—I concur.

D.

Appeal allowed.

BOMBAY HIGH COURT

Criminal Revision Application No. 142
of 1939

June 20, 1939

BROOMFIELD, AG. C. J. AND SHN, J.
KANAYALAL MOHANLAL GUJAR—
ACCUSED
versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 286—Agreement between purchaser and seller that commodity sold should be measured by measure produced by purchaser—No representation by purchaser that measure produced was standard one—Purchaser, if guilty under s. 286—"False measure," meaning of—Commission of offence under Bombay Weights and

Measures Act, whether makes measure false within meaning of s. 266.

Where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud.

Where therefore it has been agreed between the seller and the purchaser that a certain commodity should be measured by a measure produced by the purchaser and purchaser has not represented in any way that the measure was the standard measure, the purchaser cannot be said to have fraudulent intent and cannot be convicted under s. 266, I. P. O. 43 Ind. Cas 433 (1), relied on.

The fact that an offence may have been committed under the Bombay Weights and Measures Act does not make the measures false within the meaning of s. 266, I. P. O. According to the ordinary use of language, if a measure is described as false, that means that it is something other than what it purports to be.

Cr. R. App. against the decision of the Sessions Judge, Poona.

Mr. V. N. Ohhatrapati, for the Accused.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Crown.

Broomfield, Ag. C. J.—This is an application for revision by one Kanaylal Gujar against his conviction under s. 266, I. P. O. of the offence of being in possession of a false weight or measure known to be false with the intention that the same may be fraudulently used. The conviction was by the First Class Magistrate of Junnar, and it was confirmed on appeal by the Sessions Judge of Poona. The learned Advocate, who appears for the applicant, contends, in the first place, that the measures used in this case were not false within the meaning of s. 266 and, in the second place, that a fraudulent intention has not been established. The facts are very simple. The accused is a *sowkar* and he deals in *hirda*. He had purchased a quantity of about 16 maunds of *hirda* from one Savleram, and he got the *hirda* measured by means of two measures called *adholis*. The measurement was made by Savleram, the vendor himself, with the assistance of another person. The *adholis* are old measure and are not in accordance with the standard prescribed by the Weights and Measures Act (Bombay IV of 1932). The *Patil* of the village was present at the time, and he says that he warned the accused not to use these old measures, and that as the accused persisted in using them, when the measurement of the *hirda* was completed, he seized the *adholis* and handed them over to the Police. The view taken by the lower Courts was that the *adholis* in question must be

regarded as false measures, because they are smaller than the *adholi* measures prescribed by the Weights and Measures Act. Because they are smaller, and the accused deliberately used these old measures, it has been held that he must have acted fraudulently. This finding has been arrived at in spite of the evidence making it clear that Savleram, the vendor, was himself using these measures and had consented that they should be used. In our opinion, the conviction of the accused for an offence under s. 266, I. P. O. cannot be sustained on these facts.

Under s. 12, Weights and Measures Act, it is provided that, subject to the provisions of s. 46 (with which we are not concerned), all dealings or contracts in any area in which the Act is in force shall be deemed to be had or made according to one of the standard weights or measures, and it shall not be lawful to use any other weight or measure in relation to any such dealing or contract. The section further provides that any dealing or contract, so far as it contravenes the provisions of the section, shall be void, unless it is proved that such dealing or contract was had or made without intention to contravene the said provisions. By s. 31 of the Act it is made a penal offence punishable with imprisonment or fine or both to use any weight or measure fraudulently. But s. 44 of the Act provides that no prosecution under the Act shall be instituted, except by or with the previous sanction of the Collector, or an officer specially empowered by the Collector, or by Govt. The Weights and Measures Act applies to the District of Poona, and it may be that the transaction between the parties was void under s. 12. Provided the use of the measures was fraudulent, the use would be an offence under s. 31 although, as I have said, prosecution under the Act would require sanction. But the fact that an offence may have been committed under the Weights and Measures Act, does not make the measures false within the meaning of s. 266. According to the ordinary use of language, if a measure is described as false, that means that it is something other than what it purports to be. In Ratanlal's Law of Crimes a passage is cited from Stokes' Anglo-Indian Codes, Vol. I, to the effect that the word 'false' in s. 264 and the following section means :

"different from the instrument, weight or measure, which the offender and the person defrauded have fixed upon expressly or by implication, with reference to their mutual dealings."

No suggestion has been made that the accused represented in any way that the *adholis* were of the standard measure. In fact the evidence makes it perfectly clear that he did nothing of the sort. We hold therefore that the measures were not false measures within the meaning of this section of the I. P. O. We are also not satisfied that there was any fraud. The vendor Savleram consented to the use of these measures. Whether he did so with reluctance or not does not, in our opinion, make any difference. In *Emperor v. Harak Chand Marwari* (1), Tudball, J. in dealing with a somewhat similar case under s. 266, observed as follows (p. 86*) :

"A necessary ingredient of an offence under s. 266 is fraudulent intent. One knows full well that the measures of weight and measures of length which are in use in this country in villages and towns differ considerably from the standard measures laid down by Govt. under Act II of 1889. Where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud."

In the present case it appears to have been agreed between the accused and Savleram that the *hirda* was to be measured by the *adholis* produced by the accused and we think it quite impossible to hold that under the circumstances the accused had a fraudulent intent. The conviction and sentence must be set aside. The fine must be refunded.

s.

Conviction set aside.

(1) 40 A 84; 43 Ind. Cas. 433; A I R 1918 All. 174; 19 Cr. L J 145.

* Page of 40 A.—[Ed.]

MADRAS HIGH COURT

Appeal No. 2 of 1938

April 12, 1938

VENKATARAMANA RAO, J.

S. V. SUBBA RAO—APPELLANT

versus

CALICUT CO-OPERATIVE

URBAN BANK, LTD.—RESPONDENT

Co-operative Societies Act (II of 1912), s. 51—Limitation—Award by Registrar—Enforcement by Civil Court other than High Court—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Art. 182.

By statute the award of the Registrar under s. 51 of the Co-operative Societies Act is given the same status as a decree of a Civil Court for the limited purpose of execution and the provisions of law relating to the enforcement of decrees of such Courts including the law of limitation applicable for such enforcement will apply by necessary implication. So when a question of limitation arises as to the

enforcement of an award of the Registrar of the Co-operative Society, the Court before which the application for its enforcement is made will have to apply the Article applicable for the enforcement of the final decree of that Court. Where the execution is by a Civil Court, other than the High Court, the Article applicable is Art. 182, Lim. Act. 104 Ind. Cas. 808 (2), dissented from: [p. 231, col. 1.] (Case-law discussed.)

A. against the appellate order of the District Court, South Malabar, dated December 13, 1937.

Mr. N. R. Sesha Ayyar, for the Appellant.

Mr. K. Kuttikrishna Menon, for the Respondent.

Judgment.—The question raised in this appeal is as to the proper Article of the Lim. Act for an application for the enforcement of an award passed by the Registrar of Co-operative Societies under s. 51 of the Act. The execution application in this case, out of which this appeal arises, was made in 1936 in respect of an award which was passed on July 15, 1931. The first application for enforcement of the award made to the District Munsif of Calicut was made in 1932 and between 1932 and 1936 there were other applications made for its enforcement. It is conceded that if Art. 182, Lim. Act applies, there is no bar of limitation. Both the lower Courts have taken the view that Art. 182 is applicable and held that the application is not barred by limitation. But it is contended by Mr. Sesha Ayyar that this view is wrong and that the Article applicable is Art. 181, Lim. Act. He places considerable reliance on the decision of Cornish, J. in *Co-operative Credit Society v. Chinna-swami Udayar* (1). With due respect, I am unable to agree with the said decision. Under s. 65, Co-operative Societies Act, the Local Govt. is empowered to make rules to carry out all or any of the purposes of the Act and one of such purposes is the enforcement of decisions or awards in proceedings before the Registrar of Co-operative Societies. The rule which has been enacted in pursuance of this section is r. 15, cl. 7. Clause 7 contains three sub-clauses providing three methods of enforcement and the sub-clause which is relevant for the purpose of the present discussion, is sub-cl. (c) which runs thus :

"On application to the Civil Court having jurisdiction over the subject-matter of the decision or award, that Court shall enforce the decision or award as if it were a final decree of the Court."

(1) 71 M L J 759; 167 Ind. Cas. 223; A I R 1937 Mad. 31; I L R (1937) Mad. 495; (1938) M W N 1198; 44 L W 720; 9 R M 437.

If therefore an application to enforce an award is made to a Civil Court, for the purpose of enforcement, the Legislature enacts that it should be treated as a final decree of that Court. Thus by statute the award of the Registrar under s. 51 of the Act is given the same status as a decree of a Civil Court for the limited purpose of execution and the provisions of law relating to the enforcement of decrees of such Courts including the law of limitation applicable for such enforcement will apply by necessary implication. So when a question of limitation arises as to the enforcement of an award of the Registrar of the Co-operative Society, the Court before which the application for its enforcement is made will have to apply the Article applicable for the enforcement of the final decree of that Court. In this case the Article applicable for the enforcement of the final decree of the Court of the District Munsif of Calicut is Art. 182. *Prima facie* therefore the Article that should govern the present case is Art. 182. In *Belvedere Jute Mills, Ltd. v. Hardwara Mull & Co.* (2) a question arose as to the enforcement of an award under s. 15, Arbitration Act, where the language is almost similar. Section 15 runs thus :

"An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court."

Rankin, C. J. and Mitter, J., held that Art. 181 would not apply to the case but the Article applicable was Art. 183, the Article applicable to the enforcement of the decree of the High Court. Rankin, C. J. in the course of the judgment remarked thus :

"If one looks at the question of limitation from the point of view of the different alternatives, there can be one inference only and that is that the words employed by the Legislature in the first subsec. of s. 15, Arbitration Act, were intended to go to the question of limitation as well as to the question of procedure."

This decision was followed in our High Court by the learned Chief Justice and King, J. in *Hindu Religious Endowments Board, Madras v. Shirur Mutt* (3). There the question arose whether Art. 181 or Art. 182 is to be applied in regard to the application for the enforcement of an order passed by the Hindu Religious Endowments Board under s. 70 (2) of the Act

which ran thus :

"The Court shall on the application of the President of the Board... recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned."

The learned Judges referred to *Lakshmindra Tirta Swamiar v. Hindu Religious Endowments Board, Madras* (4) where it was held that the words "as if a decree had been passed" attract to the order the whole procedure in execution and followed the ruling in *Belvedere Jute Mills, Ltd. v. Hardwara Mull & Co.* (2) and applied Art. 182. In my opinion the above decisions lay down the correct principle. I therefore hold that Art. 182, Sch. I, Lim. Act, would apply to the enforcement of an award passed by the Registrar of Co-operative Societies under s. 51 of the Act by a Civil Court other than a High Court.

I shall now deal with the decisions relied on by Mr. Sesha Ayyar. The first case relied on by him is *Co-operative Credit Society v. Chinnaaswami Udayar* (1). On a perusal of the said decision, it looks as if it was assumed that Art. 181 applied to the case and the only question was whether the application was time-barred. This appears clear from the following observation of the learned Judge in that case :

"The only question in this appeal is whether the application is time-barred. Admittedly it is, if Art. 181 of the Lim. Act governs it. But the argument is that the application not being one under the Civil P. O., the Lim. Act has no application."

The learned Judge after overruling this contention held that the application being one under the Code, Art. 181 would apply and he purported to follow the decision in *Sambasiva Mudaliar v. Panchanada Pillai* (5) which is another decision relied on by Mr. Sesha Ayyar. That was a decision under s. 40, Revenue Recovery Act. The question there was what Article would apply for an application by a purchaser at a revenue auction sale for delivery of possession. The learned Judges applied Art. 178 of Act XV of 1877, corresponding to Art. 181 of the present Lim. Act and the decision turned on the language of s. 40, Revenue Recovery Act, which runs thus :

"Where notwithstanding such publication, any lawful purchaser of land may be resisted and prevented from obtaining possession of his purchased land, any Court of competent jurisdiction, on application and production of certificate of sale provided for by s. 38 shall cause the proper process to be

(2) 31 O W N 1087; 104 Ind. Cas. 808; A I R 1927 Cal. 853; 55 C 499.

(3) 58 M 760; 156 Ind. Cas. 747; A I R 1935 Mad. 217; 68 M L J 200; 41 L W 264; (1935) M W N 142; 8 E M 44.

(4) 56 M 712; 141 Ind Cas 799; A I R 1933 Mad. 305; 65 M L J 364; 37 L W 207; Ind. Rul. (1933) Mad. 162; (1933) M W N 213.

(5) 31 M 24; 17 M L J 441; 3 M L T 19.

issued for the purpose of putting such purchaser in possession in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court."

It is with reference to this language the following observations were made :

"The section as we read it places the purchaser in the position of a decree-holder for the purposes of putting the machinery of the Court in motion in order that the certificate of sale granted by the revenue authority may be given effect to. It does not by implication make the law of limitation with reference to the execution of decrees or orders of Civil Courts applicable to proceedings under s. 40 of the Act."

But the language of r. 15, cl. 7 (c) given above is quite different. For the limited purpose of execution, an award is treated as a decree of the Court. On this ground the decision in *Sambasiva Mudaliar v. Panchanada Pillai* (5) is distinguishable as it may be possible to contend that the use of the words "the proper process to be issued" and "in the same manner" connote only the bare machinery of the Court for putting the purchaser in possession. The other cases relied on by Cornish, J., in his judgment seem to me to have no bearing on the actual point for decision before me, and I think it unnecessary to deal with them. Mr. Sessa Ayyar brought to my notice the decision in *Raghavendra v. Industrial Bank, Gulegdud* (6) where Beaumont, C. J. doubted whether the award of the Registrar of Co-operative Societies under the Bombay Co-operative Societies Act of 1925 would ever become a decree of a Civil Court within the meaning of Art. 182, Lim. Act, but left the question open. It may be pointed out that the wording of the rule which the learned Chief Justice was dealing is different from the rule in the present case. The question is not, if I may say so with respect, whether the award becomes a decree of the Civil Court but whether the law of limitation governing the execution of a decree of a Civil Court is made applicable by statute by necessary implication. Both the lower Courts took the view that the decision in *Co-operative Credit Society v. Chinnaswami Udayar* (1) would not apply in view of s. 57-B of the Act which runs thus :

"The Registrar or any person empowered by him in that behalf, shall be deemed, when exercising any powers under this Act for the recovery of any amount by the attachment and sale or by the sale without attachment of any property, or when passing any orders on any application made to him for such recovery or to take some step-in-aid of such recovery, to be a Civil Court for the purposes of Art. 182, Sch. I, Lim. Act, 1908."

(6) 38 Bom. L R 927; 165 Ind. Cas. 512; A.I.R. 1936 Bom. 396; 9 R B 147.

In terms this section would not be applicable to an application for the enforcement of an award in a Civil Court as provided in r. 15, cl. 7 (c), but the object underlying the section in my opinion establishes beyond doubt that the Legislature intended by necessary implication in enacting the said cl. (c) that Art. 182, Lim. Act would apply to applications made in pursuance thereof, because the award has to be treated by a Court as a decree of that Court. The object in enacting s. 57-B is to have one uniform rule of limitation for the enforcement of decrees of Civil Courts and the decrees and awards and orders of a Registrar of Co-operative Societies and whether they are enforced by a Registrar or a Civil Court. It would be anomalous to hold that an award when enforced by a Registrar would be governed by Art. 182 but when enforced by a Civil Court is governed by Art. 181. In the result, the appeal fails and is dismissed with costs. Leave to appeal granted.

N.D.

Appeal dismissed.

LAHORE HIGH COURT

Execution Second Appeal No. 124 of 1939

May 18, 1939

DIN MOHAMMAD, J.

FIRM JETHU MAL-HARI PARSHAD

—FORBES-HOLDER—APPELLANT

versus

TELU—JUDGMENT-DEBTOR—RESPONDENT.

Res judicata—Objection by judgment-debtor that he is governed by custom in matter of succession, allowed by executing Court but disallowed by Appellate Court—In appeal High Court not going into question of custom but reversing lower Appellate Court's decision on other grounds—Plea that judgment-debtor, is governed by custom, if res judicata in subsequent suit.

Executing Court allowed the objection by the judgment-debtor that he was governed by custom in the matter of succession. On appeal, that finding was reversed by the District Judge. On appeal to the High Court, the High Court declined to enter into the question of custom but on other points reversed the findings of the District Judge and restored those of the executing Court :

Held, that it could not be fairly argued that any part of the District Judge's judgment had been left intact so as to make the findings arrived at by him binding on the parties. Consequently, the plea that the judgment-debtor was governed by custom could be reargued in subsequent suit.

Ex. S. A. from an order of the District Judge, Ambala, dated October 27, 1938.

Mr. Shamair Chand, for the Appellant.

Messrs Tek Chand and Roop Chand, for the Respondent.

Judgment.—The sole question involved in this case is whether the contention raised by the judgment-debtor that he is governed by custom in the matter of succession to land can be re-agitated in view of a previous decision against him. It is common ground that on a similar objection raised by the judgment-debtor, Lala Ram Kanwar, Senior Subordinate Judge, found that the judgment-debtor being a member of a dominant agricultural tribe and an agriculturist himself was governed by custom. The decree-holder preferred an appeal against this order and the District Judge, Mr. Henry, reversed the decision of the executing Court and came to the conclusion that the judgment-debtor was governed by Hindu Law. Thereupon, the judgment-debtor presented an appeal to this Court which came on for hearing before Tek Chand, J. The learned Judge declined to go into the question of custom as no certificate, as required by s. 41, Punjab Courts Act, had been obtained by the appellant. He, however, reversed the decision of the District Judge on other grounds and restored that of the executing Court.

Counsel for the appellant contends that inasmuch as Tek Chand, J., had not disturbed the finding arrived at by the District Judge that the judgment-debtor was governed by Hindu Law, that finding remained intact despite the fact that his whole judgment had been reversed and that of the executing Court restored. Counsel for the respondent on the other hand urges that the order of the District Judge merged in the order of the High Court and inasmuch as the original decision was restored by the High Court, the finding of the executing Court that the judgment-debtor was governed by custom stood. Neither party has referred me to any authority on the matter and the case therefore is one of first impression. In my view it cannot be fairly argued that any part of the District Judge's judgment has been left intact so as to make the finding arrived at by him binding on the parties. As soon as Tek Chand, J. set aside the judgment of the District Judge and restored that of the executing Court, all the findings arrived at by the District Judge, whether specifically disturbed by this Court or not, disappeared, leaving the findings of the executing Court alone in the field and, as remarked above, the finding on the question of custom was in favour of the judgment-debtor. I accordingly hold that there has never been any previous decision against the judgment-

debtor on this matter and that there is consequently no force in the plea of *res judicata* raised by the appellant. I accordingly dismiss this appeal with costs.

D.

Appeal dismissed.

ALLAHABAD HIGH COURT

Second Appeal No. 1972 of 1937

September 13, 1939

ALLSOP, J.

RAM CHANDER—DEFENDANT—APPELLANT
versus

Mst. RURE KUNWAR—PLAINTIFF

—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Art. 89—Suit against agent on basis of revocation of agency—Time, when begins to run

Under the Lim. Act, limitation begins to run when a cause of action accrues. It is obvious that it would be the right of the agent to claim that no cause of action on the basis of revocation could arise against him until the termination of his authority as an agent. In so far as the cause of action is the revocation of the agency, he could not be sued until he had received notice of such revocation. It follows, therefore, that the period of limitation would begin to run on that date and would extend for a period of 3 years.

S. A. from the decision of the Civil Judge, Meerut, dated August 10, 1937.

Mr. C. B. Agarwala, for the Appellant.

Mr. Shiva Prasad Sinha, for the Respondent.

Judgment.—This second appeal arises out of a suit against an agent for the recovery of money collected by him on account of his principal. The only question that had been argued is whether the suit was barred by limitation. It is not denied that Art. 89 of Sch. I to the Lim. Act applies to this suit. The only question is when the period of limitation began to run. If it so began to run on March 17, 1933, when according to the Court below notice of revocation of the agency was served on the agent, then the suit is within time. On the other hand, if it began to run on the date when the letter containing the revocation was consigned to the post, then the suit is barred. Learned Counsel has relied upon s. 201, Contract Act. He has also referred to the provisions of s. 20, which, he argues, give the agent a right as though the agency continued but do not burden him with any liabilities. His point is that the agent's rights are secured by s. 20, but the rights of the principal are terminated when the revocation becomes binding upon him under the provisions of s. 4, Contract Act. I do not think that it could possibly

have been the intention of the Legislature that an agent should be able to claim a right as such and at the same time repudiate liabilities. It is unnecessary to decide the question in this case because the principle to be applied is a very simple one. Obviously under the Lim. Act limitation begins to run when a cause of action accrues. It is obvious that it would be the right of the agent to claim that no cause of action on the basis of revocation could arise against him until the termination of his authority as an agent. In so far as the cause of action was the revocation of the agency, he could not be sued until he had received notice of such revocation. It follows, therefore, that the period of limitation would begin to run on that date and would extend for a period of 3 years. It is a finding of fact that the authority of the agent was terminated on March 17. There is no force in this appeal and I dismiss it with costs. Leave to appeal under the Letters Patent is refused.

8.

Appeal dismissed.

PRIVY COUNCIL

Appeal from the Calcutta High Court

October 30, 1939

LORD THANKERTON, LORD ROMER AND SIR

GEORGE RANKIN

JADUNATH ROY AND OTHERS—APPELLANTS

versus

PARAMESWAR MULLIOK AND OTHERS—
RESPONDENTS

Partition—Suit for—Mortgagee of undivided share who has purchased property in execution of his decree pending suit, if necessary party—Purchaser at execution sale under money decree and purchaser under mortgage decree, distinction—Rights of parties added after preliminary decree, if can be adjusted at time of final decree.

A partition necessarily affects the interest of a mortgagee of an undivided share, since after the partition his security is upon the divided share of the separate allotment. The mortgagee of an undivided share might be prejudiced if that share did not receive a proper allotment in severalty, and it is for the benefit of all other persons interested in the joint property that such a mortgagee should be bound by the allotment. Hence it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected. *Mohindra Bhoosun v. Sohee Bhoosun* (4) and *Khetterpal Sritirutno v. Khelal Kristo Bhattacharjee* (5), referred to. [p. 237, col. 1.]

While the purchaser at an execution sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, title and interest in the mortgaged subjects which the mortgagor had at

the date of the mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor-in-interest of the owner of the equity of redemption at the date of the sale. [p. 237, col. 2.]

If the mortgagee has proceeded to a sale pending partition, the purchaser would become a necessary party to the partition suit.

A partition suit, in which a preliminary decree has been passed, is still a pending suit and the rights of the parties who are added after the preliminary decree, have to be adjusted at the time of the final decree [p. 236, col. 2.]

A mortgagee of an undivided share obtained a decree against B, the son of the deceased mortgagor and purchased the property on January 11, 1930, and the sale was confirmed on February 19, 1930. In the meanwhile a partition suit was brought on August 30, 1929, to which B his mother and an unmarried sister were made parties. On October 1, 1929, a preliminary decree for partition was passed declaring the share of B subject to the charge for maintenance and other expenses of his mother and sister. The mortgagee was neither made a party nor was any decision given as to mortgagee's rights, in the decree. The mortgagee applied by applications, one made before execution sale and other after the sale but before confirmation, to be made party to partition suit and on appeal from their rejection, the High Court directed that they should be made parties "as from April 12, 1930, on which date their application was rejected, the proceedings taken before the said date, being binding upon them just as much as they would be binding upon their predecessor-in-interest." The mortgagee thereupon applied to set aside the preliminary decree so far as it declared charges upon the property but this was rejected in view of the High Court's order. The mortgagee then applied for separate allotment of his share and the allotment was made without making any charge on the property. The High Court set aside this order on the ground that in view of the previous order of that Court the preliminary decree could not be altered or modified.

Held, that the mortgagee owing to his purchase of the property was a necessary party and the previous order of the High Court need not be construed as holding that after the execution sale the ladies had the same rights against the purchasers as they had had against B's interest in the equity of redemption. The ladies' interest in the equity of redemption equally with B's must be regarded as having passed to the mortgagee. At no time was it correct to treat the mortgagee as mere assignee of B's interest. Before the sale his interest was as mortgagee and was not represented in the suit. After the sale when he was made party, his interest as complete owner was before the Court—an interest which at no time had belonged to B. At no time was it correct or sufficient to regard B as mortgagee's "predecessor-in-title"; upon any question as between B and other persons claiming to be interested in the equity of redemption, a decision charging or limiting his interest had no bearing upon the rights of the mortgagee whether before the execution sale or afterwards. The property purchased by the mortgagee could not therefore be charged with the maintenance of B's mother and sister.

Messrs. L. P. E. Pugh, K. C. and W. Wallach, for the Appellants.

Sir George Rankin.—By three English mortgages executed in 1923 and 1924 one Bhuvan Mohan Mullick (a Hindu governed by the Dayabhaga) mortgaged to appellant No. 1 and the father of the other four appellants his one-eighth share in certain immovable property. The capital sums secured amounted to Rs. 2,35,000. On April 24, 1925, he died intestate, leaving him surviving a widow *Sm.* Annabati Dassi, a minor son Biswanath and an unmarried daughter *Sm.* Parbati Dassi (also a married daughter who need not here be further mentioned). By the decree under appeal, which is dated January 28, 1937, it has been held by the High Court at Fort William in Bengal that the maintenance of the widow and unmarried daughter is a charge upon the interest of the mortgagees under the mortgages. This conclusion is *prima facie* opposed to the rights of the parties; indeed it does not in the end appear to have been doubted by the Courts in India that while the ladies would have a claim to a charge upon any property coming to Biswanath as heir to his father, the interest of the father's mortgagees was not such property and is not liable upon the death of the mortgagor to be burdened with the maintenance of his widow or daughter. In order to trace the steps by which a contrary result has been arrived at by the High Court, it will clearly be important to bear in mind throughout that the appellants' mortgages were all taken from Bhuvan Mohan in his lifetime and not from his son after his death.

The appellants brought a suit upon their mortgages in the High Court on June 7, 1926, impleading Biswanath. They obtained a preliminary decree on January 12, 1928, and a final decree for sale on January 21, 1929. On January 11, 1930, they purchased the mortgaged property at the execution sale and obtained a sale certificate on February 19, 1930, in respect thereof.

On August 30, 1929—some seven months after final decree and some five months before the execution sale—the partition suit, out of which the present appeal arises was brought in the Court of the Subordinate Judge, 24 Parganas. The one-eighth share which Bhuvan Mohan had mortgaged was his share in certain properties which had belonged to his grandfather Kunja Bihari Mullick. Kunja had died in 1849 leaving a will whereby, after giving certain pecuniary legacies, he

directed that the residue of his estate should go in equal shares to his three sons and a grandson by a deceased son. His fourth son was Pulin Behari, who died intestate on December 28, 1919, leaving him surviving two sons, Bhuvan Mohan and another. Hence Bhuvan Mohan had a one-eighth share in a number of properties which had belonged to his grandfather and by the mortgages of 1923 and 1924 he had incumbered his share in some (not all) of these properties. The partition suit was brought by Murari Mohan, a son of Kunja's eldest son. Biswanath was impleaded as defendant No. 6, Annabali, his mother, and Parbati, his sister, were defendants Nos. 13 and 15, respectively. The appellants were not made parties to the suit. By a written statement filed on behalf of Biswanath, Parbati and the widow, it was submitted that Biswanath's one-eighth share should be allotted to him subject to the claim of his mother and sister for maintenance. On October 1, 1929, a preliminary decree for partition was pronounced declaring the share of Biswanath to be "one-eighth subject to the charge for maintenance and other expenses of his mother, defendant No. 13, and marriage expenses and maintenance of his unmarried sister, defendant No. 15." Neither in the pleadings nor in the decree was any mention made of the mortgages to the appellants nor was any decision given with respect to the appellants' rights. The direction to the Commissioners of partition was a general direction to make the valuation and allotments of the properties "according to the aforesaid shares," though in the case of some of the shares other than Biswanath's, the decree provided for the maintenance of females being charged not on all the property allotted to each particular share but only on a sufficient part thereof.

On December 12, 1929 (before the execution sale), and also on January 14, 1930 (after the sale but before confirmation), the appellants applied to the Subordinate Judge that they might be made parties to the partition suit. By orders dated January 29, and April 12, 1930, the Subordinate Judge refused their request on the ground that it was not necessary at that stage to make them parties; but he directed the Commissioners of partition to hear the appellants' submission. This order was challenged in the High Court and on July 14, 1930, a Division Bench of the High Court set it aside directing that the present appellants should be added as

parties to the suit "as from April 12, 1930, on which date their application was rejected, the proceedings taken before the said April 12, 1930, being binding upon them just as much as they would be binding upon their predecessor-in-interest." The Subordinate Judge having amended the plaint on September 12, 1930, in accordance with this decision, the appellants (now defendants Nos. 17 to 21) on September 17 applied to him to set aside or amend the preliminary decree in so far as it declared charges upon the share of Biswanath in favour of his mother and sister. This application was by order dated February 23, 1931, refused on the ground that by virtue of the High Court's decision "the decree that was passed on October 1, 1929, is as binding upon them as upon their predecessor-in-interest and it is clearly not open to them to challenge anything that was done in relation to the proceedings in Court prior to April 12 last." The argument of the appellants' Pleader, "that it is not the defendant No. 6 who should really be treated as their predecessor-in-interest," was repelled on the ground that it was contrary to the language of the appellants' previous petitions and the appellants were reproached for seeking to evade the express terms of the High Court's judgment. On July 31, 1931, the appellants applied for separate allotment of their share to them and this was granted (November 21, 1931) without discussing the question of the charges in favour of Biswanath's mother and sister. The Commissioners of partition on January 17, 1934, made their final report allotting certain properties to the appellants but directing that these should remain charged as a security for the payment of the maintenance and other expenses of defendants Nos. 13 and 15. The appellants having objected to this direction, their objections were heard and were allowed by order dated May 8, 1934. This order was not passed by the same learned Judge who had previously dealt with the case but by his successor (Babu Kali Prasanna Bagchi). After pointing out that the claim of the ladies to have priority over the appellants was untenable in law by reason that the mortgages had been granted by Bhuban Mohan in his lifetime and not by Biswanath after his father's death, the learned Subordinate Judge noticed that this question had not been argued or considered by the High Court, and concluded that no order had been passed in the matter. He did not

think that the appellants were entitled to an order setting aside the preliminary decree and he regarded their previous application to that effect as ill-advised and rightly rejected. "But," he said, "a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties who are added after the preliminary decree have to be adjusted at the time of the final decree. The defendants Nos. 17 to 21 cannot ask for setting aside the preliminary decree but they can reasonably claim that at the time of the final decree they should get an allotment as purchasers and their rights should be adjusted." Accordingly he ordered that the properties allotted to Biswanath and those only should stand charged with the maintenance of his mother and sister, and not the properties allotted to the appellants. A final decree for partition was passed on May 12, 1934, in accordance with this direction. From this final decree Biswanath, his mother and his sister on June 28, 1935, appealed to the High Court, whose decree is dated January 28, 1937. The view taken by the learned Judges was that "by virtue of the order of this Court passed on July 14, 1930, the preliminary decree in the suit for partition passed on October 1, 1929, would not be allowed to be altered or modified in any way in the present proceedings for partition." They agreed with the views expressed in the order dated February 23, 1921, by the learned Subordinate Judge (Babu D. L. Sen Gupta) who had dealt with the application of September 17, 1930, to set aside or modify the preliminary decree, and considered that the appellants were seeking to nullify the effect of a decision *inter partes* by the High Court.

The final decree for partition as settled by the High Court is now before their Lordships on appeal but the appeal appears to turn solely on the High Court's order of July 14, 1930—a reported decision *Jadunath Ray v. Murari Mohan Mullick* (1) which must necessarily have effect upon the procedure adopted in partition cases by the Courts of the province and elsewhere. It is unfortunate that no appearance has been made by the respondents and no argument heard on their behalf with reference to that decision, but their Lordships cannot omit to examine it.

A partition necessarily affects the interest of a mortgagee of an undivided share,

(1) 35 C W N 296; 134 Ind. Cas. 307; A I R 1931 Cal. 594; Ind. Rul. (1931) Cal. 803.

since after the partition his security is upon the divided share or the separate allotment. For this reason some High Courts in India would appear to join such mortgagees as parties to the suit as a matter of course, and by some English authorities [cf. *Daniels Chancery Practice* (8th Ed.) p. 198] the practice is considered to be that while a mortgagee upon the whole estate is not a necessary party a mortgagee of one of the undivided portions would be a necessary party [cf. *Swan v. Swan* (2), *Sinclair v. James* (3)]. The practice in Bengal follows the lines laid down by Sir Arthur Wilson in 1800 in the case of *Mohindro Bhoosun v. Soshee Bhoosun* (4), where a person having a disputed claim to be a mortgagee from the plaintiff in a partition suit applied to be joined. In refusing the application, Sir Arthur Wilson said :—

"The question as between the plaintiff and the defendant is who is entitled to the property in dispute? To determine that question, it is not necessary that the mortgagees should appear; they will not be bound by any finding come to in their absence. In case of a decree for partition being made, the mortgagees should have leave to come in and attend the partition proceedings."

In 1894 Sale, J. in *Khetterpal Sritirutno v. Khelal Kristo Bhattacharjee* (5), stated the practice succinctly: "A mortgagee is not a necessary party to a partition suit but he may and frequently does obtain leave to attend the proceedings as a *quasi-party*". The mortgagee of an undivided share might be prejudiced if that share did not receive a proper allotment in severalty, and it is for the benefit of all other persons interested in the joint property that such a mortgagee should be bound by the allotment. Hence it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected, just as in other types of case a person interested only in the result of a particular account may be allowed to attend at the taking of that account, especially if it be in the interests of others that he should not thereafter dispute the result. It is a fundamental condition of this practice in partition cases in Bengal that the extent of the share should not be in dispute; on that assumption an important advantage of the practice is that it lightens the partition suit by avoiding

the necessity of deciding as to the existence and validity of the mortgages claimed over the undivided shares.

So far as regards the application made and decided in the present case before the execution sale had been confirmed, it is not necessary to examine or criticise the order of the learned Subordinate Judge. He may have been right in applying the ordinary practice and he had a discretion in the matter. But if he was right, he was right entirely because it was not necessary in order to safeguard the appellants' interests that they should be made parties, because without being parties to the suit they could be heard by the Commissioners of partition on the question of the allotment proper to be made to answer the one-eighth share over which they claimed to have security, and because as to all else, in Sir Arthur Wilson's words, "they will not be bound by any finding come to in their absence."

The learned Subordinate Judge's order of April 12, 1930 is, however, in a very different position. The effect of the sale under the mortgage decree was to divest Biswanath, his mother and his sister of all interest in the property comprised in the mortgages made by his father in 1923 and 1924. The ladies' interest was gone equally with his. Both his interest and theirs were derivative interests in the equity of redemption and arose to them only on the death of Bhuban Mohan in 1925. While the purchaser at an execution sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, title and interest in the mortgaged subjects which the mortgagor had at the date of the mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor-in-interest of the owner of the equity of redemption at the date of the sale. The position of the partition suit so far as regards the property now in question was that as a result of the execution sale the suit had become defective: there was no longer any party before the Court who had any interest in this property. It was to the interest of all other parties that the suit should be properly constituted and it was not within a judicial discretion to insist that the suit

(2) (1819) 8 Price 518; 22 R. R. 770.

(3) (1894) 3 Ch. 554; 63 L. J. Ch. 873; 8 R. 637; 71 L. T. 483.

(4) 5 O. 882.

(5) 21 O. 904 at p. 909.

should go on as regards this property behind the backs of the new owners. As Sale, J. had said in the case already cited: "If the mortgagee had proceeded to a sale pending partition, the purchaser would have become a necessary party to the partition suit." The learned Judges of the High Court were right therefore in directing that the appellants should be made parties. But the observation at the end of their judgment that "it goes without saying" that all proceedings taken before April 10, 1930, would be binding upon the appellants just as much as they would be binding upon "their predecessor-in-interest" is not easy to interpret or accept. It may have been directed only to this—that there was no need to invalidate what had already been done in the suit merely because the appellants had not been parties at the time, that partition could proceed under the preliminary decree, the appellants' rights being adjusted thereunder. Sale, J., on a question of the costs of partition, had harmlessly referred (in the case already cited) to the original mortgagor as predecessor-in-title of a purchaser at a mortgage sale meaning no more than that he was the person who had previous to the sale represented the share in question before the Court. He had held that the purchaser could not take advantage of the partition and at the same time repudiate all liability for costs of partition incurred before his purchase. After referring to this passage in the judgment of Sale, J., the learned Judges in the present case may have had similar matters in mind when they employed the same language, and the phrase "it goes without saying" suggests some such interpretation rather than a decision upon an important matter which had not been argued. But two Courts in India have interpreted the order made as a decision to the effect that because the preliminary decree of October 1, 1929, rightly held the mother and sister of Biswanath to have a charge for maintenance upon what he inherited, the appellants—at one time mortgagees from his father and now purchasers of the whole original interest of his father—were liable to maintain his mother and sister out of the property and that partition should be made accordingly. This interpretation runs some risk of doing an injustice to the learned Judges, but if their Lordships may assume against the appellants that the order of the High Court involved an erroneous opinion to the effect that the preliminary

decree of October 1, 1929, bound the mortgagees, it still remains that the appellants had since the passing of that decree become purchasers of the whole interest in the share and that no decision as to their rights as purchasers had at any time been given in the suit. Their Lordships are not prepared to hold that the order of July 14, 1930, must needs be construed, contrary to the rights of the parties, as holding that after the execution sale the ladies had the same rights against the purchasers as they had had against Biswanath's interest in the equity of redemption.

It is manifest that the ladies' interest in the equity of redemption equally with Biswanath's must be regarded as having passed to the appellants, if it is not regarded as having come to an end. At no time was it correct to treat the appellants as mere assignees of Biswanath's interest. Before the sale their interest was as mortgagees and was not represented in the suit. After the sale when they were made parties, their interest as complete owners was before the Court—an interest which at no time had belonged to Biswanath. At no time was it correct or sufficient to regard Biswanath as "their predecessor-in-title"; upon any question as between Biswanath and other persons claiming to be interested in the equity of redemption a decision charging or limiting his interest had no bearing upon the rights of the appellants whether before the execution sale or afterwards.

Their Lordships fully agree with the observation made by the learned Subordinate Judge who passed the final decree in his order of May 8, 1934, whereby he allowed the objections of the appellants to the Commissioners' report on the ground that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree.

In this view it becomes unnecessary to consider whether, if the High Court's order of July 14, 1930, was binding upon the Division Bench who heard the appeal from the final decree, it necessarily follows that it could not be disturbed on appeal to His Majesty in Council.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court, dated January 28, 1937, set aside, and the final decree of the learned Subordinate Judge restored.

The respondents Nos. 9, 15 and 17 who appealed to the High Court must pay the costs of the present appellants incurred in the High Court and of this appeal.

s. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. Hy. S. L. Polak & Co.

MADRAS HIGH COURT

Second Appeals Nos. 1180 of 1934 and 38 of 1935

November 7, 1935

WADSWORTH, J.

NARAYANA MUDALI AND OTHERS

— PLAINTIFFS—APPELLANTS

versus

PERIA KALATHI MUDALI AND OTHERS—
DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 9—Suit to establish right to observe Kappu Kattu and Diparathana, whether one of civil nature—Whether can be tried by Civil Court.

It is well-established that the Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. It is also established that a general right of worship either in a particular temple or outside is a civil right which can be claimed in the Courts. Generally speaking the rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed; nor will they prescribe the manner in which the worship is to be conducted. It is also the rule that when there is no obligation to perform an act of worship, there will be no civil right to claim honours or perquisites of nominal value which ordinarily accompany the voluntary act of worship. The position is different if the perquisites are attached to an office or an obligation; but when there is no obligation to render service to the deity, there is no legal right to claim any honorific return for the services rendered.

Kappu Kattu is an act of ritual, partly religious and partly appertaining to the caste, which is at the most a mere incident in a series of ritual observances making up the communal festival. There is no obligation upon the members of the community to take part in the festival or to have their young men decorated in a particular way by the priest who presides at the festival. In the same way Diparathana is a matter arising out of no legal obligation and forming the basis of no legal claim. A suit therefore to establish right to observe Kappu Kattu and Diparathana is not of a civil nature and Civil Court has no jurisdiction to entertain it. [p. 240, col. 2.]

(Case-law referred to.)

S. As. against the decree of the Sub-Judge, Vellore, in Appeal Suit Nos. 61 and 60 of 1934.

Messrs. T. V. Ramanatha Aiyar and M. Seshapathi, for the Appellants.

Messrs. K. Rajah Aiyar and M. Krishna Barathi, for the Respondents.

Judgment.—These two appeals both relate to claims made by the appellants who represent the minority section of the Senguntha community in a village, to establish rights of a religious or quasi-religious nature in a village temple. It is common ground that the temple is a public temple with an endorsement from public funds, but that the Senguntha community performs certain festivals therein, financing them by contributions levied from the community in proportion to their means.

There also appears to be no doubt that, owing to factions in the community, the plaintiffs discontinued their contributions and by way of retaliation, the majority excluded them from certain religious privileges. Second Appeal No. 1180 relates to an observance known as Kappu Kattu. Second Appeal No. 38 relates to another observance known as Diparathana. Kappu Kattu is a rite whereby the unmarried boys of the caste go through a sort of initiation which consists in the tying of a sacred string round the wrist as preparatory to their taking part along with others in the festival. Diparathana consists in the making of offerings of cocoanut, betel and fruits to the God on the occasion of the festival and the return to the person who makes the offerings of a portion or the whole of the offerings after they have been placed before the god.

The claim of the plaintiffs with reference to the Kappu Kattu is that they have a right to present all their boys for this ceremony without restriction and without any question of payment. This claim was resisted by the defendants on the ground that Kappu Kattu is conditional on payment of the contributions to the cost of the festival, that the number of boys is restricted and that the choice of those who are to take part in the rite involves a process of selection. With reference to the Diparathana, plaintiff's case was that it was also an absolute right independent of contributions and that it included a right to the return of the whole of the offerings. Defendants' case was that the right to make offerings belonged to the community as a whole unconditionally, but that those who did not contribute to the cost of the festival were entitled to receive back only half of what they offered.

The main question in this appeal is whether these rights are legal rights which can be the subject of adjudication by the

Civil Courts. There is no question here of claiming rights in connection with any office. The plaintiffs claim simply as members of the community, all the members of which are entitled to worship in a particular way; so that unless the plaintiffs can show that the refusal to them of the unlimited rights which they claim is the refusal of the right of worship, they have no case on which the Civil Courts can adjudicate. It is well-established that the Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. It is also established that a general right of worship either in a particular temple or outside is a civil right which can be claimed in the Courts. There is at least one case in which it has been held that the rejection of a worshipper's offerings is a denial of a civil right of worship in the temple. The well-known *Mandagapadi* case reported in *Thirumalai Alwar Aiyangar v. Srinivasachariar* (1), the correctness of which has been doubted in subsequent decisions, held that a right to perform exclusively a *mandagapadi* festival at one's own expense and to receive honours thereat is a civil right which can be decreed by the Courts. The logic of this decision is a little difficult to follow; but apparently it was based on the fact that this *mandagapadi* right had in fact been recognized as a proprietary right in the family which owned it and had been the subject of partition and otherwise treated as capable of exclusive ownership.

Generally speaking the rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed; nor will they prescribe the manner in which the worship is to be conducted. It is also the rule that when there is no obligation to perform an act of worship, there will be no civil right to claim honours or perquisites of nominal value which ordinarily accompany the voluntary act of worship. The position is different if the perquisites are attached to an office or an obligation; but when there is no obligation to render service to the deity, there is no legal right to claim any honorific return for the services rendered. Cases quoted before me on this subject are *Kooni Meera Sahib v. Meera Sahib* (2), *Kadirvelu Chetty*

v. Nanjundaivar (3), *Ramalingam Pillai v. Ponnusami Goundan* (4), *Thathachariar v. Srinivasaraghava Aiyangar* (5), *Srinivasa Thathachariar v. Srinivasa Aiyangar* (6) and *Perianan Servai v. Mahadevan Ambalam* (7).

Applying the principles laid down in these decisions to the present case, it seems to me fairly clear that no suit lies for either of the reliefs which are claimed. *Kappu Kattu* is an act of ritual, partly religious and partly appertaining to the caste, which is at the most a mere incident in a series of ritual observances making up the community festival. There is no obligation upon the members of the community to take part in the festival or to have their young men decorated in a particular way by the priest who presides at the festival. Their right to worship has not been denied. It is not, in my opinion, the duty of the Courts to prescribe the precise ritual to be followed in these voluntary observances nor the persons who are to take the leading part therein.

The suit for the *Diparathana* seems to me to stand on an even flimsier basis. The plaintiffs seek to establish in the Courts their right, at a festival in which no one denies their right to participate, to make offerings to the God and to receive them back intact. The remedy for the refusal of the presiding faction to allow the return of these offerings is to refrain from offering them. If the plaintiffs wish to get the honour and glory attaching to the making of offerings, that is a matter arising out of no legal obligation and forming the basis of no legal claim. It seems to me that both the suits should have been dismissed on the ground that they are not of a civil nature. I do not think it necessary to go into the further question whether assuming that a civil right to these privileges can be established, the non-payment of contributions provides a sufficient justification for the refusal of these privileges to the plaintiffs. In the result, therefore, both these appeals are dismissed with costs of the contesting respondents. One set in each appeal. Leave to appeal is refused.

N.-S.

Appeal dismissed.

(3) 3 L W 512; 35 Ind. Cas. 88; A I R 1917 Mad. 888.

(4) 38 L W 333; 145 Ind. Cas. 1014; A I R 1933 Mad. 728; 6 R M 188.

(5) (1938) 1 M L J 174; 173 Ind. Cas. 986; (1938) M W N 18; 47 L W 459; 10 R M 654; A I R 1938 Mad. 334.

(6) 9 M L J 355.

(7) 41 L W 752; 158 Ind. Cas. 375; A I R 1935 Mad. 679; (1935) M W N 520; 8 R M 258 (1).

(1) 31 M L J 758; 36 Ind. Cas. 568; A I R 1917 Mad. 903; 4 L W 562; (1916) 2 M W N 327.

(2) 30 M 15; 16 M L J 471.

NAGPUR HIGH COURT
Civil Revision No. 764 of 1937
October 20, 1938

GRUBER, J.

MEGHJI HIRJEE & Co.—PLAINTIFF

—APPLICANT

versus

THE BENGAL NAGPUR RAILWAY
COMPANY, LTD.—DEFENDANT

—OPPOSITE PARTY

Railways Act (IX of 1890), ss. 77, 41, 28, 30—Overcharges, claim for—S. 77, if provides remedy—"Overcharges", what are—Jurisdiction of Civil Court to investigate into Railway Company's liability created by statute—S. 77, if contemplates notice in anticipation—Limitation Act. (IX of 1903); Sch. I, Art. 62, s. 14—Claim for overcharges—Article applicable—Governor-General in Council, if Court—Proceedings before Railway Advisory Board, if can extend time under s. 14.

Section 77, Railways Act, assumes the possibility of claims for overcharge, but where such a claim lies in law then it cannot succeed unless notice within six months has been given. It does not provide a remedy under the Act; it only cuts down the remedy in cases where claims would lie according to the general law. [p. 242, col. 1.]

An overcharge is simply a charge of more than is permitted by law. The word should be interpreted in a wide sense *Haratchand v. G. I. P. Ry. Co.* (1), followed. [*ibid.*]

Chapter V of the Railways Act, provides the detailed remedies under ss. 72 to 82. Chapter V of the Act gives a particular remedy against the Railway Company for a liability created by the statute itself, and s. 41 excludes the jurisdiction of the Civil Court. It is to be inferred that, the litigant is confined to this remedy which has been specially provided. *Jagannath v. Khubā* (4), followed. *The Rhymney Railway Co. v. Rhymney Iron Co., Ltd.* (3) and *Manchester Sheffield and Lincolnshire Ry. Co. v. Denaby Main Colliery Co.* (3), referred to. [p. 242, col. 2.]

A notice claiming overcharges upto a certain date does not operate as notice for similar future claims. *Dhanpat Mal v. Agent, B. B. & C. I. Ry. Co.* (5) and *Shamul Haq v. Secretary of State* (6), distinguished.

The object of s. 77 of the Railways Act is to prevent stale and dishonest claims for loss and not as a means to enable the Railway authorities to deprive their customers of just dues; but the Railway authorities are entitled to have due notice of the total extent of the claim preferred against them. [p. 243, col. 1.]

A suit for overcharges against a Railway Company must be instituted within three years under Art. 62, Limitation Act.

For the applicability of s. 14, Limitation Act, an enquiry by the plaintiff must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. But where the plaintiff had a recourse to the Advisory Board which is not a Court, instead of to the Railway Commissioners, he cannot be said to have prosecuted his claim in good faith and hence in such a case s. 14 cannot extend time. [p. 243, col. 2.]

Similarly though the Governor-General in Council is the supreme executive authority in India, there is no statute constituting him a Court. *Har Shankar Partap Singh v. Ragharaj Singh* (8), *Muhammad*

Subhan Ullah v. Secretary of State (9) and *Laxman Ganesh v. Keshav Govind* (10), followed.

App. for revision of the decree of the Court of the Judge, Small Cause Court, Nagpur, dated September 15, 1937.

Mr. J. M. Thakar, for the Applicant.

Mr. P. N. Rudra, for the Opposite Party,

Order.—In this case before the Small Cause Court, Nagpur, the plaintiff-applicant Meghji Hirji and Co., Forest Contractor and fire-wood merchant, unsuccessfully sued the Bengal Nagpur Railway Company for a sum of Rs. 1,000 excess charges on wagons of fire-wood sent from time to time to Motibagh, Itwari and Nagpur Railway Stations from Talodhi Station on the Gondia-Chanda section of the railway. The plaintiff had first of all complained to the Governor-General-in-Council on January 16, 1933, that the rates charged by the Company were unfair and gave undue preference to his competitors at other stations. The Governor-General-in-Council referred the question for enquiry to the Railway Rates Advisory Committee whose printed report is Ex. P-1 on the record. The plaintiff's application is to be found at pp. 52 to 54. It complains that the Railway Administration has been giving unreasonable preference in contravention of s. 42 (2) of the Indian Railways Act. The applicants prayed that their complaint be referred under s. 28 of the Indian Railways Act to the Railway Rates Advisory Committee for decision about the rates and that the applicants be awarded damages of Rs. 7,795 on account of overcharges paid by them under protest from December 10, 1929, to December 10, 1932. The Committee found (p. 18 of the report) that undue preference had been given and undue prejudice caused to the applicant and that he was entitled to have the rates reduced. They indicated the ways by which this could be done. With regard to the applicant's claim for damages the Commissioners said (p. 2 of the report):

"It was explained to him that we are an advisory body and not a judicial body with legal powers, that our powers and rules of procedure were laid down in Government of India (Railway Department), Resolution No. 606-T, dated September 25, 1930, and that, as such, apart from other legal difficulties, we had no power to award damages, to grant injunctions, or to make recommendations to the Government in those respects. We should like to add, in this connection, that there is no provision in Chap. V of the Indian Railways Act, IX of 1890, for the awarding of damages by the Railway Commissioners."

The recommendations of the Committee

were accepted by the Governor-General-in-Council on January 9, 1935, and the Railway Company reduced its rates for the timber booked from this station.

Plaintiff's present claim is for overcharges on 75 wagons from April 22, 1932, to April 1, 1933, and on 112 wagons from April 1, 1933 to April 1, 1934. The claim has been dismissed on these grounds: first, it is barred under s. 41 of the Indian Railways Act; secondly, it is unmaintainable for want of valid notice; and thirdly, it is time-barred. It is contended in revision that the decision on all these three points is erroneous.

Plaintiff admits that by s. 41 of the Indian Railways Act, he could not have brought this suit "except as provided in this Act", but he says that s. 77 provides for the launching of his claim. Now s. 77 says that nobody shall be entitled to a refund of an overcharge unless his claim has been preferred in writing to the railway administration within six months from the date of the delivery of the goods. The section certainly assumes the possibility of claims for overcharge, but all it means is that where such a claim lies in law, then it cannot succeed unless notice within six months has been given. It does not provide a remedy under the Act: it only cuts down the remedy in cases where claims would lie according to the general law.

It may be mentioned incidentally that the lower Court is not satisfied that the claim related to an overcharge as contemplated by the section. That point is not pressed by defendant's Counsel, and I see no force in it. An overcharge is simply a charge of more than is permitted by law: *Harackchand v. G. I. P. Ry. Co.* (1). The word should be interpreted in a wide sense.

To return to s. 41, where there has been an omission by a railway administration in violation of Chap. V the remedy provided for in this Act is laid down in s. 28. When complaint is made to the Governor-General in Council he may refer the case to the Commissioners for decision, and in hearing such a case the Railway Commission shall have the powers which may be exercised in the hearing of an original civil suit by the High Court: (s. 30). Now the plaintiff did not follow this remedy. He applied for reference of his complaint to the Railway Rates Advisory Committee, not to the Railway Commission-

(1) A I R 1937 Nag. 77; 100 Ind. Cas. 406.

ers. The request was acceded to. This Advisory Committee could only express an opinion, it could not make an award or allow damages. If the matter had been referred to the Commissioners, the result might have been different. Analogous cases have arisen in England under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. C. 31). Section 6 of that Act reads:

"No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies or privileges of any person or company against any railway or canal or railway and canal company under the existing law."

Section 3 of the same Act provides the remedy of application to the Railway and Canal Commission which can issue injunction against the Railway Company for contravention of the Act. Section 6 means that that remedy must be followed although at the same time it says that the remedies under the existing law are not taken away. Although the section is differently worded, it corresponds in principle to s. 41 of the Indian Railways Act. If no claim for past damages can be brought in an ordinary civil suit under s. 6 of the English Act, I am unable to see how s. 41 of the Railways Act allows any greater latitude. In the case of *The Rhymney Railway Co. v. Rhymney Iron Co., Ltd.* (2), their Lordships followed *Manchester, Sheffield and Lincolnshire Ry. Co. v. Denaby Main Colliery Co.* (3), and held that the only remedy where it is alleged that there has been a breach of s. 2 of the Railway and Canal Traffic Act, 1854, is by application to the Railway Commissioners under s. 3, and the only remedy they can give has regard to the future, not the past, and therefore that past payments alleged to be overcharges by reason of being contrary to the Act could not be recovered by action. In the Indian Act, Chap. V provides the detailed remedies under ss. 72 to 82, Chapter V of the Act gives a particular remedy against the railway company for a liability created by the statute itself, and s. 41 excludes the jurisdiction of the Civil Court. It is to be inferred that the litigant is confined to this remedy which has been specially provided: see *Jagannath v. Khuba* (4) at pp. 178, 179. On this ground therefore I agree with the lower Court that the suit is not maintainable.

(2) (1890) 25 Q B D 146; 59 L J Q B 414; 63 L T 407; 38 W R 764.

(3) (1885) 14 Q B D 209; 54 L J Q B 103.

(4) 5 N L R 176, at pp. 178, 179; 4 Ind. Cas. 795.

The next question is about notice. Plaintiff admittedly gave notices on May 8, 1932, and September 27, 1932, and the lower Court holds that these are valid in respect of consignments up to September 27, 1932. A further notice was given on August 9, 1933 (Ex. P-3) after the Advisory Board had given their findings, but it is beyond six months from the date of delivery of the goods and so does not comply with s. 77. Plaintiff's contention is that it is a case of a continuing wrong, and secondly, that as the agent had knowledge and notice of his claim with regard to previous consignments, it was unnecessary to give a separate notice for the later consignments. I should say that there was a recurring wrong, no doubt, but it did not occur independently of plaintiff's volition. It only occurred because plaintiff continued to send the various consignments. Nor from the fact that overcharges up to a certain date were claimed would the Agent know that overcharges in future would also be claimed. Section 77 is mandatory and does not contemplate that a notice should be given in anticipation. I think that the claim for items subsequent to September 27, 1932, would fail on this ground also.

Plaintiff relies on *Dhanpat Mal v. Agent, B. B. & C. I. Ry. Co.* (5), which does not cover the point. It held that when notice was given to one railway and the other railway concern had taken notice of plaintiff's claim, made enquiries and replied to him, no separate notice was necessary. That was with regard to a claim which had accrued before that time: so, too, in *Shamsul Huq v. Secretary of State* (6). No doubt the object of s. 77 of the Railways Act is to prevent stale and dishonest claims for loss and not as a means to enable the railway authorities to deprive their customers of just dues; but the railway authorities are entitled to have due notice of the total extent of the claim preferred against them.

The third point is whether the claim is time-barred. I should first of all remark that as plaintiff bases his cause of action on the finding of the Advisory Committee, and as that Committee in para. 49 of its report says that

"nothing in this report should be taken as bearing on the applicant's contention that the rates in

force prior to that date causes undue prejudice to him"

it seems to follow that there is no cause of action for transactions prior to April 1, 1933. For deliveries subsequent to that date, the suit had to be brought within three years under Art. 62 of the Lim. Act, unless s. 14 of the Lim. Act applied to exclude the period of enquiry before the Advisory Committee. If s. 14 is to apply, this enquiry must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. The lower Court points out that the Advisory Committee had no judicial powers and so could not be a Court. It is now argued that the Governor-General-in-Council was a Court. But even if he were, the enquiry was conducted not by him but by the Advisory Board. Taking it, however, that as the enquiry was made under his orders, it and his acceptance of it formed one proceeding, is the Governor-General-in-Council a Court constituted by law? The word 'Court' has not been defined in the Civil P. O., but in *Manavala Goundan v. Kumarappa Reddy* (7), it has been held to mean "a place where justice is judicially ministered." In *Har Shankar Pratab Singh v. Raghuraj Singh* (8), it is pointed out that administrative officers are not Courts within the meaning of this section: see also *Muhammad Subhan-Ullah v. Secretary of State* (9) and *Laxman Ganesh v. Keshav Govind* (10). The Governor-General-in-Council is no doubt the supreme executive authority in India, but there is no statute constituting him a Court, nor has any ruling been brought to my notice which treats him as such.

It is said that by Chap. V of the Act the Governor-General-in-Council is invested with all the powers of a High Court. In my view that is not so. It is the Commissioners appointed by the Governor-General in Council that are given powers of a High Court under s. 30. It does not follow that the authority appointing a Court or appointing Commissioners having the powers of a Court is itself a Court. I need not go

(7) 30 M 326 at p 327; 17 M L J 313.

(8) 29 A 519; 34 I A 135; 4 A L J 497; 9 Bom. L R 757; 11 O W N 811; 17 M L J 354; 2 M L T 391; 10 O O 313 (P O).

(9) 26 A 382; A W N 1904, 51.

(10) 43 B 201; 48 Ind. Cas. 467; A I R 1918 Bom. 82; 20 Bom. L R 918.

(5) A I R 1928 Lah. 438; 110 Ind. Cas. 718.

(6) 37 O 1286; 128 Ind. Cas. 248; A I R 1930 Cal. 332; 52 O L J 260; Ind. Rul. (1931) Cal. 72.

on to consider whether by having recourse to the Advisory Board instead of the Railway Commissioners the plaintiff can be said to have prosecuted his claim in good faith according to s. 14 or not. I hold that s. 14 did not come in to extend time in the case.

The application for revision, therefore, fails and is dismissed with costs. Counsel's fee will be Rs. 30.

D.

[Application dismissed.]

SIND JUDICIAL COMMISSIONER'S COURT

Miscellaneous Appeal No. 24 of 1937

February 23, 1939

DAVIS, J. C. AND TYABJI, J.

Srimati KALAWANTIBAI—PLAINTIFF—
APPELLANT

versus

UDHAVDAS GIRDHARIDAS AND ANOTHER
—DEFENDANTS—RESPONDENTS

Jurisdiction—Administration suit—Jurisdiction how determined—Subject-matter valued for court-fee at sum below Rs. 5,000—First Class Sub-Judge returning plaint for presentation to proper Court—Appeal from order—Forum of

In suits for accounts and administration, the court-fees payable determine the jurisdiction of the Court and the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court but on the value of the subject-matter in dispute. [p 245, col 2]

Consequently, where in an administration suit the subject-matter valued for purpose of court-fee is below Rs. 5,000 and the plaint is returned by the First Class Sub-Judge for presentation to the proper Court, an appeal from his order lies to the District Court and not to the High Court. *Bai Amba v. Jivandas Dullabhram* (2), *Maganlal-Chunilal v. Kanchanlal Manchharam* (3) and *Nathasingh Mul Singh v. Manager, Incumbered Estates in Sind* (4), relied on.

Misc. A. against the decision of the First Class, Sub-Judge, Shikarpur, dated March 13, 1937.

Mr. Pahlaising B. Advani, for the Appellant.

Mr. Srikishindas H. Lulla, for the Respondents.

Davis, J. C.—This is an appeal from an order of the First Class Subordinate Judge at Shikarpur, in which he returned a plaint to the appellant on the ground that jurisdiction as determined by the value put by the appellant upon her plaint was the jurisdiction of the Second Class Court and not of a First Class Court. The plaintiff-appellant is a widow and she brought this suit

in the First Class Subordinate Judge's Court which was taken by all the parties concerned as a suit for administration of the estate of her deceased husband and was treated on that footing. She was the wife of one Gobindram, and defendant No. 1 was a brother of this Gobindram and defendant No. 2 was the son of this brother. She alleged in her plaint that Gobindram had separated from his brother and his brother's son, defendants Nos. 1 and 2, that the movable and immovable property was divided, the immovable property even divided by metes and bounds and that all the relevant entries were in the books in the possession of the defendants, that after the partition her late husband Gobindram and his brother defendant No. 1 commenced a banking business, that they went into partnership in the banking business in the name and style of Girdharidas Udhavdas at Shikarpur, Bombay, and other places in the Madras Presidency, and this partnership continued until Girdharidas's death, and that after his death the defendants have been carrying on the partnership business and they have wrongly possessed themselves of the business and property of her late husband Gobindram, even including her *stridhan* ornaments, and that they were unlawfully realizing all the outstandings collecting the rents of the property, the interest on cash and *hundies* and dividends on shares and generally intermeddling and administering the estate of her late husband Gobindram, she herself not being given a single pie for maintenance, and for the last three years she had been living on borrowed money. Therefore, she said that she brought, as she was entitled to, this suit for the administration of the estate, for accounts and for partition, and, what is loosely stated as a declaration. She goes on in her plaint to say that even if it be found that her late husband was not separate from the defendants even then she is entitled to have the estate administered and in the course of that administration, she should have awarded her a monthly allowance of Rs. 100 for her life and also arrears of maintenance.

Subsequently she abandoned her claim for arrears of maintenance because it was the opinion of the Court that the claim for maintenance could not be granted in an administration suit. But even so, the plaintiff was not fortunate in this litigation because finally the learned Subordinate Judge after having considered the case carefully came to the conclusion that as the

plaintiff had valued for the purpose of court-fees her claim at Rs. 400, so thereby she fixed the value for the purpose of jurisdiction at the same amount. This the learned Judge found in accordance with the provisions of s. 7, cl. (iv) (f), Court Fees Act and s. 8, Suits Valuation Act, and assuming that the suit was one essentially for the administration of an estate, the Judge's finding on this point would be correct. Therefore, after having given the plaintiff an opportunity to pay the extra court-fees, which opportunity was rejected by the plaintiff, he returned the plaint for presentation to the proper Court, and it appears that when the plaintiff through her legal adviser presented the plaint to the Second Class Court, she was again unfortunate, for it appears that it was taken there, as it was taken here, that in the plaint there was an alternative claim for maintenance and that the claim for maintenance being properly valued would bring the suit again out of the jurisdiction of the Second Class Court into that of the First Class Court which had already returned the plaint. Thus, the unfortunate plaintiff was in a position of being told by the First Class Court to go to the Second Class Court and being told by the Second Class Court to go to the First Class Court, and we think that blame must attach to those who drafted the plaint in such a manner as to give reasonable ground for this confusion and difficulty. We, therefore, while following the provisions of the law, do not wish to add to the difficulties of this unfortunate plaintiff and will make an order which we hope will enable her to have her claim when put forward in an honest and reasonable manner adjudicated upon and finally decided.

Now, so far as the rejection of the plaint by the learned First Class Subordinate Judge is concerned on the ground that the valuation of Rs. 400 for court-fees fixed the valuation of the jurisdiction, there is ample authority to show that on the basis that the suit is one essentially for the administration of an estate, the learned Subordinate Judge was right. The alternative plea for maintenance was not raised clearly. The prayer for a declaration is only loosely made and there is no prayer for a declaration in the proper sense of that word: *Ramkhelawan v. Surendra Sahai* (1). Firstly, there is the case in *Bai Amba v.*

Pranjiwandas Dullabhxram (2). In that case the plaint, though made up of several items was substantially one for the administration of the estate of certain minors, and there was included within that principal prayer other prayers for the taking of accounts, and for an order for the payment of any balance found due. But nevertheless Sargent, C. J. held that the case was essentially one for the administration of the estate and that although the value of the property in dispute was put by the plaintiff at Rs. 30,000, the plaint showed for the purpose of court-fees the value was put at Rs. 130. This the learned Chief Justice held decided the question of jurisdiction in the matter of the appeal which he held lay not to the High Court but to the District Court.

This case again was followed by a Bench of the Bombay High Court in *Maganlal Chunilal v. Kanchanlal Manohararam* (3). In the suit out of which that appeal arose, as in this suit, a preliminary issue was raised as to whether a proper court-fee had been paid, and the question as to which Court an appeal lay from the order of the Subordinate Court on that preliminary issue was discussed at length by Broomfield, J. in his judgment. It is true that in that case the Subordinate Court had held that the suit fell within the provisions of cl. (iv) (f) of s. 7, Court Fees Act, because it was a suit for accounts, but that makes no difference in principle, and in this case the learned Subordinate Judge found that this suit as an administration suit came under s. 7, cl. (iv) (f), Court Fees Act, in the same way. It is clear from that judgment and indeed, from the relevant sections of the relevant Acts, that in suits for accounts and administration the court-fees payable determine the jurisdiction of the Court and that the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court but on the value of the subject-matter in dispute.

It does not, for instance, follow that because a First Class Subordinate Court decides a dispute, gives judgment, passes a decree, an appeal lies to the High Court. An appeal lies to the High Court from the decision of the First Class Subordinate Judge if the amount or value of the subject-matter in dispute exceeds Rs. 5,000, and, indeed, this simple point has been decided by this Court in *Nathasingh Mulsingh v.*

(1) 19 B 198.

(2) 38 Bom. L.R. 754; 165 Ind. Cas. 954; - A I R 1936 Bom. 353; 9 B B 189.

(3) 16 Pat. 766; 172 Ind. Cas. 840; A I R 1938 Pat. 22; 18 P. L. T. 977; 10 R. P. 349; 4 B R 178.

Manager, Incumbered, Estates in Sind (4). There also appears no force in the argument of the learned Advocate for the appellant that an appeal would lie to this Court as a High Court and not to the District Court, because the question in dispute is whether the First Class Subordinate Judge was right when he said that it was for the Second Class Court to decide questions relating to property valued at Rs. 30,000, the value of the subject-matter in dispute. Also the learned Advocate is not correct when he argues that in all the decided cases which have been cited to us, the appeal was against the decree and not against an order directing the plaint to be returned to the plaintiff for presentation to the proper Court. Section 26, Bombay Civil Courts Act, which has been applied to Sind, provides only that in all suits decided by a Sub-Judge of which the amount or value of the subject-matter exceeds five thousand rupees, the appeal shall lie direct to the High Court; and s. 8, Sind Courts Act, which corresponds to s. 8, Bombay Civil Courts Act, provides that a regular appeal shall lie from the decisions of a Judge of a Subordinate Court to the District Court whenever such appeal is allowable under the Civil Procedure Code, or any other law for the time being in force in the province of Sind. Therefore, as in this case, the Subordinate Judge did not decide a suit, an appeal does not lie under the provisions of s. 26, Bombay Civil Courts Act, and s. 8, Sind Courts Act, is the appropriate section.

There appears indeed no reason why the procedure in this Province should differ from the procedure in Bombay. In the case already referred to in *Bai Amba v. Pranjirendas Dullabhram* (2), the plaint was returned in order that it might be properly stamped and the appeal was made against that order. In the same manner in the case referred to in *Maganlal Chunilal v. Kanchanlal Manchharam* (3), the appeal was against an order deciding a question raised as a preliminary issue; and in the case reported in *Jamnadas Vrijlal v. Chandulal Jamnadas* (5), the appeal was also against an order on a preliminary issue. Section 8, Suits Valuation Act of 1887, provides that where in suits other than those referred to in the Court Fees Act, 1870, s. 7, paras. v, vi and ix and para. x, cl. (d) (and this case does not

fall within any of those paragraphs), court-fees are payable *ad valorem* under the Court Fees Act, 1870 (and here the court-fees are payable *ad valorem* under Sch. I), the value as determinable for the computation for court-fees and the value for purposes of jurisdiction shall be the same. The Bombay Civil Courts Act and the Sind Courts Act and the Sui's Valuation Act must be read with the Court Fees Act. Section 7, cl. (iv) (f), Court Fees Act, provides that the amount of court-fee payable under the Act in suits for accounts which include suits for the administration of estate shall be computed according to the amount at which the relief sought is valued in the plaint.

Therefore it appears to us clear that the jurisdiction of the Court in this case was the Court of the Second Class Subordinate Judge because the relief sought was valued at Rs. 400 but that is upon the assumption that the suit is a suit for administration of the estate and that there is no such other alternative relief, sought as the learned Advocate for the plaintiff contends, as will bring this case out of the ambit of the rulings we have cited and will bring the suit within the jurisdiction of the First Class Subordinate Court. But this can only be upon an amendment of the plaint which the learned Advocate for the plaintiff, in order to find some means whereby she should not be sent vainly from one Court to another asks now to be allowed to do, so that it may be made clear that the plaintiff asks in the alternative for future maintenance at the rate of Rs. 100 a month which, he says, will, for the purpose of court-fee, be valued at maintenance payable for a period of ten years, and he will be prepared to pay the extra court-fee so as to enable the First Class Court to deal finally with this suit which had proceeded far before it before this question of court-fee and jurisdiction was raised. We do not think that we should here grant leave to amend the plaint so as to make clear this alternative prayer or decide that if the plaint be so amended, the suit would be one for the First Class Subordinate Judge to try, for, we think that these are questions which should be dealt with by the District Court which we have held is the appropriate Court to which an appeal against the order of the First Class Subordinate Judge dated March 13, 1937, will lie.

The learned Advocate for the appellant asks that the plaintiff be permitted, if she cannot find means to pay the court-fee for

(4) A I R 1936 Sind 190; 165 Ind. Cas. 742; 9 R S 107; 30 S L R 335.

(5) 39 Bom. L R 138; 162 Ind. Cas. 449; A I R 1937 Bom. 167; 1 L R (1937) Bom. 623; 9 R B 369.

maintenance at Rs. 100 a month, to ask leave to amend her plaint, reducing the amount of the maintenance claim. That question is a matter for the District Judge, and we have no doubt that he will take into consideration the difficulties of a widow seeking maintenance against her relations and will, so far as the law and a proper discretion permit, give the appellant permission to amend her plaint and pay such court-fees as will enable her to get her claim heard and decided. As the case now stands, the First Class Subordinate Judge here returned her plaint because he has held on the plaint as he has interpreted it, that the case is a case of a Second Class Court, but it would appear, the Judge of the Second Class Court has taken a different view and has held that if the suit is, as it would appear to him to be, a suit for maintenance, among other things, he has no jurisdiction to hear it for the value of the maintenance the plaintiff claims takes the case out of the jurisdiction of his Court. We think therefore that the proper order we should pass is that the appeal against the order dated March 13, 1937, of the Subordinate Judge is not within our jurisdiction and that the appeal should be returned to the appellant for presentation to the District Court, where the learned Judge will, we have no doubt, give all proper consideration to the prayer that she wishes to make that her plaint may be so amended that her claim can be heard and decided.

D. Order accordingly.

MADRAS HIGH COURT

Civil Revision Petition Nos. 1317

and 1561 of 1936

October 21, 1938

VARADACHARIAR, J.

PERUMAL NAICKEN—PETITIONER

versus

KONDAMA NAICKEN AND ANOTHER

—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. IX, rr. 7, 13, 6—Code, if in terms provides for application to set aside order declaring defendant ex parte—Courts in mofussil so declaring defendant—If can put restriction on him that he can only cross-examine opposite witnesses and not lead evidence himself—Whether can be debarred for filing written statement at that stage.

Though it is the practice in the mofussil to pass an order declaring a defendant *ex parte*, the Civil P. O., does not, in terms provide for an application to set aside that order. All that r. 7 of O. IX provides is that where the *ex parte* hearing of a suit has been adjourned, the defendant

may at any time before the disposal of the suit appear, and if he assigns good cause for his previous non-appearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is only when a decree has been passed that an application in terms to set aside that decree is contemplated in r. 13. [p. 248, col. 1].

In the absence of any express statutory provision as that found in O. VI, r. 2, of the Original Side Rules, Courts in the mofussil have no warrant to impose while declaring a person *ex parte*, a restriction on him to the effect that he is entitled only to cross-examine the witnesses on the other side and is not entitled to lead any evidence on his own side. Similarly there is no reason to deny him an opportunity to file a written statement at that stage. The mere fact that on the new statement, additional issues may have to be framed does not amount to re-opening anything that has happened already. Where by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why rr. 6 and 7 of O. IX should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. *Venkatasubbiah v Lakshminarasimham* (1), *Arumugam Pillai v. Kandasami Pillai* (3) and *Harba v. Chandrabhaga* (4), relied on.

O. R. P. under s. 115 of Act V of 1903 and section of 107 of the Government of India Act, praying the High Court to revise the Orders of the Court of the District Munsif of Karur, dated August 15, 1936, and September 10, 1936, and made in I. A. Nos. 747 and 866 of 1936, respectively in O. S. No. 512 of 1935.

Mr. L. V. Krishnaswami Iyer, for the Appellant.

Mr. P. J. Kuppanna Rao, for the Respondents.

Judgment.—These petitions have been filed by the 1st defendant in the lower Court, asking this Court to revise two orders passed by the lower Court in the following circumstances.

The 1st defendant did not appear on the first hearing date and he was declared *ex parte* on January 10, 1936. On July 30, 1936, he applied to have that order set aside alleging that summons had not been served on him. The lower Court was of opinion that this allegation was not true and accordingly dismissed that petition on August 15, 1936. O. R. P. No. 1317 has been filed against the order.

On August 18, 1936, the 1st defendant applied for permission to file a written statement and to take further part in the conduct of the case. The District Munsif was of opinion that in view of his former order dismissing his application to set aside the order declaring him *ex parte*, all that the 1st defendant could be permitted

to do was to cross-examine the witnesses on the other side without letting in any evidence on his side. He was also of opinion that the 1st defendant was not entitled to file a written statement at that stage. With these observations he dismissed the petition of August 18, 1936, and it is against this dismissal that O. R. P. No. 1561 of 1936 has been filed.

So far as O. R. P. No. 1317 is concerned, I do not feel justified in interfering with the order of the lower Court. The finding that the first defendant had been duly served is a finding of fact which I see no reason to set aside on any grounds open in revision. I may, however, add that though it is the practice in the *mofussil* to pass an order declaring a defendant *ex parte*, the Code does not, in terms provide for an application to set aside that order. All that r. 7 of O. IX, provides is that where the *ex parte* hearing of a suit has been adjourned, the defendant may at any time before the disposal of the suit appear and if he assigns good cause for his previous non-appearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is only when a decree has been passed that an application in terms to set aside that decree is contemplated in r. 13. With this observation, I dismiss O. R. P. No. 1317 with costs.

In O. R. P. No. 1561, however, I am unable to approve of the order passed by the lower Court. I am not able to gather exact ground on which the District Munsif thought the 1st defendant can only cross-examine witnesses on the other side but not lead any evidence on his side. There is no doubt a specific provision of this kind in the Original Side Rules—See O. VI, r. 2 of the Original Side Rules—but in the absence of any express statutory provision of this kind, Courts in the *mofussil* seem to me to have no warrant to impose such a restriction. Among the authorities referred to by the District Munsif, it is sufficient to refer to the judgment of Wallace, J., in *Venkatasubbiah v. Lakshminarasimham* (1). The principle enunciated by the learned Judge is that even a defendant who fails to show good cause for his previous non-appearance is not debarred from participating in the further conduct of the case and that the Original Order only covers the period during which the party was originally absent. He pro-

ceeds to point out that where good cause for non-appearance is shown, the party would be relegated back to the position which he would have been put in if he had appeared at the previous hearing, i. e., that proceedings which have taken place in his absence could be re-opened so as even to give him the opportunity of cross-examining witnesses that had been examined in his absence. This principle has generally been adopted in most of the reported cases—*Vide Pattanna Pattabirama Aiyangar v. Neeli Chetty* (2), *Arumugam Pillai v. Kandasami Pillai* (3) and *Harba v. Chandrabhaga* (4). The extreme view taken in Oudh is opposed to the preponderance of authority. On the above principle, I do not see any justification for drawing a distinction between the liberty to cross-examine the plaintiff's witnesses and the liberty to adduce evidence on his own side so far as future proceedings are concerned. I have, however, felt some hesitation as to whether or not the 1st defendant should be permitted to file a written statement. But I have come to the conclusion that there is no reason to deny him this opportunity. According to the test suggested by Wallace, J., it will not, in any sense, be re-opening what has happened in the past, if the 1st defendant should be permitted to file a written statement. I am informed that the other defendants have filed written statements and certain issues have been framed thereon. No evidence has yet been recorded. I also gather that the 1st defendant is not content with the issues raised already and that his proposed written statement might raise other issues. Assuming these facts to be true, it appears to me that what the 1st defendant asks for is nothing in contravention of what the authorities recognise him to be entitled to. The mere fact that on the new statement, additional issues may have to be framed does not amount to re-opening anything that has happened already. It has been stated that even while asking for permission to file the additional written statement the petitioner stated that he had his witnesses ready and that he did not require any adjournment on the ground of having to summon any witness. It may be that on the filing of the petitioner's written

(2) 51 M 597; 108 Ind. Cas. 297; 27 L W 361; A I R 1927 Mad. 1197; (1928) M W N 103.

(3) 106 Ind. Cas. 664; A I R 1928 Mad. 211; 39 M L T 656.

(4) A I R 1931 Nag. 122; 134 Ind. Cas. 268; 27 N L R 50; Ind. Rul. (1931) Nag. 140.

(1) 49 M L J 273; 91 Ind. Cas. 545; A I R 1925 Mad. 1274; (1925) M W N 647.

statement, the plaintiff might require time to get ready to meet the plea there raised; but there is an indulgence required by the plaintiff and not an indulgence required by the petitioner; I quite realise that the object of rr. 6 and 7 of O. IX will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stages of a litigation. But where by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why these rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. The rule laid down in *Venkatasubbiah v. Lakshminarasimham* (1) seems to me, if I may say so to adopt the golden mean and according to the test there laid down, I think this petition ought to be allowed.

The lower Court is directed to receive the written statement proposed to be filed by the 1st defendant and frame the necessary issues after giving sufficient opportunity to the other parties to file any additional pleadings that they may consider necessary in view of the 1st defendant's written statement. In the circumstances there will be no order as to costs in C. R. P. No. 1561.

N.-D.

Petitions allowed.

CALCUTTA HIGH COURT

Criminal Revisions Nos. 179 and 180 of 1939

March 13, 1939

EDGLEY, J.

GIANI MEHER SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 499, 514, 497 (1)—Bail bond for appearance containing undertaking for good behaviour—Forfeiture, legality of—Offence under s. 124-A, Penal Code (Act XLV of 1860)—Bail should not be granted.

The only condition contemplated by a bail bond is a condition for attendance in Court and a bail bond in which any other condition of the nature of condition as to undertaking for good behaviour such a bond, is included, cannot be regarded as a bond under the Code. The forfeiture of such a bond is therefore illegal.

The offence under s. 124-A, Penal Code, is a non-bailable one punishable with transportation for life. So the accused should not be released on bail at all.

Mr. Anil Chandra Roy Choudhury, for the Petitioner.

Mr. Probodh Chandra Chatterjee, for the Crown.

Order.—Criminal Revision No. 179 of 1939.—This Rule is directed against an order of the Additional District Magistrate of 24 Parganas dated December 19, 1938, in which he directed that a bond which had been executed by a man named Gyani Meher Singh should be forfeited and that he should pay a penalty of Rs. 200. It appears that the petitioner Gyani Meher Singh had been accused of an offence under s. 124-A, Penal Code. After his arrest he gave an undertaking to the effect that he would not deliver any speech and thereupon he was released on bail. The bail bond was executed by Gyani Meher Singh himself and Babu Girin Das Gupta executed the bond as a surety whereby he bound himself to forfeit to His Majesty the sum of Rs. 500 in the event of any breach of the bond. The conditions mentioned in the bond were to the effect that Gyani Meher Singh would give security for his attendance in Court on August 5, 1938, and on subsequent days fixed for the hearing of the case against him and further he undertook not to deliver any speech until the disposal of the case. It has been found by the learned Magistrate that Gyani Meher Singh in fact delivered a speech on November 7, 1938, and it was due to this fact that he held that the bond should be forfeited.

It is argued by the learned Advocate for the petitioner that the order of forfeiture is illegal because there is no provision in the Criminal Procedure Code whereby an undertaking for good behaviour such as that which has been embodied in the bail bond in this case can be so included. The object of bail is primarily to ensure the appearance of an accused person on a certain day and place. The offence in respect to which Gyani Meher Singh was accused was a non-bailable one punishable with transportation for life. Strictly speaking this man ought not to have been released on bail at all having regard to the provisions of s. 497 (1), Criminal Procedure Code, and doubtless had it not been for the fact that he was prepared to give an undertaking to the effect that he would not deliver any speech, he would never have been so released. The fact remains, however, that under the provisions of s. 499, Criminal Procedure Code, it is provided that before any person is released on bail or released on his own bond, a bond for such a sum of money as the Police Officer or the Court, as the case may be, thinks sufficient, shall be executed by such person and, when he is released on bail, by one or more sufficient

sureties conditioned that such person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the Police Officer or the Court, as the case may be.

It follows therefore that the only condition contemplated by a bail bond is a condition for attendance in Court and it further follows that a bail bond in which any other condition is included of the nature of condition with which we are now dealing, such a bond cannot be regarded as a bond under the Code Section 514, Criminal Procedure Code, which prescribes the procedure to be followed on the forfeiture of a bond only relates to bonds taken under the Code. In this view of the case, I do not think that the learned Magistrate had jurisdiction to forfeit the bond executed by the petitioner and his surety in this case, as that bond could only be regarded as a bond taken under the Code in so far as the bond is for the appearance of the petitioner in Court. In view of the undertaking which had been given by Gyani Meher Singh, I consider that the procedure which should have been adopted in a case of this sort would have been for the Police to bring to the notice of the Court the fact that there had been a violation of the undertaking in order that the Court might thereupon cancel the bail bond in the exercise of its inherent jurisdiction. It is also possible that by violating this undertaking the petitioner may have committed a contempt of Court. I am of opinion, however, that this undertaking, not to make any speech, should not have been imported into the bail bond and that the forfeiture of this bond was therefore illegal. The Rule must, accordingly, be made absolute and the order of the learned Magistrate dated December 19, 1938, is set aside.

Criminal Revision No. 180 of 1939

In view of my judgment in the other Rule, the Rule obtained by Girin Das Gupta must also be made absolute and the order of the learned Magistrate dated December 19, 1938 is also set aside.

D.

Rules made absolute.

PATNA HIGH COURT

Letters Patent Appeal No. 14 of 1938

April 25, 1939

HARRIES, O. J. AND WORT, J.

Musammam HALIMAN BIBI AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MUHAMMAD TAJAMUL HUSSAIN—

PLAINTIFF AND OTHERS—DEFENDANTS—

RESPONDENTS.

Landlord and tenant—Abandonment—Chandnadar transferring holding but remaining in possession of one room of house standing on holding with leave and license of transferee—There is abandonment and landlord can recover holding—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Suit dismissed—Appeal by one of defendants—No appeal by plaintiff but only cross-objection—Appellate Court, if can grant him relief

Where a chandnadar after executing a *kobala* transferring his holding to another person has remained in possession of a room in the house standing on the holding with the leave and license of the transferee, it cannot be said that the relationship between the transferor and the landlord continues. There is an abandonment of the holding by the chandnadar and hence the landlord is entitled to recover the holding. *Laley Dharnidhar v. Jugeshwar Mahton* (2), distinguished.

Where an action is dismissed and an appeal has been filed by one of the defendants, the Appellate Court has power under O. XLI, r. 33, Civil Procedure Code, to grant the plaintiff relief even if he has not preferred an appeal but has filed only cross-objection.

L. P. A. from the decision of Mohammad Noor, J., dated April 26, 1938.

Mr. G. C. Das, for the Appellants.

Mr. P. Misra, for the Respondents.

Wort, J.—This is an appeal from the decision of Mohammad Noor, J. arising out of an action for the recovery of .04 acre of land with a house thereon which at one time was in possession of one Bhajani Mahalik, who was chandnadar. The appellant before my brother, Mohammad Noor, was defendant No. 2. One of the questions of fact decided by the Courts below was whether the son of Bhajani Mahalik pre-deceased him or whether he survived him and in his turn became the chandnadar. It was originally recorded in the Provincial Survey, as I have already indicated, in the name of Bhajani Mahalik. In the current settlement it was recorded in the name of defendant No. 1, Sunai Bewa, in other words, widow of one Rama Mahalik, the son. On December 19, 1932, defendant No. 1, the widow, executed a *kobala* in favour of defendant No. 2. There were two other transactions a few days later, that is, on January 11, 1933, which have been held to be merely transactions to cover up

the true nature of the transaction of December 19. In other words, as I understand the judgments of the Courts below they were transactions, one of mortgage and the other of sale of a lesser area of the land, which, if taken at their face value, would lead one to suppose that the whole of the land, the subject-matter of the tenancy, had not been transferred, and having regard to the events which happened, this is explicable on the grounds that one of the contentions put forward by the defendant was that the holding had not been abandoned. One of the arguments on behalf of the parties in the Courts below was that this tenancy was a mere tenancy-at-will. There has been a finding against that based upon a decision of this Court in *Jahabaj Khan v. Srikrishna Dey* (1) where it was held that the tenancy was not a tenancy-at-will. Sub-s. (2) of s. 236, Orissa Tenancy Act, provides:

"Save as otherwise expressly provided in this Act, the incidents of the tenancy of a *chandnadar* shall be regulated by local custom or usage and his rent shall be liable to re-assessment on each revision of land revenue settlement."

The character of such tenancy can be gathered from the definition in s. 3, sub-s. (3):

"*Chandnadar*' means a person holding land which has been recorded as *chandna* in the course of a settlement of land revenue, and for which rent has been fixed for the term of that settlement, and includes also the successors-in-interest of such a person."

It is not too much to say from the definition in the section, to which I have already referred, that it is indicated that a tenancy of the character with which we are dealing in this case, at least subsists during the currency of a settlement. In the result, apart from the question which was argued before Mohammad Noor, J. as to the competency of the appeal before the first Appellate Court, the question which arose was whether defendant No. 1 could be held to have abandoned the holding.

The contention of defendant No. 2, the transferee relying, as I have already indicated, upon the other two transactions of January 11, 1933, was that the holding had not been abandoned, and apart from the transactions to which I have just made reference, reliance was placed upon the fact that the *chandandar*, defendant No. 1, after the transfer of December, 1932, remained in possession. In my judgment it is a contention that cannot be supported, because it has been found as a fact that

the possession of the defendant was merely the occupation of one room in the house, which stood on the land with the leave and license of the transferee, defendant No. 2. Even supposing if something more than a mere license is meant, it could, in the circumstances, be no more than a sub-tenancy and it would be impossible to contend that the relationship between the transferor, that is, defendant No. 1, and the plaintiff, the landlord, continued. The learned Advocate for the appellants has failed to state what other circumstances would be necessary for the purpose of holding that an abandonment has taken place. In my judgment, it is impossible to contend that the decision of the Court below that the holding or tenancy had been abandoned is wrong. If the holding was abandoned, there is no doubt and it is not seriously disputed that the plaintiff is entitled to recover.

One other question was raised which is not very strenuously pressed, is the question of competency of the appeal by defendant No. 2 in the first Appellate Court. The action in that Court had been dismissed for reasons which need not be stated. Defendant No. 2 appealed, and there was a cross-appeal or cross-objection by the plaintiff. Obviously the contention could not be that defendant No. 2 should not have appealed, but that the cross-objection of plaintiff No. 1 was incompetent and that there should have been a properly constituted appeal by him. Whether described as a cross-objection or as an appeal, it seems to me not to matter. The only question that could possibly have arisen would be whether coming with his cross-objection the plaintiff had paid the proper court-fees. No question arose as regards that and apart from the considerations which have been stated by the learned Judge in the Court below and those to which I have referred, it must be remembered that the Court had the widest powers under O. XLI, r. 33, Civil Procedure Code. In my judgment, there is no substance in the objection as to the competency of the cross-objection by the plaintiff. For the reasons which I have stated, in my opinion, the decision of Mohammad Noor, J. is right.

There is reference to one authority on the question of abandonment: *Laley Dharnidhar v. Jugeshwar Mahton* (2). The head-note says that

"ordinarily execution of an effective sale deed by

(1) 16 P L T 864; 160 Ind. Cas. 437; A I R 1936 Pat. 29; 15 Pat. 187; 2 B R 218; 8 R P 365 (F B).

(2) A I R 1935 Pat. 269; 156 Ind. Cas. 217; 8 R P 46.

the *raiyat* in favour of a stranger will constitute an abandonment of the holding by the *raiyat*. If afterwards the *raiyat* continues cultivating the land and has made arrangement for the payment of rent, he is not liable to be ejected, provided that he has not repudiated the relationship with his landlord."

Mohammad Noor, J. decided that where the *raiyat* who has executed a sale cultivates the land under the purchaser as an under-*raiyat*, the landlord entitled to a decree for ejectment against the purchaser. This was a case under the Bengal Tenancy Act. One of the contentions upon which the three appeals were decided, was that where provision has been made for the payment of the rent, it could not be held that there had been an abandonment. There can be no possible application of the decision to the facts of the present case for the reasons which I have sufficiently stated. In my judgment, the appeal fails and must be dismissed with costs. The stay order is discharged.

Harries, C. J.—I agree.

s.

Appeal dismissed.

BOMBAY HIGH COURT

Suit No. 406 of 1936

July 19, 1938

ENGINEER, J.

MULCHAND JIVRAJ—PLAINTIFF

—APPLICANT

versus

D. LOW AND ANOTHER—DEFENDANTS

—OPONENTS

Minor—Suit by next friend on behalf of minor dismissed with costs—No express direction in decree that next friend should pay costs—Estate of minor, if liable for costs—In execution of decree for costs property of minor attached—Minor paying money to raise attachment—Application for refund of such money, whether can be made by new next friend.

Where the plaintiff is a minor, and suit brought on his behalf by a next friend is dismissed with costs, if the Court intends the next friend to pay the costs, there should be an express direction to that effect. Where there is no such direction in the decree and the decree merely says: "The plaintiff's suit is dismissed and the plaintiff do pay to the defendants their costs of the suit", the decree must mean what it says and the estate of the minor plaintiff must remain liable to satisfy the costs. It is not necessary that the decree should state in so many words that the costs of the successful party are to be taken out of the estate of the minor losing party. *Turner v. Turner* (1) and *Slaughter v. Talbot* (2), distinguished, *Brijesurree Dossai v. Kishore Doss* (3), relied on. (p 251, col. 1.)

Where a suit filed on behalf of the minor plaintiff by his next friend is dismissed with costs and in execution of the decree for costs the property of the minor is attached and the minor pays

money to raise the attachment, an application for the refund of the money so paid, on the ground that the decree could not be executed against the minor is maintainable by the new next friend.

Mr. M. A. Jinnah, for the Applicant.

Mr. M. C. Setalvad, Advocate-General for the Opponents.

Judgment.—This is a Chamber Summons taken out on behalf of the minor plaintiff for an order that the Sheriff of Bombay do refund to him certain moneys paid to the Sheriff under protest in order to raise an attachment brought on certain goods belonging to the minor plaintiff. The plaintiff's contention is that the decree is not one which can be executed against him. The suit was filed on behalf of the minor plaintiff by his next friend Umedmal Genaji. The suit was dismissed with costs. The decree as drawn up says:

"The plaintiff's suit is dismissed and the plaintiff do pay to the defendants their costs of the suit when taxed and noted in the margin hereof."

In execution of this decree for costs, the defendants got attached certain goods belonging to the minor plaintiff in the business which he now carries on through a *munim* who is other than the original next friend. The present application is made on behalf of the plaintiff by his present *munim* as his new next friend. It is contended on behalf of the defendants that the summons is misconceived as the application cannot be made on behalf of the plaintiff by anybody else except the original next friend. I cannot accept that submission. The suit is at an end, and in any event, it certainly cannot be expected that the original next friend should come forward and say that the estate of the minor plaintiff is not liable but he himself is personally liable. The present application has nothing to do with the suit itself and the present next friend has made an affidavit stating that he has no interest directly or indirectly adverse to the minor applicant. I do not see any reason why the present application cannot be made by the new next friend. On the merits of the summons, the contention on behalf of the plaintiff is that whoever might be liable for the costs of the defendants, the decree taken in connection with the judgment shows that the minor is not liable. In the affidavit in support of the summons, the contention is put in these terms:

"The remedy of the defendants for realization of their costs is against the said Umedmal Genaji, the next friend who in law is liable to the defendant for payment of the costs and not the said Mulchand Jivraj nor his properties."

The affidavit alleges that the conduct of Umedmal Genaji in the suit was improper, that his evidence was disbelieved by the learned Judge who tried the suit and that Umedmal Genaji is not even entitled to look to the minor's properties in respect of his liability for costs of the defendants. The question is really one of construction of the decree. There is no doubt that a minor cannot be made personally liable for the costs of the suit. It is equally clear that where the plaintiff's suit is dismissed with costs, the Court generally directs the next friend to pay the costs either without prejudice to his right to have recourse to the estate of the minor or without having such recourse if the next friend's conduct has not been proper. In this case the order does not say that the next friend should pay the costs. All that the decree says is that the plaintiff do pay the costs of the defendants. The argument for the plaintiff falls into two parts. First it is contended that in a decree of this kind it is the next friend who is liable to pay the costs, and, secondly, that in any event even if the next friend cannot be held liable on the construction of the decree as it stands, the minor cannot be liable and that the decree so far as the payment of costs is concerned, is abortive. Two decisions were cited in support of the first submission. They were *Turner v. Turner* (1) and *Slaughter v. Talbot* (2). In those cases the order simply was that the action be dismissed with costs, and it was held that under a judgment in that form, proceedings could be taken against the next friend for recovering the costs. In those cases there was no express direction that the plaintiff should pay the costs, and the next friend was considered liable to satisfy a decree in that form. Subsequent decisions, however, show the necessity of the decree providing expressly for payment of the costs by the next friend. In *Harrison v. O'Donnell* (3), judgment was entered for the defendant with costs, and an application was subsequently made to amend the certificate of judgment by adding in the judgment the words that the next friend should pay the costs. In delivering the judgment allowing the amendment, the learned Judge observed as follows (p. 104)*:

"As an infant was not liable for costs, it might well be argued that the judgment as delivered and as recorded in the associate's certificate, amounted

(1) (1726) 2 Str. 708.

(2) (1730) Willes 190.

(3) (1919) W N 104.

*Page of (1919) W. N. — [Ed.]

to a direction that the costs should be paid (to the defendant) by the (plaintiff's) next friend; but it was a better and safer practice that the Judge, when delivering judgment, should be asked to deal in express terms with any question that might arise as to the liability of the next friend in reference to costs."

It will be noticed that in this case the judgment had not been perfected before the application for amendment was made. In a similar case, *Hulbert v. Thursten* (4), an application for insertion of the words that the next friend should pay the costs was refused because the judgment had been drawn up and perfected. In *In re Picton; Picton v. Picton* (5), as the order was not drawn up, an application to have the order amended so as to make the next friend pay costs without prejudice to his right against the minor's estate was allowed. In making the order, the learned Judge observed that he did not intend to make an abortive order. It is these words which are relied on on behalf of the plaintiff in support of the submission that unless the order specifically directs the costs to come out of the estate of the minor, an order cannot be executed. I do not think that the submission is correct. One does not know what the position was in that case. It may be that the minor had admittedly no property and the order would therefore be abortive. In any case there is high authority for the proposition that an order can be made simply in terms that the minor plaintiff do pay the costs. I will refer to those authorities presently.

In *Brijessuree Dossia v. Kishore Doss* (6), where the decree did not in express terms say that the next friend was to pay the costs, execution proceedings taken against the next friend were set aside. It was pointed out that the rights of the parties depended upon the terms of the decree. It was argued on behalf of the plaintiff that in this suit the decree does not make it quite clear that the learned Judge intended that the costs of the defendants were to be recovered out of the estate of the minor plaintiff, and that therefore the execution proceedings taken cannot be sustained. In my opinion, the decree is quite clear and it directs the minor plaintiff to pay the defendants' costs. Undoubtedly such a decree does not entail any personal liability on the minor; but there is no reason why under a decree in this form the defendants cannot proceed against the estate of the minor as they have done. It

(4) (1931) W N 171.

(5) (1931) W N 254.

(6) 25 W R 316.

is not necessary that the decree should state in so many words that the costs of the successful party are to be taken out of the estate of the minor losing party. The Court of Appeal in *Slingsby v. The Attorney-General* (7), made an order directing the infant and his guardian to pay the costs both in the Court of Appeal and in the Court below. The case went up to the House of Lords and the decision of the Appeal Court was confirmed. But as regards the costs of the appeal to the House of Lords, it was ordered that the next friend should pay the costs. Again in *Elumalai Naicker v. Kuppammal* (8), the Court of Appeal made an order allowing the successful respondents to recover their costs from the next friend or the minor appellant as they chose.

I cannot, in these proceedings, go into the alleged misconduct of the next friend in the suit and conjecture whether the Court did or did not mean that the minor's estate should be liable for the costs. I can only go by the decree as it stands. There is nothing in the judgment itself which militates against the construction which I put on the decree. The judgment is that the suit is dismissed with costs. That is the form of the judgment usually adopted whether the plaintiff is an adult or a minor. But where the plaintiff is a minor, if the Court intends the next friend to pay the costs, there should, in my opinion, be an express direction to that effect. In the absence of such direction, the decree must mean what it says and the estate of the minor plaintiff must remain liable to satisfy the costs. Summons dismissed with costs. Costs to be paid by the present next friend. Counsel certified.

B.

Summons dismissed.

(7) (1916) 32 T L R 364.

(8) 53 M 716; 128 Ind. Cas. 156; A I R 1931 Mad. 249; 58 M L J 623; (1930) M W N 289; Ind. Rul. (1931) Mad. 12.

PATNA HIGH COURT

Appeal No. 747 of 1938

August 11, 1939

AGARWALA, J.

KHEDU MAHTO AND OTHERS—**APPELLANTS***versus***KHONKA MAHTO AND OTHERS—****RESPONDENTS**

Evidence Act (I of 1872), s. 35—Suit to eject defendants on ground that they were under-raiyats of plaintiffs—In Khanapuri proceedings which preceded finally published Record of Rights, one of plaintiffs

on behalf of all was stated in decision of Khanapuri Officer to have admitted that predecessors-in-interest of defendants were co-sharers—Admissibility of such statement.

A suit was instituted to eject the defendants on an allegation that they were under-raiyats of the plaintiffs. The defence was that the defendants were not under-raiyats but co-sharers with the plaintiffs. In the finally published Record of Rights, the predecessors of the defendants were recorded as under-raiyats in respect of the disputed land. But in the Khanapuri proceedings which preceded the finally published Record of Rights, M, one of the plaintiffs, was stated in the decision of the Khanapuri Officer to have admitted before him that the predecessors-in-interest of the defendants were co-sharers. At that time M was acting on behalf of all the persons jointly interested in the land in dispute.

Held, that the admission contained in the decision of the Khanapuri Officer was admissible. Furthermore, even if the decision of the Khanapuri Officer were inadmissible for proving the truth of the admission made by M before the Khanapuri Officer, it would still be admissible for the purpose of proving that M made such a statement. *Krishnasami Ayyangar v. Rajagopala Ayyangar* (2), *Collector of Gorakhpore v. Ram Sundar Mal* (3) and *Chand Roy v. Bhagwati Charan* (5), relied on. *Ram Parkash Das v. Anand Das* (4), distinguished.

A. from the appellate decree of the Sub-Judge, Purulia, dated May 26, 1938.

Mr. R. S. Chatterji, for the Appellants.

Mr. N. N. Roy, for the Respondents.

Judgment—This is an appeal by the plaintiffs from a decision of the Subordinate Judge of Purulia reversing a decision of the Muusif. The appeal arises out of a suit to eject the defendants on an allegation that they were under-raiyats of the plaintiffs. The defence was that the defendants were not under-raiyats but co-sharers with the plaintiffs. The Court below has accepted the defence and dismissed the plaintiffs' suit. This decision is challenged by the appellants on the ground that the Court has acted on inadmissible evidence. The evidence objected to is a decision of the Khanapuri Officer in the course of the settlement in 1903. In the finally published Record of Rights, the predecessors of the defendants were recorded as under-raiyats in respect of the disputed land. But in the Khanapuri proceedings which preceded the finally published Record of Rights, one of the present plaintiffs, Jhari Mahto, is stated in the decision of the Khanapuri Officer to have admitted before him that the predecessors-in-interest of the present defendants were co-sharers. It is this admission contained in the decision of the Khanapuri Officer which is challenged as inadmissible. In *Parbutty Dassi v. Purno*

Chunder Singh (1) the plaintiff who was sued for possession of a fishery sought to put in evidence an admission alleged to have been made in a previous suit by the defendants' predecessors in title in a written statement filed in that suit. The only evidence of the admission was the recital from the pleadings contained in the preliminary portion of the decree in the final suit. It was held that the statement in the decree was evidence of the admission under s. 35, Evidence Act. The next case on the point is *Krishnasami Ayyangar v. Rajagopala Ayyangar* (2). That was a suit for partition of family property in which it became necessary for the plaintiff to prove that his grandfather had been adopted by A. He sought to prove this fact by judgments in which it was stated that A's brother who was the grandfather of defendant No. 1 had sued to recover moneys due to A, alleging that the adopted son was an infant living under his protection. It was held that these judgments were admissible in order to prove the statement made by the predecessor-in-title of the party against whom they were sought to be used. This case was referred to by the Privy Council in *Collector of Gorakhpur v. Ram Sundar Mal* (3) at p. 165. With reference to the Madras case, their Lordships said:

"In *Krishnasami Ayyangar v. Rajagopala Ayyangar* (2) a statement amounting to an admission which was contained in a judgment was received in evidence under s. 35 as an entry in a record made by a public servant in the course of his duty. There is much to be said for this view of s. 35. In India judgments have to be in writing and signed by the Judge and the original judgments and decrees are records of the Court and retained in the record room the parties being supplied with certified copies only."

Now, the question before the Privy Council was whether an admission contained in a pedigree attached to a decree in a former suit was admissible against the successor-in-interest of the person on whose behalf the pedigree had been admitted in the former suit. Their Lordships held that the pedigree attached to the decree was admissible for the purpose of proving the admission relied upon. On behalf of the appellants reference was made to the decision of the Privy Council in

Ram Parkash Das v. Anand Das (4). The question in dispute between the parties in suit case related to the right to succeed to an *asthal*, it being alleged that one of the claimants was debarred by reason of his being a married man. This was sought to be proved by a statement with regard to it in the judgment of the Criminal Court. The Privy Council held that the judgment was inadmissible for this purpose. That case was distinguishable from the cases already referred to in this respect that the person who made the statement in that case was a stranger to the parties before the Privy Council. Their Lordships, therefore, there said that the criminal proceedings were irrelevant in the case before them. In the case that is before me not only is Jhari Mahto himself the plaintiff, but from the decision of the Khanapuri Officer it appears that he was, at the time, acting on behalf of all the persons jointly interested in the land in dispute. I, therefore hold that the decision of the Court below cannot be challenged on the ground of inadmissibility of evidence. Furthermore, even if the decision of the Khanapuri Officer were inadmissible for proving the truth of the admission made by Jhari Mahto before the Khanapuri Officer, it would still be admissible for the purpose of proving that Jhari Mahto made such a statement, and when that fact is admissible, the further fact, that Jhari Mahto himself being the plaintiff in the present litigation did not venture into the witness box in support of his case that the defendants are under-*raiyats* could not but impress the Court of fact unfavourably with regard to his claim. It is evident from the judgment of the Court below that that Court was very unfavourably impressed by the fact that Jhari Mahto did not offer himself for cross-examination. Under these circumstances, even if the evidence objected to were inadmissible, I am not prepared, in second appeal, to hold that the rejection of that evidence would have made any difference to the decision of the Court below.

Finally, reference may be made to the decision in *Chand Ray v. Bhagwati Charan* (5) that the proceedings before the survey authorities prior to the publication of the Record of Rights are admissible for the

(1) 9 O 586.

(2) 18 M 73.

(3) A I R 1934 P O 157 at p. 165; 150 Ind. Cas. 545; 56 A 468; 61 I A 286; 7 R P O 1; 11 O W N 889; 40 L W 217; (1934) A L J 779; 67 M L J 274; 15 P L T 531; 60 O L J 67; (1934) M W N 751; 36 Bom. L R 867; 38 O W N 1101 (P O).

(4) 43 I A 73; 33 Ind. Cas. 583; A I R 1916 P O 256; 43 O 707; 20 O W N 802; 14 A L J 621; (1916) 1 M W N 466; 31 M L J 1; 18 Bom. L R 490; 3 L W 556; 24 O L J 116; 20 M L T 267 (P O).

(5) 2 Pat. 814; 81 Ind. Cas. 326; A I R 1924 Pat. 248.

purpose of rebutting the presumption which attaches to the finally published record. The appeal is dismissed with costs.

s. *Appeal dismissed.*

CALCUTTA HIGH COURT Special Bench

First Appeal No. 87 of 1937; F. A. No. 108 of 1938; F. M. A. No. 110 of 1938; F. A. No. 306 of 1937; F. M. A. Nos. 98 and 146 of 1938; S. A. No. 877 of 1936; S. A. No. 714 of 1937; M. A. No. 115 of 1937; S. M. A. No. 164 of 1938; Civil Revision No. 1405 of 1938 and F. A. No. 73 of 1937

July 10, 1939

DERBYSHIRE, C. J., NASIM ALI AND
R. C. MITTER, JJ.

KHIRODE C. GHOSE AND OTHERS—
APPELLANTS

versus

NARENDRA N. SANYAL AND OTHERS—
RESPONDENTS

Bengal Agricultural Debtors Act (VII of 1936), ss. 32 to 36—"Civil Court," if includes High Court

The expression "Civil Court," in Bengal Agricultural Debtors Act, does not include the High Court.

Messrs. Apurba Chandra Mukherjee (in No. 87), Jatindra Mohan Choudhury (in Nos. 108 and 110), Phani Bhusan Chakravarty (in No. 306), Panchanon Ghose (in No. 96), Chandra Sekhar Sen (in No. 146), Atul Chandra Gupta (in No. 877), Narendra Kumar Das (in No. 744), Phani Bhusan Chakravarty (in No. 115), Nripendra Chandra Das (in No. 164), Jitendra Kumar Sen Gupta (in No. 1405), and Amarendra Nath Bose and Dharendra Krishna Roy, (in No. 73), for the Appellants.

Messrs. Phanindra Kumar Sanyal (in No. 87), Satindra Nath Roy Choudhury (in Nos. 108 and 110), Nripendra Chandra Das (in No. 306), Abinash Chandra Ghose (in No. 96), Anil Kumar Das Gupta (in No. 146), Jatindra Mohan Choudhury and Bireswar Chatterjee (in No. 877), Rohini Binode Rakshit (in No. 744), Asok Chandra Sen (in No. 115), Jatindra Mohan Ghose (in No. 164), Bhupendra Kishore Bose (in No. 1405) and Paresh Lal Shome (in No. 73), for the Respondents.

Derbyshire, C. J.—In *Narsing Das Tansukdas v. Chogemul and another* (1), which was heard before a Special Bench consisting of myself, Lord-Williams, Bartley, Nasim Ali and Mitter, JJ., in December and (1) 43 O W N 613; 183 Ind. Cas. 113; A I R 1939 Cal. 435; 69 O L J 468; 12 R O 129; 1 L R (1939) 2 Cal. 98 (F B).

January last, judgment was given on March 31 of this year. The view of myself, Bartley and Nasim Ali, JJ. was that the words "Civil Court" in the Bengal Agricultural Debtors Act, 1935, did not include the High Court. That was the basis of the decisions that we gave. Lord-Williams and Mitter, JJ. differed on that, but were of opinion that if the words "Civil Court" did include the High Court, then the Act was *ultra vires* of the local Legislature. In my opinion we are bound by the majority decision in that case that the words "Civil Court" in the Bengal Agricultural Debtors Act, 1935, do not include the High Court. The consequence is that the notices which have been received in the cases brought before us are no reason for making any stay in the appeals or in the revision case. We accordingly order that the appeals and the revision case be heard in the ordinary course.

Nasim Ali, J.—I agree.

R. C. Mitter, J.—I agree.

D. *Order accordingly.*

ALLAHABAD HIGH COURT Criminal Revision No 431 of 1939 September 4, 1939

MULLA, J.

CHIRANJI LAL—APPLICANT
versus

EMPEROR—OPPOSITE PARTY

U. P. Public Gambling Act (III of 1867), s. 3—*Prosecution must prove commodity in respect of alleged gambling.*

It is incumbent on the prosecution under the law to prove by definite evidence the commodity in respect of which the alleged *satta* gambling was going on. The vague and general statement by the prosecution witnesses that *satta* gambling was going on proves nothing in law. *Shyam Sunder v. Emperor*, Cr. R No 263 of 1932, *Shyam Sunder v. Emperor*, Cr. R No. 173 of 1931 and *Sarnimal v. Emperor*, Cr. R. No. 699 of 1925, relied on.

Cr. R. from an order of the Sessions Judge, Agra, dated February 24, 1939.

Mr. K. D. Malaviya, for the Applicant.

The Deputy Government Advocate, for the Crown.

Order.—This is an application in revision by one Chiranji Lal who has been convicted by a First Class Magistrate in a summary trial of an offence under s. 3, Gambling Act. From the judgment of the learned trying Magistrate which is the only record in the case, it appears that the charge against the applicant was that he was keeping his

shop as a gaming house for *satta* gambling. There is nothing in the judgment of the learned Magistrate to show what constituted the alleged gambling and what was the commodity in respect of which the gambling was going on. Several points of fact and law have been taken by the learned Counsel for the applicant in challenging the conviction; but the most important one which is sufficient for deciding this application is that it was incumbent for the prosecution under the law to prove by definite evidence the commodity in respect of which the alleged *satta* gambling was going on. The vague and general statement by the prosecution witnesses that *satta* gambling was going on proved nothing in law. The argument is obviously sound and must prevail. It is fully supported by several decisions of this Court, *e. g.*, *Shyam Sunder v. Emperor*, Criminal Revision No. 263 of 1932, *Shyam Sunder v. Emperor*, Criminal Revision No. 173 of 1931 and *Sarnimal v. Emperor*, Criminal Revision No. 699 of 1925. It appears that these cases have not been reported and that accounts for the lower Courts going wrong in this matter. The legal position is, however, perfectly clear and I, therefore, allow the application and set aside the conviction and sentence of the applicant. The fine, if any, paid by him will be refunded.

s. *Application allowed.*

MADRAS HIGH COURT Special Bench

Civil Miscellaneous Petition No. 3117
of 1939

August 21, 1939

LEACH, C. J., MCKEET and KRISHNASWAMI
AYYANGAR, JJ.

In the matter of K. J., A VAKIL, MADRAS
Legal practitioner—Misconduct—Appropriation of
client's money by Advocate—Name struck off roll—
Reinstatement, when advisable.

Where an Advocate misappropriates a considerable sum of his clients, the act of professional misconduct committed by him is a very grave one and it is not possible to allow him to continue practising in an honourable profession. But that does not mean that the Court is precluded from reinstating him when adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into his profession again.

Messrs. T. R. Venkatarama Sastri and K. S. Sankara Iyer, for the Petitioner.

Leach, C. J.—The name of the petitioner was struck off the roll of Advocates of this

Court on October 15, 1931, as it had been shown that he had misappropriated a sum of Rs. 4,800 belonging to a client. The petitioner, who had considerable property, got into financial difficulties in 1927 and on February 14, of that year he was adjudicated an insolvent. On April 25, 1927, he was suspended from practice. The delay in the passing of the order striking the petitioner's name off the rolls was due to the fact that the Court desired to know the position disclosed by the insolvent's public examination before arriving at a decision. The justice of the order of this Court striking the petitioner's name off the roll of Advocates is not and could not be questioned. It is said, however, that during the 12 years that have elapsed since the petitioner was first suspended he has worked hard to rehabilitate himself and has succeeded in establishing an honourable reputation. The petitioner rendered all assistance that he could to the Official Assignee and secured his discharge on December 8, 1930. After his suspension from practice he obtained a clerkship in the office of Mr. Shamanna, a well-known solicitor of Madras, and retained this post until 1934 when he obtained a clerkship with Messrs. King and Partridge, also well-known solicitors of this city. He has continued in their service ever since. Mr. Shamanna and Messrs. H. Maitland Jones and Leslie D. Miller of Messrs. King and Partridge have given the petitioner certificates of character. Mr. Shamanna says that while he was employed by him the petitioner was dealing with his cases and with his clients and that he found his conduct and dealings both with his clients and the other members of his establishment to be satisfactory, and guided by a high sense of probity. Mr. Maitland Jones says that while in the employment of his firm the petitioner has been entrusted with important work. Mr. Maitland Jones had many opportunities of observing his conduct which he says was excellent and in addition his probity was above suspicion. Mr. Miller says:

"From my knowledge of him, in spite of what happened in the past, I personally would place every confidence in his integrity."

The petitioner has also filed a certificate given to him by Mr. Nugent Grant in April of this year. Mr. Grant says that the petitioner has throughout the period of his exclusion from the profession exhibited a consciousness of the injury he has done to himself and the profession of which he was

once an honourable member. Mr. Grant believes that he had made every endeavour to atone for his lapse from morality. The act of professional misconduct committed by the petitioner was a very grave one and it was not possible to allow him to continue practising in an honourable profession. But that does not mean that the Court is precluded from reinstating him when adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into his profession again. I consider that there is here ground for the Court holding that the petitioner has been fully punished and that he has re-gained his character to an extent that justifies his re-admission as an Advocate of this Court. For these reasons, I would allow the petition.

Mockett, J.—I agree.

Krishnaswami Ayyangar, J.—I agree.

N.D.

Petition allowed.

OUDH CHIEF COURT

Full Bench

First Civil Appeal No. 11 of 1936

October 14, 1939

THOMAS, C. J., ZIA-UL HASAN AND BENNETT, JJ.

On difference of opinion between

HAMILTON AND YORKER, JJ.

Lala MAHADEO PRASAD—DEFENDANT—

APPELLANT

versus

Musammat JAGANNATH KUAR—

PLAINTIFF—RESPONDENT

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 2 (2), Proviso 1, Expl. VII—Expl. VII, whether independent of first proviso—Interpretation of Statutes—Language of statute plain—Consideration of hardship in particular cases.

Explanation VII to s. 2 (2), U. P. Agriculturists' Relief Act is independent of the first proviso and it is not an addition to cls. (a) to (g) of s. 2 (2). The word "explanation" has wrongly been used. It is more like a "Proviso" than an "explanation". [p. 262, col. 2.]

There is no absurdity or ambiguity in the Expl. VII. [*ibid.*]

Per Thomas, C. J.—Where the language of a statute is plain in itself, it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense. The words themselves alone must be considered to see the intention of the law given. [*ibid.*]

F. O. A. against the order of the Civil Judge, Gonda, dated December 12, 1935.

Mr. Ram Prasad Varma, R. B., for the Appellant.

Messrs. Radha Krishna and Karta Krishna, for the Respondent.

Hamilton, J.—(January 21, 1939).—This appeal No. 11 of 1936 is an appeal from the Court of the Subordinate Judge of Gonda in a suit under s. 33 of the Agriculturists' Relief Act.

The learned Judge came to the conclusion that the plaintiff was an agriculturist and, therefore, decreed the suit reducing interest under s. 30 of the Agriculturists' Relief Act.

The one ground urged in this appeal is that this decision is incorrect in view of Expl. VII to s. 2 (2) of the Agriculturists' Relief Act.

The plaintiff is a *zamindar* who pays over Rs. 1,000 revenue, who pays over Rs. 120 local rates—in fact, the amount is stated to be over Rs. 1,200—and who pays over Rs. 500 rent. But for these amounts he would have come under s. 2 (2) (a), (c), (d) and (f).

The learned Civil Judge came to the conclusion that Expl. VII which says that a person holding land free of revenue when he pays both rent and local rate shall not be deemed to be an agriculturist if the total of the rent and local rate annually payable by him exceeds Rs. 500 is subject to the first proviso which is as follows:

"Provided that in s. 2 (10) (a), 3, 4, 5, 8 and Chaps. IV and V an 'agriculturist' means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section, if the limits of land revenue local rates, rent and area mentioned in these parts were omitted."

There are a number of points to be considered, and I shall consider them in what I regard as being the proper order.

The first point is whether for a person to be an agriculturist under this section, he must come within one of the cls. (a) to (g) and not more than one, that is to say, if he pays revenue he must not pay rent: if he pays rent, he must not pay revenue and so on.

I do not think that a person who comes in under more than one class is by this fact no longer an agriculturist. In the first place the Act does not say so, and secondly, Expl. VI, Expl. VII and illustrations 1 and 2 show that a person who belongs to more than one of the cls. (a) to (g) can still be an agriculturist provided his annual payments do not exceed a certain sum. The fact, therefore, that the plaintiff pays land revenue, local rate

and rent do not prevent him being an agriculturist.

The next point to be considered is whether a person whose annual payment of either revenue or local rate or rent exceeds the maximum amount of any of these in (a) to (f) ceases to be an agriculturist. I hold that he does cease to be an agriculturist because otherwise there would be no reason for the first proviso, and this is also shown by the words in Expl. VI "or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g)" which is further illustrated by Illustration (ii).

The plaintiff, therefore, is not an agriculturist under (a) to (g), and it is only if the first proviso brings him in again that he is an agriculturist.

Undoubtedly, Expl. VII applies to the plaintiff because he holds land free of revenue and he pays both rent and local rate and the annual amount so payable by him exceeds Rs. 500. This proviso is entered in the statute as Expl. VII, but the question is whether the word "Explanation" is a correct term. I have not been able to find either in Maxwell on the Interpretation of Statutes or in Beal's Cardinal Rules of Legal Interpretation anything about explanations occurring in statutes. I think indeed that it is doubtful whether an explanation should occur in a statute which, if properly framed, should require no explanation in it, and an explanation is really an interpretation which is a matter for Courts. The only doubt as to the meaning of s. 2 (2), up to, but not including the first proviso, would be whether a person who came under more than one of (a) to (g) would or would not be an agriculturist. If coming under more than one clause, disqualifies a man from being an agriculturist, the amounts payable by him in the form of revenue, local rate and rent do not have to be taken into consideration. If it is not a disqualification then the payment of rent, revenue and local rate not exceeding the maximum for rent, revenue and local rate respectively would not be a disqualification. Explanation VII, however, lays down that a payment exceeding Rs. 500 does disqualify so that a payment of Rs. 120 local rate and Rs. 500 rent would disqualify a person from being an agriculturist although neither the maximum amount of local rate nor the maximum amount of rent was exceeded. Explanation VII, has, therefore, modified the main body of the section instead of explaining

it, and it should have appeared as a proviso or should have been called an exception. If it is a proviso, it modified the provisos which come before it and would, therefore, modify the first proviso, and if it is an exception, it is a complete disqualification.

The learned Counsel for the appellant accordingly argues as follows:—

It is true that generally a person otherwise coming under one or more of (a) to (f) will still be an agriculturist for certain sections if he exceeds the maximum limit, in any, of (a) to (f) because of the first proviso, but the first proviso is superseded whenever Expl. VII, comes in. Whenever a person who holds land, free of revenue, pays both rent and local rate more than Rs. 500, he ceases to be an agriculturist even if he pays less than Rs. 120 local rate and less than Rs. 500 rent; for instance, if he pays Rs. 110 as local rate and Rs. 391 as rent; as this is laid down in Expl. VII. In such a case the first proviso cannot help him because it only applies to persons who exceed Rs. 120 local rate or Rs. 500 rent, or both. The learned Counsel argues then that when such a man ceases to be an agriculturist, it is only reasonable to hold that a person who exceeds the maximum of local rate or rent can be in no better position than the poorer man to whom the first proviso cannot be applied.

The learned Counsel for the respondent admits that a person paying not more than Rs. 120 local rate and not more than Rs. 500 rent when the total payment does exceed Rs. 500 ceases to be an agriculturist. He argues, however, that this does not apply when there is a payment of local rate or rent above the maximum allowed for local rate or rent as then the first proviso comes into play. He points out that Expl. VI, excludes for the purposes of certain parts of the Act persons who pay more than Rs. 1,000 as rent and revenue or a person who is excluded from the definition of agriculturist under any of the cls. (a) to (g). From this he argues that the exclusion of persons who pay more than Rs. 1,000 rent and revenue combined refers only to such persons as do not pay more than Rs. 1,000 as revenue or Rs. 500 as rent, and if either of these limits are exceeded, the disqualification is under the succeeding words "or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g)". He then asks that Expl. VII should be read

similarly as if these words "or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g)" occurred in Expl. VII. In the first place, these words do not occur there and Expl. VII has a meaning without these words being there. Further, it does not follow that his argument about Expl. VI is correct, for one can hold that the words "or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g)" are redundant because the main body of the section with the first proviso already introduces this disqualification, but the legislature wanted to make this clearer still.

In my opinion, Expl. VII is to the effect that once the maximum annual combined payment has been exceeded, the payer is not an agriculturist, whether he exceeds Rs. 500 as rent or Rs. 120 as local rate or not, and this exclusion continues even if he exceeds either or both of these *maxima*. The explanation, as I have said, although so called, is really a proviso or an exception and coming after the first proviso must supersede it when repugnant to it.

The Act is undoubtedly designed to make provisions for the relief of agriculturists from indebtedness, but the first part of s. 2 (2) defines an agriculturist and shows that generally only agriculturists of a certain financial status are to be benefitted. It is true that for certain sections of the Act the first proviso enlarges the number of agriculturists but it may well be that even this enlargement was intended by the legislature not to include those holding land free of revenue-paying rent and local rate above a certain amount. Why such classes should be singled out I do not know, but when they are undoubtedly not agriculturists if they pay more than Rs. 500 even if they do not exceed the various maximum amounts of (a) to (f), it is difficult to hold that when paying rent and local rate exceeding any of these *maxima* they were intended by the legislature to be deemed to be agriculturists.

I would, therefore, find that the plaintiff is not an agriculturist in view of Expl. VII, and the appeal must, therefore, be allowed with costs. Interest will then be throughout at the contractual rate.

Yorke, J.—(January 21, 1939).—I regret that I am unable to agree with my learned brother's view in this appeal.

The question for decision is whether the plaintiff who is a *zamindar* paying over Rs. 1,000 as land revenue and paying over, much over Rs. 120 as local rate and who also pays over Rs. 500 as rent is an agriculturist within the meaning of s. 2 (2) of the Agriculturists' Relief Act read with the first proviso to that section. I would put the matter as it appears to me on somewhat different lines from those which he has followed. In the first place it appears to me clear that the intention of the Act, as it is to be derived both from the preamble and from the general scheme of the Act, is that it is intended to make provision for the relief of agriculturists, both small and big, that it is intended to help big agriculturists as well as small is clearly inferable from the wording of the first proviso which removes the limits of land revenue, local rates, rent and area mentioned in the definitions (a) to (g) for the purposes of certain sections of the Act, those sections being sections which afford a very large degree of relief to agriculturist debtors. Secondly, I am clear that in the light of the provisions in s. 2 (2), there is no general bar to combinations of qualifications for being held to be an agriculturist that is to say, that an agriculturist may, subject to any of the explanations, combine the whole of the capacities (a) to (g), and yet be counted as an agriculturist for the purposes of the Act, and he may further be an agriculturist for the purposes of certain sections of the Act, the sections already referred to, in the same capacities but with the limits of land revenue, etc., removed. There are only two explanations which seem to operate as limitations in this case of combination of capacities. These are found in Expl. VI and Expl. VII. Explanation VI provides that

"a person, who pays both rent and revenue, shall not be deemed to be an agriculturist for the purposes of Chaps. II (except ss. 3, 4, 5 and 8), III and VI, if the total of the rent and revenue annually payable by him exceeds Rs. 1,000, or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g)."

It is important to note that this explanation has effect only in respect of sections which are not mentioned in the first proviso. There is, therefore, no sort of interrelation between the first proviso which removes the limits provided in the definitions (a) to (g) and this explanation. I am very doubtful whether Expl. VI is really of any assistance for the purpose of interpreting Expl. VII since it

definitely cannot have any operation whatsoever to exclude the application of the first proviso, and the real question which arises in regard to Expl. VII is whether the wording of that explanation is such as to preclude the applicability of the first proviso.

Coming to Expl. VII, this explanation is either an absolute bar or it is not an absolute bar. If it is an absolute bar, then it is in contradiction with the whole scheme of the Act and it leads to illogical and unreasonable results. Secondly, if it is an absolute bar, it should not have been described as an explanation, but as an exception, or preferably it should have found a place in the section itself above the explanations, as a fourth proviso. As it has not found such a place, I do not think it is reasonable to interpret it as if it were worded "provided further that" instead of "Expl. VII". Now as to the illogical results which seem to me to follow from treating this explanation as an absolute bar; in the first place it may be read as contradicting the definitions (b) and (c) since it is obvious that a man who pays local rate under (b) or (c) amounting to Rs. 499 and rent amounting to Re. 1 is still within the combined maximum allowed by Expl. VII. From another point of view, there is a similar incongruity. A pays Rs. 500 or Rs. 5,000 or even Rs. 5 lakhs as local rate. He comes under definition (b) or definition (c) assisted for the purposes of the important sections by Proviso I. B on the other hand pays Rs. 500 or Rs. 5,000 or Rs. 5 lakhs local rate plus Re. 1 as rent, B on this line of argument is barred entirely. Thus there is on this view a completely illogical exclusion of people who combine two qualifications, although it is not really the mere combination of the qualifications which excludes them, since it does not do so provided the combined total under the two heads does not exceed Rs. 500. In these circumstances, I am strongly inclined to the view that Expl. VII is really, though described as an explanation, a sort of addition to cls. (a) to (g), and means no more than that, whereas by combination of qualifications (c) and (f) or (b) and (f) a man would be an agriculturist if he paid even as much as Rs. 500 rent in addition to the full limit of Rs. 120 local rate, by this explanation there is added a further limitation (similar to the limitations in (a) to (f) for people who combine those two sets of qualifications, that is to

say, a limitation for the purposes of the sections not covered by the first proviso. I would therefore infer that if Expl. VII is properly so described and is to be construed as I have suggested above, it must necessarily be subject to the application of the first proviso. It may be that *prima facie* that proviso will not operate to help a person who has a combination of local rate and rent totalling between Rs. 500 and Rs. 620, but if this explanation is taken as a kind of additional classification of a like nature with those in (a) to (g), it would not require very much elasticity in the interpretation of the law to apply the first proviso to such cases even though not strictly so applicable.

There is only one case on record in which this point has been at all considered, namely *Sheo Shankar Das and another v. Mohammad Hasan* (1937 A. L. J. R. 620) (1) in which a Bench of the Allahabad High Court disposing of an appeal under O. XII, r. 11, remarked as follows:—

"It is contended in appeal that the Expl. VII added to the section lays down that a person in districts subject to the Benares Permanent Settlement Regulation, 1795, shall not be deemed to be an agriculturist if the total of the rent and local rate annually payable by him exceeds Rs. 500, and it is urged that this explanation must override the proviso. We are of opinion that this explanation has been added in order to explain the provisions of the main section, particularly (b), whereas the proviso is intended to exempt from the operation of the limits imposed by certain sections and two specific Chapters. There is nothing in Expl. VII to suggest that it was intended to apply to applications governed by Chaps. IV and V and other sections mentioned in the proviso. In our opinion, the explanation is subject to the proviso so far as applications specially exempted under it are concerned."

It is unfortunate that the remarks which follow in the next few lines clearly indicate that this was not a case to which Expl. VII was really applicable, and therefore the above remarks were undoubtedly of the nature of *obiter dicta*. None the less they do express what appears to me to be a reasonable view of Expl. VII, namely that it is subject to the application of the first proviso.

On this view of the case, the present appeal would necessarily fail and be dismissed with costs.

By Court.—(January 21, 1939).—As there is a difference of opinion between the Members of the Bench, we accordingly refer

(1) (1937) A L J 680; 171 Ind. Cas 573; A I R 1937 All. 633; 1937 R D 359; 10 R A 297 (1); I L R (1937) All. 759; (1937) A L R 862 (2).

this case to a Full Bench under s. 13 (b) of the Oudh Courts Act.

Messrs. *Ram Prasad Varma*, R. B., and *S. N. Srivastava*, for the Appellant.

Messrs. *R. B. Lal* and *Karta Krishna*, for the Respondent.

Thomas, C. J.—(October 5, 1939).—*Bhaiya Lat Bakhsh Singh Taluqdar* of Majhgawan filed a suit under s. 33 of the U. P. Agriculturists' Relief Act in the Court of the Civil Judge of Gonda. The learned Civil Judge held that the plaintiff was an agriculturist and accordingly decreed the suit and determined the amount on the three mortgages, Exs. 1, 2 and 3.

The appeal came up for decision before a Bench of this Court, and as it differed with regard to the construction to be placed on the first proviso to s. 2 (2) of the U. P. Agriculturists' Relief Act read with Expl. VII to the said section, it referred the appeal to a Full Bench.

The word "agriculturist" is defined in s. 2 (2), cls. (a) to (h). Clauses (a) to (g) show that the word "agriculturist" means a person who pays land revenue, local rates, rent or holds land free of rent up to certain specified limits of land, revenue, local rates, rent and area.

The plaintiff admittedly paid over Rs. 1,000 as land revenue, over Rs. 120 as local rates and over Rs. 500 as rent; he also held some land revenue-free.

The learned Civil Judge held that the plaintiff was an agriculturist because in his opinion Expl. VII to s. 2 (2) of the U. P. Agriculturists' Relief Act was subject to the first proviso of the section.

On appeal to this Court Mr. Justice Yorke concurred with the above view, but Mr. Justice Hamilton was of opinion that the plaintiff was taken out of the class of agriculturists by the Expl. VII to s. 2 (2), which is as follows:—

"When a person holding land in districts subject to the Benares Permanent Settlement Regulation I of 1795, or holding land free of revenue, pays both rent and local rate, he shall not be deemed to be an agriculturist if the total of the rent and local rate annually payable by him exceeds Rs. 500"

The question for consideration is whether the proviso should be construed as subject to Expl. VII or whether Expl. VII should be construed as creating an absolute bar.

The contention on behalf of the defendant-appellant is that the plaintiff is not an agriculturist in view of Expl. VII to s. 2 (2) of the U. P. Agriculturists' Relief Act. The first proviso lays down that

"In ss. 2 (10) (a), 3, 4, 5, 8 and Chaps. IV and

V an 'agriculturist' means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section, if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted"

It means that the limits of revenue, local rates, rent and area which are to be omitted in determining the status of an agriculturist under Chap. V are the limits mentioned in cls. (a) to (g) of s. 2 (2). No other limits are intended as prescribed in Expls. VI or VII to the said section. In my opinion, therefore, it is clear, that Expl. VII is independent of the first proviso and it is not an addition to cls. (a) to (g) of s. 2 (2). The word "explanation" has wrongly been used. It is, in my opinion, more like a "Proviso" than an "explanation."

There is no absurdity or ambiguity in the Expl. VII. Where the language of a statute is plain in itself, it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense. The words themselves alone must be considered to see the intention of the law given.

I am therefore of opinion that Expl. VII is independent of the first proviso and the plaintiff is not an agriculturist.

I would, therefore, allow the appeal with costs.

Zia-ul Hasan, J.—(October 5, 1939).—This appeal arises out of a suit brought by *Bhaiya Lat Bakhsh Singh*, now deceased, predecessor-in-interest of the respondent, in the Court of the Civil Judge of Gonda under s. 33 of the Agriculturists' Relief Act.

The appeal came up for decision before a Bench of this Court but as the learned Judges composing the Bench differed on the question whether or not the plaintiff was an agriculturist to which the provisions of s. 33 of the Act could be applied, the appeal was referred to a Full Bench.

It is not disputed that the plaintiff was a *zemindar* who paid over Rs. 1,000 as land revenue, over Rs. 120 as local rates and over Rs. 500 as rent and that he also held some land, revenue-free.

It was contended by the defendant (the present appellant) that the plaintiff was not an agriculturist in view of Expl. VII of s. 2 (2) of the Agriculturists' Relief Act.

The trial Court held that he was an agriculturist because, according to his view, Expl. VII was subject to the first proviso of

the said section. On this finding the suit of the plaintiff was decreed and the amount due on the mortgage deeds in suit was determined. The defendant appealed to this Court and while Mr. Justice Hamilton was of opinion that the plaintiff was taken out of the class of agriculturists by Expl. VII to s. 2 (2), Mr. Justice Yorke concurred with the view of the trial Court in holding that that explanation was governed by the first proviso to the said section. After giving my best consideration to the question, I agree with the view taken by Mr. Justice Hamilton, though on grounds totally different from those on which he has based his opinion.

It appears to me that for the determination of the question before us it is not necessary to see what is the effect of a combination of qualifications mentioned in cls. (a) to (h) of s. 2 (2), nor, in view of the clear wording of the section, is it for us to speculate about the intention of the Legislature in enacting the different parts of s. 2 (2). The simple key to the solution of the apparent difficulty lies, in my opinion, in the words "mentioned in these parts" occurring in the first proviso. These words clearly show that the limits of revenue, rent etc., which are to be omitted according to the proviso in determining the status of an agriculturist under Chap. V (which includes s. 33 under which the suit was brought) are only the limits mentioned in the clauses (called "parts" in the proviso) (a) to (g) of s. 2 (2) and not any other limits such as are prescribed in Expl. VI or VII. It follows therefore that Expl. VII must be read as independent of the first proviso, so that even if a person is an agriculturist under that proviso, he is not to be deemed such if he holds land in a district subject to the Benares Permanent Settlement Regulation I of 1795 or holds land free of revenue and pays both rent and local rate, the aggregate amount of which exceeds Rs. 500.

There is another reason why I am of opinion that Expl. VII must be given effect to irrespective of the first proviso and that is a comparison of that explanation with Expl. VI. Explanation VI shows that though a person who pays both rent and revenue is not to be deemed an agriculturist if the total of rent and revenue payable by him annually exceeds Rs. 1,000 or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g), this provision is not to

apply when the question of the person being an agriculturist arises under ss. 3, 4, 5 and 8 or under Chaps. IV and V, that is to say, in almost every case in which the limits mentioned in cls. (a) to (g) are to be omitted under the first proviso. No such exceptions appear in Expl. VII. This necessarily leads to the conclusion that a person to whom Expl. VII applied is not to be deemed an agriculturist for any purposes of the Act, that is, even if the question arises under ss. 3, 4, 5 and 8 and Chap. IV, and V for which provision is made in the first proviso. Had it been the intention of the Legislature that Expl. VII should be subject to the first proviso like Expl. VI, the sections and chapters mentioned in the proviso would have been excepted in this explanation also as they were in Expl. VI.

It is no doubt true that, as my learned brothers have pointed out, the term "explanation" does not properly apply to what has been enacted in Expl. VII and that that provision is more in the nature of a proviso to the first proviso than an explanation of the main section; but perhaps it was termed an explanation because like the other explanations it has reference to some of the cls. (a) to (h) of s. 2 (2). Expls. I and II refer and show the intention of the Legislature in regard to cls. (a), (d), (e), (f), and (g), Expl. III to cl. (d), Expls. IV and V to cls. (f) and Expl. VI to a combination of cl. (a) and (f). Similarly Expl. VII contemplates combinations of cls. (b) and (f), and (c) and (f). When however the provision contained in Expl. VII is clear and unambiguous in its terms, we should not look to how it is designated by the Legislature. Nor do I think it is necessary for us to probe into the question why the Legislature deprived persons holding land in districts subject to the Benares Permanent Settlement Regulation I of 1795 or holding land free of revenue and paying rent and local rate exceeding Rs. 500, of the benefits of the Agriculturists' Relief Act.

I am therefore of opinion that as the first proviso refers only to the limits mentioned in cl. (a) to (g) and as there is nothing in Expl. VII to show that its provisions are subject to that proviso, we cannot but hold that Expl. VII is quite independent of the first proviso. Consequently the plaintiff who held land free of revenue and who pays rent and local rate much more than Rs. 500 cannot, in view of Expl. VII, be held to be an agriculturist.

I would; therefore, allow the appeal with costs.

Bennett, J.—(October 5, 1939).—This case has been referred to a Full Bench in view of a difference of opinion between two learned Judges of this Court with regard to the construction to be placed on the first proviso to s. 2 (2) of the Agriculturists' Relief Act, read with Expl. VII.

Sub-section (2) of s. 2 contains the definition of the word "agriculturist" and the substantive portion of the definition is contained in eight clauses (a) to (h). The first seven of these, (a) to (g), show that in all sections of the Act where the term is used, it means a person who makes payments of land revenue, local rates or rent, or holds land free of rent up to certain specified limits of land revenue, local rates, rent and area.

The first proviso extends this definition for the purpose of certain sections and chapters of the Act to all persons making such payments or holding such land irrespective of these limits. It reads:—

"Provided that in ss. 2 (10) (a), 3, 4, 5, 8 and Chaps. IV and V an 'agriculturist' means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted."

There follow two more provisos and then seven Explanations, of which the five only appear to be properly so called. The next two Explanations are:—

Explanation VI.—When a person pays both rent and revenue, he shall not be deemed to be an agriculturist for the purposes of Chaps. II (except ss. 3, 4, 5 and 8), III and VI, if the total of the rent and revenue annually payable by him exceeds Rs. 1,000, or if he is excluded from the definition of agriculturist under any of the cls. (a) to (g).

Explanation VII.—When a person, holding land in districts subject to the Benares Permanent Settlement Regulation I of 1793, or holding land free of revenue, pays both rent and local rate, he shall not be deemed to be an agriculturist if the total of the rent and local rate annually payable by him exceeds Rs. 500."

The question for consideration is whether the proviso should be construed as subject to Expl. VII, or whether Expl. VII should be construed as merely adding further limits when certain qualifications are combined, these limits being inapplicable under the proviso for the purpose of the sections and chapters stated therein.

The learned Judge of this Court who held that in view of Expl. VII the plaintiff-appellant is not an agriculturist,

considered that the Explanation, though so called, was really a proviso or an exception, and coming after the first proviso, must supersede it where repugnant to it. He thought that the Legislature may not have intended to include in the proviso those holding land free of revenue paying rent and local rate above a certain amount, though the reason behind this intention is not apparent.

The learned Judge who took the contrary view observed that it appears from the preamble and the general scheme of the Act that it was the intention of the Act to make provision for the relief of agriculturists, both small and big. There were only two Explanations which seemed to operate as limitations in the case of combination of capacities, namely Expl. VI and Expl. VII. The real question which arises in regard to Expl. VII is whether its wording is such as to exclude the applicability of the first proviso.

He considered that if Expl. VII is regarded as an absolute bar, it is in contradiction with the whole scheme of the Act and it leads to illogical and unreasonable results. Moreover, if it is an absolute bar, it should not have been described as an explanation, but as an exception, or preferably it should have found a place in the section itself above the explanations as a fourth proviso. As it has not done so, it was not reasonable to regard it as a further proviso.

The learned Judge then gave instances of illogical results which follow from the view that Expl. VII is an absolute bar. He said that "in the first place it may be read as contradicting the definitions (b) and (c), since it is obvious that a man who pays local rate under (b) or (c) amounting to Rs. 499, and rent amounting to Re. 1. is still within the combined maximum allowed by Expl. VII".

He proceeded:—

"From another point of view there is a similar incongruity. A pays Rs. 500 or Rs. 5,000 or even Rs. 5 lakhs as local rate. He comes under definition (b) or definition (c) assisted for the purposes of the important sections by Proviso I. B on the other hand pays Rs. 500 or Rs. 5,000 or Rs. 5 lakhs local rate plus Rs. 1 as rent, B on this line of argument is barred entirely. Thus there is on this view a completely illogical exclusion of people who combine two qualifications, although it is not really the mere combination of the qualifications which excludes them, since it does not do so provided the combined total under the two heads does not exceed Rs. 500."

He considered therefore that Expl. VII is really a sort of addition to cls. (a) to (g), and as such, subject to the application

of the first proviso, as held (though *obiter*) in *Sheo Shankar Das and another v. Mohammad Hasan* (1937 A. L. J. R. 680) (1).

If the question could be decided by reference to the probabilities alone, I should be inclined to agree with this view. When the proviso allows persons who pay land revenue, local rate, or rent up to any amount to be treated for certain parts of the Act as agriculturists; it certainly seems doubtful whether in the case of the combination of two of these qualifications it was intended to impose a bar which might, in certain circumstances, lead to very illogical results. Moreover, Expl. VII seems to be complementary to Expl. VI. The latter explanation deals with a combination of the qualifications referred to in cls. (a) and (f), while Expl. VII refers to a combination of the qualifications referred to in cls. (b) and (f), and (c) and (f). *Prima facie* there is no reason why a different principle should be applied in Expl. VII from that applied in Expl. VI. But a different principle has been applied by the omission from Expl. VII of the words "for the purposes of Chap. II, (except ss. 3, 4, 5 and 8), III and VI", and the reason may be that these words were omitted inadvertently. This is, I think, more probable than that an Explanation which is found at the end of the section was intended to be read as if it came before the provisos. Had that been the intention, it must have been also the intention in regard to Expl. VI and there would have been no need to insert in this Explanation the words "for the purposes of Chap. II (except ss. 3, 4, 5 and 8), III and VI".

But though I consider it not unlikely that these words were inadvertently omitted from Expl. VII, I do not consider it possible to hold that they must have been. It is possible that the Legislature had reasons, not apparent, for imposing a general limit applicable for all sections of the Act in cases of a combination of rent and local rate paid by persons holding land in districts subject to the Benares Permanent Settlement Regulation I of 1795 or by persons holding land free of revenue. Some incongruous or illogical results may follow on a consideration of the limits imposed and possible combinations thereof, but incongruities occur not infrequently where an arbitrary limit is imposed, and some may occur as it is

even in the case of persons not governed by the proviso. For instance, it might appear incongruous that a man who pays rent of Rs. 499, and local rate of Re. 1, should be an agriculturist, while a man who pays rent of Rs. 499, and local rate of Rs. 2 is not.

I do not think that there is any contradiction between the Explanation and cls. (b) and (c). The Explanation does not, in my opinion, make the proviso entirely inoperative. It does not extend the limits given in cls. (b) and (c) in the case of a combination of qualifications, and those limits will still apply except where the proviso comes in. That is to say, except where the proviso excludes the limits, the limit of Rs. 120, local rate will still apply. The example given above of a person paying Rs. 499, local rate and Re. 1, rent and still being an agriculturist would only be possible under the proviso. Any other person paying Rs. 499 local rate, or any amount in excess of Rs. 120, would be barred by cl. (b) or cl. (c). It is not therefore the case that where the qualifications referred to in the Explanation are combined, the Explanation puts every one on the same footing. On the contrary it allows a person to whom the proviso applies to pay a much larger amount of local rate, if the amount of rent paid by him is correspondingly smaller.

The very fact that the words "for the purposes of Chap. II (except ss. 3, 4, 5 and 8), III and VI" have been omitted from Expl. VII may be considered indicative of the Legislature's intention. The presumption is rather that they were omitted by design than by accident.

I would refer in this connection to certain principles laid down in *Maxwell's Interpretation of Statutes* (Eighth Edition) and derived from English authorities.

Pages 3 and 4.

"When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. '*Absoluta sententia expositio non indiget.*'"

The rule of construction is 'to intend the Legislature to have meant what they have actually expressed.

Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous.

The words cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced."

It is true that these principles appear to receive some qualification further on. On

p. 73 it is stated:

"Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the real meaning of the words."

But this is on the assumption that the passage is susceptible of more than one meaning.

On p. 202 it is stated:—

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

It can hardly be said that the language of Expl. VII, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended.

Page 220.

"An omission which the context shows with reasonable certainty to have been unintended may be supplied, at least in enactments which are construed beneficially, as distinguished from strictly."

It has been argued in the case under consideration—and I think with force—that an enactment which makes encroachments on the rights of individuals (in this case of money-lenders) should be construed strictly. A large number of persons should not be allowed to take advantage of it than its language on a strict construction warrants.

Page 141.

"Where there are two sections dealing with the same subject-matter, one section being unqualified and the other containing a qualification, effect must be given to the section containing the qualification."

If the provisions under consideration were contained in different sections, there can be no doubt, therefore, that effect would have to be given to the section containing the qualification.

Reference has been made on behalf of the respondent to an observation of their Lordships of the Privy Council in *Henrietta Muir Edwards and others v. Attorney-General of Canada and others* (A I R 1930 P. O., 120) 2) "the question is not what may be supposed to have been intended, but what has been said."

In *Aziz Ahmed Khan and others v. Chhote Lal and others* (A. I. R. 1928 All., 241) (3), the Allahabad High Court observ-

(2) A I R 1930 P O 120; 126 Ind. Cas. 88; 58 M L J 300; 31 L W 601; Ind Rul. (1930) P O 312 (P O).

(3) A I R 1928 All 241; 109 Ind. Cas. 38; 28 A L J 298; 50 A 569.

ed:—

"Where the language of a statute is plain in itself, it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense."

I do not find that there is any such manifest absurdity or such improbability in Expl. VII as to justify a construction not warranted by its apparent meaning. It is clear that the word "Explanation" is a misnomer: it is on any construction rather of the nature of a further proviso or exception, and since it has been placed at the end of the section, it is natural to construe it as governing whatever precedes it. This and the omission in it of any words of exception such as are contained in Expl. VI are, in my opinion, fatal to the plaintiff-respondent's case. I would, therefore, allow the appeal with costs.

By Court.—(October 14, 1939)—We allow the appeal with costs.

E.

Appeal allowed.

LAHORE HIGH COURT

Criminal Appeals Nos. 710 and 865 of 1939

November 3, 1938

DIN MOHAMMAD, J.

JAIMAL SINGH AND ANOTHER—CONVICTS

—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 170—Innocent persons falsely implicated—Investigating officer, if justified in not sending them for trial on ground of insufficient evidence—Criminal trial—Conviction—No conviction on basis of scientific theories.

Where definite allegations are made by aggrieved persons which they are prepared to support by positive evidence, apparently free from taint, it is generally not the function of the Police to play the role of Judges and to pronounce their verdict on the truth or falsehood of those allegations. In such cases, they are bound to send up the accused for trial and not to discuss the probabilities or the improbabilities of the case and come to a final decision of their own. But where there is a tendency to implicate innocent persons along with the guilty whenever any occasion arises in that respect, not only the Courts but the investigating officers must proceed cautiously when they are faced with that situation. A Police Officer is in the same position as a Magistrate holding inquiry in cases triable by a Court of Session, and such Magistrate has power to discharge an accused person if the evidence against him is palpably false or legally insufficient. Where the investigating officer not being satisfied with the evidence against some of the accused feels that they are falsely implicated he is justified in not sending them for trial.

Persons cannot be convicted merely on scientific theories which may or may not be infallible.

Cr. As. from an order of the Sub-Divisional Magistrate, Rupar, dated July 26, 1938.

Messrs. B. R. Puri and Gullu Ram, for the Appellants.

Mr. Mohammad Amin (Malak), for the Advocate-General, for the Crown.

Judgment.—This judgment will dispose of Criminal Appeals Nos. 710 and 865 of 1938. The former has been presented by Jaimal Singh and Naranjan Singh through Counsel while the latter has been submitted by Sarwan Singh through the jail authorities. These appellants were convicted of an offence under s. 326 read with s. 34, Indian Penal Code, and each sentenced to five years' rigorous imprisonment. That is a peculiar case in which the investigating agency was at loggerheads with the complainant. In the first information report made by Dalip Singh he had stated that while Sarwan Singh and Naranjan Singh held him fast, Jaimal Singh had given a blow with a *safajang* on his right leg cutting it off clean, and that this occurrence had been witnessed by Maluk Singh, Naranjan Singh, Surjan Singh and some other persons who were known to Maluk Singh. The motive for the attack was also stated in detail. The Sub-Inspector of Police who held the investigation after examining the witnesses produced by Dalip Singh did not believe that Jaimal Singh and Naranjan Singh had participated in the assault and consequently sent up Sarwan Singh alone on the strength of a few witnesses in whom Dalip Singh placed no reliance. Dissatisfied with this investigation, Dalip Singh made a representation to the authorities on which the Deputy Superintendent of Police was deputed to hold further investigation in the matter. He, too, agreed with the Sub-Inspector.

On receiving the *chalan* the prosecuting Sub-Inspector reported to the Superintendent of Police that the *chalan* as sent up would fail even as against Sarwan Singh inasmuch as the witnesses who had been put forward to support the case against him had not made such statements as would lead to his conviction. Despite this report the previous *chalan* was not amended in any manner. Dalip Singh then put in a private complaint reiterating the allegations made by him in the first in-

formation report and the proceedings in the complaint were taken along with the *chalan*. The Magistrate after recording the evidence of both sets of witnesses came to the conclusion that the Sub-Inspector had conducted himself in an objectionable manner and that Dalip Singh had succeeded in bringing home the offence to all the three persons originally implicated by him in the first information report. He accordingly convicted them as stated above.

I may remark at once that I am not prepared to say that the procedure adopted by the Police in this case cannot be approved in any manner. It is true that in cases where definite allegations are made by aggrieved persons which they are prepared to support by positive evidence, apparently free from taint, it is generally not the function of the Police to play the role of Judges and to pronounce their verdict on the truth or falsehood of those allegations. In such cases they are bound to send up the accused for trial and not to discuss the probabilities or the improbabilities of the case and come to a final decision of their own. But unfortunately in this country, as has been noticed so often there is a tendency to implicate innocent persons along with the guilty whenever any occasion arises in that respect, and not only the Courts but the investigating officers must proceed cautiously when they are faced with that situation. To restrain them altogether from using their discretion in such cases would prove detrimental to the interests of the public and would lead to unnecessary harassment of persons who had absolutely no hand in the crime. A Police Officer in my view is in the same position as a Magistrate holding inquiry in cases triable by a Court of Session and there is a string of rulings which lay down that such Magistrate has power to discharge an accused person if the evidence against him is palpably false or legally insufficient and this in spite of the fact that the function of sifting the truth or falsehood of that evidence is within the competence of the Sessions Judge only. I do not therefore agree with the Magistrate that the conduct of the Police in this case necessarily pointed to the conclusion that they had been actuated by sordid motives. Both the Sub-Inspector and the Deputy Superintendent of Police may have honestly believed that Dalip Singh was falsely implicating both Jaimal Singh and Naranjan Singh and on that ground they were quite

justified in not showing their willingness to send up the case against them.

Coming now to the merits of the case before me, I am not satisfied that the case against Jaimal Singh and Naranjan Singh is above suspicion. The statement of Dalip Singh has been corroborated by Mal Singh, Amolak Singh and Surjan Singh. Mal Singh was not mentioned in the first information report although he states that he was going ahead of Amolak Singh and Surjan Singh and was thus in close proximity to Dalip Singh and the first to see the occurrence. He has admitted that Jiwa Singh, brother of Jaimal Singh, had instituted a criminal case against his brother Rulya Singh, and that Ohhanga, an uncle of Jaimal Singh, had obtained a decree against him in the execution of which his she-camel had been attached. Moreover, the Magistrate has himself remarked that this witness had been prevaricating and, in these circumstances, it would be unsafe to rely on his statement. Amolak Singh is a first cousin of Dalip Singh and, although in the first information report, it had been alleged that both Dalip Singh and Amolak Singh were coming together from their fields, at the trial they did not adhere to this story and Amolak Singh professed to have arrived at the scene of occurrence only when the accused had assaulted Dalip Singh. Surjan Singh is a son of Musammat Ram Piari and is complainant enough not to object to her living with Dalip Singh in immoral circumstances and in this respect does not see eye to eye with his brother Sarwan. It is further significant that Naranjan Singh who had been named as an eye-witness was not at all produced at the trial. There is thus no impartial, independent or disinterested evidence on the record and Dalip Singh's enmity with Jaimal Singh being admitted unless there is definite evidence, direct or circumstantial, free from taint, connecting Jaimal Singh and Naranjan Singh with the offence, it would be impossible to maintain their conviction. Only one blow was struck and it is quite possible that in order to implicate these two persons successfully the story of their holding Dalip Singh in their grip was introduced.

The Magistrate has laid much stress on the statement of Dr. Pir-bi Ohand Beri, Sub-Assistant Surgeon, who has stated that the injury inflicted on Dalip Singh was possible only if somebody had held him fast. Apart from the fact that the

statement made by this witness is not in the nature of expert evidence, persons cannot be convicted merely on scientific theories which may or may not be infallible. The main ground urged by this witness is that the leg should have been stationary before it could have been cut in the clean manner in which it was cut; but it is evident that in a moment of fright a person would cease walking and would thus be stationary for some period at least, however small it may be, and it is also obvious that the striking of a solitary blow with a *safajang* does not take very long. It also cannot be ignored that even in the normal posture of walking one leg is not moving fast when the other leg is in motion. Anyhow, it is a guess-work one way or the other, and mere guesses do not take the place of evidence on the basis of which one can maintain a conviction with a peaceful mind. I accordingly accept the appeal of Jaimal Singh and Naranjan Singh and giving them the benefit of the doubt acquit them. So far as Sarwan Singh is concerned, it is true that Dalip Singh does not attribute the blow to him but he does not exonerate him also from the charge altogether. His statement coupled with the evidence brought on the record on behalf of the Police is in my view sufficient to bring home the offence to him. I accordingly uphold his conviction and confirm his sentence.

D.

Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 363 of 1938

March 14, 1939

DAVIS, J. C. AND TYABJI, J.
EMPEROR—PROSECUTOR

versus

ABDULLAH KARIM—ACCUSED

Bombay Borstal Schools Act (XVIII of 1929), ss. 6, 8—Previous convictions as evidence of criminal habits—Proof—Action under s. 6, when can be taken—Procedure to be followed before referring case to High Court—Criminal Procedure Code (Act V of 1898), s. 439—Power is discretionary.

Where the evidence of criminal habits or tendencies from which it is to appear to the Court that it should take action under s. 6, Bombay Borstal Schools Act is that of previous convictions, the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of cl. (b) of s. 6. There is no difference in the standard of proof required for pre-

vious convictions, for the purpose of s. 75, Penal Code, or for the purpose of s. 6, Bombay Borstal Schools Act. 33 Ind. Cas. 825 (1), relied on. [p. 270, col. 1.]

Where the only evidence of previous convictions is merely the extracts from the records of Central Bureau of Finger Prints and no certificate from Jail Officer or warrant of commitment is produced to prove it, on such evidence, the Court cannot take account of the previous convictions and cannot, consequently, take action under s. 6.

Before a case is referred to the High Court under s. 6, a reference should be first made to the Inspector-General, and only when he is of the opinion that he cannot, by reason of the particular circumstances of the case or the provisions of s. 11, Borstal Schools Act, transfer a young offender to the Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to the High Court. [p. 270, col. 2.]

Exercise by the High Court of the revisional jurisdiction in criminal matters is a matter of discretion.

Cr. Ref. made by the Superintendent, Karachi District Prison, dated December 1, 1938.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Mr. W. D. C. Vellani, for the Pauper Accused.

Davis, J. C.—The record in this case has been sent to us by Superintendent, Karachi District Prison, under s. 536, Bombay Jail Manual, it being his opinion that this accused, Abdullah, son of Karim, aged about 20, is a fit and proper subject for a Borstal School, and that we should under ss. 6 and 8, Bombay Borstal Schools Act, 1929, send him to a Borstal School. But we do not think that this is a case where we should interfere. It appears the evidence on which the Superintendent relies to show that the accused is a person of criminal habits or tendencies is the fact that the judgment shows two previous convictions, one on July 20, 1937, of three months' rigorous imprisonment under ss. 454-511, Indian Penal Code, by Lucknow Court, and the other on November 30, 1937, also by a Lucknow Court of an offence under s. 379, Indian Penal Code, with six months' rigorous imprisonment. But the learned Advocate who appeared for the accused took the point that these two previous convictions had not been properly proved, their proof merely being extract from the records of the Central Bureau for Finger-prints and the evidence of one Ramchand, an expert of the Finger-print Bureau at Karachi. The wisdom of the rule which requires previous convictions to be properly proved is, we think, illustrated by this

very case because while the extract from the Register of Finger-prints was interpreted by the expert as showing the accused was convicted by a First Class Magistrate on July 10, 1935, and sentenced to three years' rigorous imprisonment under s. 379, Indian Penal Code; further inquiry apparently showed that the entry as interpreted by the expert was incorrect, and that the sentence was not three years' rigorous imprisonment but three years in a Reformatory School at Dharwar. There should really be no difficulty about proof of these previous convictions if the prosecution would take the little trouble that is necessary.

The simplest thing for them to do, is to obtain from the prison or from the Court a certified copy of the judgment in which the previous convictions on which they rely are recorded. Section 511, Criminal P. O., provides for this: A previous conviction or acquittal may be proved *inter alia* by an extract certified, under the hand of the officer having the custody of the record of the Court in which such conviction or acquittal was had, to be a copy of the sentence or order; or, in the case of a conviction, either by a certificate signed by the officer in charge of the jail, in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered. Thus the fact of the previous conviction or acquittal, as the case may be, is satisfactorily proved. But this is not enough; in addition, there must be proof of the identity of the accused person as the person so convicted, and here comes in the use of finger-prints. But the evidence of finger prints is evidence of identity and is not in itself evidence of the previous convictions. For instance, in this very case, there has been a mistake which would have been avoided if there had been a copy of the sentence or order or a certificate signed by the officer in charge of the jail or the warrant of commitment. There would not have been then this confusion as to whether the sentence was of three years' rigorous imprisonment or three years in the Reformatory School, and we think this simple illustration shows the necessity of proving the conviction and sentence in the manner set out in s. 511 (a) or (b), Criminal P. O., to which we have already referred.

The learned Advocate-General who appeared to support the reference of the Superintendent of the Jail pointed out to us that s. 6, Bombay Borstal Schools Act, merely requires that it should appear to the Court, and that

these words imply something less than proof. But where the evidence of criminal habits or tendencies from which it is to appear to the Court that it should take action under s. 6, is that of previous convictions, we think that the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of cl. (b) of s. 6. The case, of course, is quite different where the prosecution rely upon something other than previous convictions to show the accused as of criminal habits or tendencies. But we ourselves can see no difference in the standard of proof required for previous convictions, for the purpose of s. 75, Indian Penal Code, or for the purpose of s. 6, Bombay Borstal Schools Act. The purpose of proof in each case is to make reasonably certain the existence of those previous convictions upon which the Court is asked to act and we do not think it was the intention of the Legislature that under s. 6, Bombay Borstal Schools Act, there should be an element of doubt as to previous convictions any more than that there should be an element of doubt as to previous convictions when the provisions of s. 75, Indian Penal Code, are to be invoked. In this case we have much the same sort of thing as in *Emperor v. Sheikh Abdul* (1). In that case the learned Judge said at p. 1137*:

"The first of these witnesses was a certified expert in finger-prints, and he produced what has been marked as Ex. 4 (1), from the Central Bureau. That purports to be a register of the thumb impressions of the accused on p. 1, and on the reverse, his descriptive roll and a list of his previous convictions. No evidence has been recorded as to how this paper comes to be made and lodged in the Central Bureau nor from what particulars the previous convictions on the reverse are recorded and certified. There is, therefore, nothing on this paper except the two certificates at the foot to show that the person convicted seven times in Bombay is the same man as was convicted at Howrah on May 22, 1912."

There is nothing in the record before us to satisfy us that the convictions and sentences shown on the slip from the Central Finger-print Bureau were convictions and sentences passed upon the accused person now before us. There is a gap in the evidence, there is not here the link of the certified copies of the sentences or orders or the certificate of the Jail Superintendent under s. 511, Criminal P. O., to connect satisfactorily

(1) 43 O 1123; 33 Ind. Cas. 825; A I R 1916 Cal. 344; 17 Cr. L.J. 185; 20 C.W.N. 725.

*Page of 43 O.—[Ed.]

the accused before us with the accused before the Lucknow Courts. We think, therefore, that we cannot take account of these two previous convictions for the purpose of this reference of the Superintendent of the Jail.

It was then said to us by the learned Advocate for the accused that if we cannot take notice of these two previous convictions for the purpose of the reference of the Superintendent of the Jail, and if it is our opinion that they were not properly proved, we should interfere and reduce the sentence of one year's rigorous imprisonment passed upon the accused, and that we should do this in exercise of our jurisdiction as a Court of Revision. But the exercise by us of the revisional jurisdiction is a matter of discretion. We see no reason whatever why we should interfere and reduce the sentence of one year's rigorous imprisonment passed upon this accused. We think under the circumstances the sentence was in no way excessive. We should also wish to point out to the Superintendent of the Jail that under s. 11, Bombay Borstal Schools Act, the Inspector-General of Prisons has certain powers of dealing with convicted persons and of transferring them from prison to a Borstal School and we think it would be for more convenient if before a case is referred to us by the Superintendent in this manner, a reference should be first made to the Inspector-General, and only when he is of the opinion that he cannot, by reason of the particular circumstances of the case or the provisions of s. 11, Borstal Schools Act, transfer a young offender to the Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to us. We therefore return the reference to the Superintendent stating that we intend to take no action in this matter, and that we should be glad if those responsible for proof of previous convictions in the Courts at Karachi will carefully consider the proper procedure to be followed and see that a more satisfactory procedure than has been adopted in this case be followed in the future. Order accordingly. A copy of this order should be sent to the Inspector-General of Prisons for information.

D.

Reference answered.

ALLAHABAD HIGH COURT

Criminal Reference No. 103 of 1938

July 19, 1939

MOHAMMAD ISMAIL AND MULLA, JJ.

EMPEROR—PROSECUTOR

versus

QUDRAT AND ANOTHER—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 289 (2)
—Direction of Judge that there is no evidence that accused committed offence, whether binding on jury
—Whether must return verdict of not guilty—Penal Code (Act XLV of 1860), ss. 366, 376—Kidnapping
—Prosecution must prove girl to be below 16—Charge under s. 376—Prosecution to prove girl to be under 14—Evidence—Age—Proof of—Statement of doctor as to age based upon certain physical peculiarities
—Whether legal proof—Evidence Act (I of 1872), s. 45.

The expression "direct" in s. 289 (2), Criminal P. C. leaves no room for doubt that the intention of the Legislature was that the jury was bound to accept the opinion of the Judge, whether they agreed with that view or not. It therefore follows that the direction of the Judge that there is no evidence that the accused committed an offence is binding on the jury and must be followed by them, and the jury cannot return a verdict of guilty on such a direction. The question of absence of evidence is a question of law and not a mere question of fact.

In order to prove the charge of kidnapping, it is incumbent on the prosecution to prove that the person kidnapped was under 16 years of age.

To prove the charge under s. 376, Penal Code, the prosecution is bound to prove that the girl is below the age of 14.

It is true that a doctor is in a better position to form an opinion about the age of a person than a layman, but the statement of a doctor is no more than an opinion. When from his statement it does not appear that he brought any scientific knowledge to bear upon his opinion, where the doctor has relied entirely on certain physical peculiarities, such as teeth, etc., his statement is not a legal proof but a mere opinion. 39 Ind. Cas. 401 (1), relied on.

Or. Ref. made by the Assistant Sessions Judge, Benares, dated November 10, 1938.

The Deputy Government Advocate, for the Crown.

Mr. Madan Mohan Lal, for the Opposite Party.

Order.—This is a reference under s. 307, Criminal Procedure Code, by the learned Assistant Sessions Judge of Benares. Musammam Bhagmanian said to be about 12 or 13 years of age, was living with her father-in-law named Sudaman in village Lachmangarh. On August 1, 1938, Sudaman found at about 8 or 9 P. M. Musammam Bhagmanian had disappeared from the house in which the family was living. Sudaman searched for the girl, but did not succeed in tracing her. He gave information to Lallan Singh, the *semdar* of the village. The next day

the Sub-Inspector of Police Station Balua happened to visit the village. Lallan Singh informed the Sub-Inspector of the disappearance of the girl. After some investigation Qudrat, accused, was summoned, and it is stated that he informed the Sub-Inspector that the girl would be found at the house of Musammam Rasulan, accused No. 2, in village Dharain. The girl was found outside the house of Musammam Rasulan and was made over to Iqbal Ahmad, the Sub-Inspector. Qudrat and Rasulan were prosecuted, the former under ss. 366 and 376, Indian Penal Code, and the latter under s. 368, Indian Penal Code. The case was committed to the Sessions and was tried with the aid of a jury. Musammam Bhagmanian stated how she was enticed away by Qudrat who, after having sexual intercourse with her, took her to the house of Musammam Rasulan at midnight and left her in custody of Musammam Rasulan. After the examination of the witnesses for the prosecution and the examination of the accused, the learned Assistant Sessions Judge was of the opinion that there was no evidence on the record to prove that the accused had committed the offences with which they were charged. He accordingly directed the jury to return a verdict of not guilty. The jury, however, returned a verdict of guilty by a majority of 3 against 2. The learned Sessions Judge then made this reference under s. 307 of the Code, with the recommendation that this Court may set aside the verdict of the jury and may pass an order of acquittal in favour of the accused persons. The first question to be determined is whether the jury were entitled to return the verdict of guilty against the clear direction of the learned Sessions Judge to the contrary, Section 289 (2), Criminal Procedure Code, provides:

"If he (accused) says he does not, the prosecutor may sum up his case; and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or in a case tried by a jury, direct the jury to return a verdict of not guilty."

The expression "direct" leaves no room for doubt that the intention of the Legislature was that the jury was bound to accept the opinion of the Judge, whether they agreed with that view or not. This interpretation finds support from illustration (a) to s. 299 of the Code:

"... It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whe-

ther that direction is right or wrong, and whether they do not agree with it."

This illustration apparently refers to the direction given by the learned Judge on points of law; but the same expression is used in s. 289 of the Code, and in our opinion it follows that the direction of the Judge that there is no evidence that the accused committed an offence is equally binding on the jury and must be followed by them. In other words, the question of absence of evidence is treated as a question of law and not a mere question of fact. Having regard to the clear language of the section, we have no hesitation in holding that the verdict of the jury in the present case cannot be accepted.

The next question for consideration is whether the learned Sessions Judge was justified in holding that there was no evidence on the record to prove that the accused had committed the offence. In order to prove the charge of kidnapping, it was incumbent on the prosecution to prove that *Musammāt Bhagmania* was under 16 years of age. Similarly to prove the charge under s. 376, the prosecutor was bound to prove that *Musammāt Bhagmania* was below the age of 14 so that her consent to have sexual intercourse with *Qudrat* may be treated as no consent in law. *Musammāt Bhagmania* herself gave her age as 12 or 13. It is manifest that *Musammāt Bhagmania* herself had no direct knowledge about her age. It is also manifest that she did not derive this information from anyone else; otherwise we would expect that she would give a more definite figure. In her statement she does not say whether she derived this knowledge from her mother or father. That being so, we must disregard the statement of *Musammāt Bhagmania* with regard to her age. Prosecution Witness No. 1, *Sudaman*, clearly stated that he did not know where and when *Bhagmania* was born, nor did he know *Bhagmania* from before her marriage. There is no other evidence on the record proving the age of *Musammāt Bhagmania*, except the statement of the Civil Surgeon. In the opinion of the Civil Surgeon, *Musammāt Bhagmania's* age was about 13. It appears that the doctor based his opinion on the particulars given in his report with regard to height, weight, etc. The learned Assistant Sessions Judge is of opinion that the medical evidence does not amount to legal proof of the age of *Musammāt Bhagmania*. Under s. 45, Evidence Act.

"when the Court has to form an opinion on a point

of . . . science . . . the opinion upon that point of persons specially skilled in such . . . science are relevant facts. Such persons are called experts."

From the statement of the Civil Surgeon it does not appear that he brought any scientific knowledge to bear upon his opinion. The indications given by the doctor could be observed by a layman. It is true that a doctor is in a better position to form an opinion about the age of a person than a layman, but the statement of a doctor is no more than an opinion. This question has been considered in several cases. We need only cite the observations of their Lordships of the Judicial Committee in *Mohammad Syedol Ariffin v. Yeoh* (1). While considering the doctor's certificate on the question of age, their Lordships observed as follows:

"Dr. Bright, on examination, says that he formed the opinion that the appellant was 21, judging by his teeth, his appearance and his voice. In their Lordships' view such a certificate is worthless. It is in truth not a certificate but only an assertion of opinion . . . Proof on the subject is not advanced by such documents."

From the report of the Civil Surgeon in the present case it would appear that he relied entirely on certain physical peculiarities, such as teeth, etc. In our opinion, the learned Assistant Sessions Judge was right in holding that there was no legal proof of the age of *Musammāt Bhagmania*. That being so, the learned Assistant Sessions Judge was fully entitled under s. 389, Criminal Procedure Code, to direct the jury to return a verdict of not guilty which the jury were bound to follow. For the reasons given above, we accept the reference, set aside the verdict of the jury and acquit *Qudrat* and *Musammāt Rasulan* of the offences with which they were charged. *Qudrat* who is in custody shall be released forthwith, unless required in connection with some other charge. *Musammāt Rasulan* is on bail, and she need not surrender. The bail bonds are cancelled.

s. Reference accepted.

(1) 43 I A 256; 39 Ind. Cas. 401; A I R 1916 P O 242; 21 O W N 257; (1917) M W N 162; 19 Bom. L R 157; (1916) 2 A O 575; 86 L J P O 15; 115 L T 564; 32 T L R 678 (P O).

ODDH CHIEF COURT

Second Civil Appeal No. 84 of 1937

November 8, 1939

HAMILTON, J.

PARBHU DAYAL—PLAINTIFF—

APPELLANT

versus

BISHESHWAR NATH AND ANOTHER—

DEPENDANTS—RESPONDENTS

Pre-emption—Muafidar paying no rent—Rent no

determinable under s. 40, Oudh Land Revenue Act (XVII of 1876)—If can pre-empt.

Where a *muafidar* pays no rent and it has not been shown that his rent has to be determined by the Settlement Officer under s. 40, Oudh Land Revenue Act, 1876, he is neither an under-proprietor nor a proprietor and is therefore not entitled to pre-empt.

S. O. A. against the decree of the Civil Judge, Hardoi, dated October 30, 1936.

Mr. S. N. Srivastava, for the Appellant.

Mr. K. N. Tandon, for Respondent No. 1.

Judgment.—This is an appeal against an appellate decision of the Civil Judge of Hardoi, who upheld the finding of the original Court that a *muafidar* is not entitled to pre-empt.

The learned Counsel for the appellant here relies on *Dalmir Khan v. Shamsher Khan*, (1931 O. W. N. 285) (1) and urges that if a *qabzadar* is entitled to pre-empt, there is no reason why a *muafidar* should not.

The custom of pre-emption may be presumed under the Oudh Laws Act to exist in all village communities, however constituted, and whether proprietary or under-proprietary, and in the cases referred to in s. 40 of the Oudh Land Revenue Act. The appellant has not shown that he holds an under-proprietary right by virtue of s. 107 (H) of the Oudh Rent Act so that he must have recourse to s. 40 of the Oudh Land Revenue Act, 1876. This section states that the Settlement Officer shall, in accordance with the provisions of the Oudh Sub-Settlement Act, 1866, so far as they are applicable, determine the rent to be paid to the proprietor by all under-proprietors in a *mahal*, and by all holders of heritable, non-transferable leases, whose rent has not been fixed by contract. The appellant must, therefore, show that he is a holder of a heritable, non-transferable lease whose rent has not been fixed by contract and whose rent has to be determined by the Settlement Officer. He is a *muafidar* paying no rent and it has not been shown that his rent has to be determined by the Settlement Officer under s. 40. Consequently as the appellant is not helped by s. 40 and he is not either an under-proprietor or a proprietor, there can be no pre-emption under the Oudh Laws Act.

The appeal is, therefore, dismissed with costs.

S.

Appeal dismissed.

(1) 1937 O. W. N. 285; 167 Ind. Cas. 275 (2); 1937 O. L. R. 97; 9 R. O. 371; A. I. R. 1937 Oudh 428; 13 Luck. 181.

PATNA HIGH COURT

Appeal No. 10 of 1938

August 8, 1939

HARRIS, C. J. AND FAZI ALI, J.

TEJPAL MARWARI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

KEDARNATH HIMATSINGKA AND OTHERS

—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 104 (c) —Appeal under—Validity of award itself, if can be challenged—Arbitration—Arbitrator—Power of, to allow amendment of plaint refused by Court before referring suit to arbitration.

The scope of an appeal under s. 104 (c), Civil P. C. is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine himself to points which have a bearing on the modification made in the award. It is clearly open to the party attacking the order to show that none of the conditions mentioned in Para. 12 of Sch. II applied and the award could not have been modified; but s. 104 does not entitle a party to appeal against the award itself; nor can he in appeal under this provision attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. An award cannot, therefore, be challenged in an appeal under s. 104, on the ground that the arbitrator was not justified in allowing certain amendment in the plaint. 15 Ind. Cas. 519 (1), relied on.

Where an entire suit has been referred to arbitration, the arbitrator has power to allow amendment of plaint in respect of certain wrong date mentioned in it even if such an amendment had been refused by the Court before reference to arbitration.

A. from the original order of the Sub-Judge, Dumka, dated December 9, 1937.

Messrs. L. K. Jha and K. K. Banarji, for the Appellants.

Messrs. Baldeva Sahai and C. P. Sinha, for the Respondents.

Fazi Ali, J.—This is an appeal by the defendants against an order modifying an award in a suit brought by the respondents in the Court of the Subordinate Judge of Santal Parganas for recovery of a certain sum of money. The plaintiffs' case was that the defendants used to take certain articles on credit from them and they referred in their plaint to certain adjustments of account between them and the defendants, one of them being alleged to have taken place on *Baisakh* 1, 1337. On February 11, 1935, before the suit was referred to arbitration, the plaintiffs applied to the Subordinate Judge to allow them to amend their plaint by changing *Baisakh* 1, 1337 into *Kartick* 16, 1337 on the ground that the former date had been mentioned by mistake. The Subordinate Judge at first allowed the amendment, but afterwards on objection by the defendants he recalled

his previous order and disallowed the amendment with these observations :

"The plaintiffs by their amendment now want to shift the date to *Kartick* 16, 1337 B. S. This changes the position materially. How far this will affect the accounts is another point, and will come up for consideration in due course."

It appears that after the suit was referred to arbitration the plaintiffs again prayed for amendment of the plaint by inserting the new date, and the arbitrator allowed the prayer. Thus when the award was submitted by the arbitrator to the Subordinate Judge, one of the objections raised by the appellants to the award was that the arbitrator had no power to allow an amendment which had previously been refused by the Court. The Subordinate Judge overruled not only this objection but all the other objections put forward by the defendants but as he found that the arbitrator had made certain mistakes in calculating interest, he made slight modifications in the award. These modifications are in favour of the defendants, and the learned Advocate appearing for them has clearly stated before us that they have no grievance in so far as the award has been modified with regard to interest. He limits his appeal to one question only, namely that the arbitrator was not justified in allowing the amendment of the plaint on a point on which amendment had been refused already by the Subordinate Judge. Now, a preliminary question arises here as to whether it is open to the appellants to attack the award on such a ground in the present appeal. This appeal has been preferred under s. 104 (c), Civil P. O., which gives a right of appeal "from an order modifying or correcting an award." It is clear that the scope of such an appeal is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine himself to points which have a bearing on the modification made in the award. Under para. 12 of Sch. II, Civil P. O., the Court has power to modify or correct an award :

"(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

Thus it is clearly open to the party attacking the order to show that none of the conditions mentioned in this paragraph applied and the award could not have

been modified; but s. 104, Civil P. O., does not entitle a party to appeal against the award itself; nor can he in appeal under this provision attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. This view is fully supported by the decision of the Calcutta High Court in *Rajbans Sahay v. Soorja Lal* (1). It was clearly pointed out in that case that cl. (c) of s. 104, Civil P. O., does not confer an unrestricted right of appeal; in other words, when an order has been made by which an award has been modified or corrected, in an appeal preferred against that order the validity of the whole award cannot be called in question, the true effect of the clause being to allow an appeal against the order only in so far as it modifies or corrects the award. The scope of the appeal being limited, it is clear that the award cannot be challenged by the appellants on the ground urged in this appeal.

Although this appeal fails on the preliminary ground, it must be stated that there is also no merit whatsoever in the objection put forward by the appellants. The learned Advocate for the appellants concedes that if the Subordinate Judge himself tried the suit, he had power to allow the plaint to be amended even if he had refused such amendment on a previous occasion. As however the entire suit has been referred to arbitration, I do not see why a similar power could not be exercised by the arbitrator. The arbitrator has pointed that the plaintiffs had made a mistake in stating the date of the adjustment of the accounts in the plaint, and, in my opinion, the arbitrator was justified in allowing amendment in these circumstances. In my opinion, there is no merit in this appeal and it must be dismissed with costs.

Harries, C. J.—I agree.

s. *Appeal dismissed.*

(1) 17 C W N 617; 15 Ind. Cas. 519.

LAHORE HIGH COURT

Criminal Appeal No. 467 of 1939

June 23, 1939

YOUNG, O. J. AND SALE, J.

KALA MOHAMMAD AKBAR—CONVICT

—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

"Criminal trial—Confession—No evidence to show that any portion of exculpatory element is false—"

Confession should either be accepted or rejected as a whole—Right of private defence—Held on facts that accused exceeded the right—Penal Code (Act XLV of 1860), s. 304.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. *Balmakund v. Emperor* (1), followed [p. 276, col. 1.]

Held, on facts that the accused had a right of private defence but in hitting the deceased on head with axe and killing him, he exceeded that right. (The conviction was altered to one under second part of s. 304, Penal Code.)

Ur. A. from the order of the Additional Sessions Judge, Rawalpindi, dated April 19, 1939.

Mr. Mohammad Amin, for the Appellant.

Mr. Nazir Hussain, Assistant Legal Remembrancer, for the Crown.

Sale, J.—Kala has been convicted, by the learned Additional Sessions Judge of Rawalpindi, under s. 302, Indian Penal Code, for the murder of Qurban Ali, on the evening of September 11, 1938, at Santh Sarola, Rawalpindi District. One Mohammad Azim was also tried by the learned Additional Sessions Judge for participation in this offence but was acquitted. The learned Sessions Judge has rejected almost the whole of the prosecution evidence and for the purposes of this appeal, the conviction of Kala rests solely on the basis of a confession recorded during the investigation by a Magistrate and repeated before the Committing Magistrate but retracted in the Sessions Court. In these circumstances it is unnecessary to recapitulate in any detail the prosecution story as recited in the first information report and the evidence of the prosecution witnesses which the learned Sessions Judge has discarded. The essential facts are that Qurban Ali, deceased, who was the Secretary of the Co-operative Credit Society of his village claimed that Kala, appellant, owed him some money. There were other causes of enmity also which need not here be detailed.

The appellant Kala, who is employed in the Commissariat Department at Razmak, came home on two months' leave at the beginning of September. On September 11, the deceased Qurban Ali returned to his village after a visit to Rawalpindi. The appellant Kala was living with his uncle Azim and, according to the prosecution version, Azim and Kala accompanied by two other persons visited Qurban Ali on the evening of September 11 and suggested that the latter should accompany

them to Azim's house to settle their debt. Qurban Ali is alleged to have agreed very reluctantly to accompany Kala and Azim to the latter's house and the suggestion of the prosecution was that having decoyed Qurban Ali to Azim's house, Kala, with the assistance of Azim, deliberately murdered Qurban Ali in the verandah of his house. The murder was committed with a *kulhari* and the medical evidence shows that the cause of death is one incised wound on the left side of the head which cut open the bone to the brain. A report was made to the Police only after considerable delay which the learned Sessions Judge holds has not been explained. The Head Constable (P. W. No. 15) investigated the case on receipt of the report, came to Azim's house and found the dead body of Qurban Ali lying on a *charpoy* in the verandah of Azim's house with a *kulhari* still embeded in the head of the deceased. Blood was found lying on the floor. There is no doubt that Qurban Ali was killed while in the verandah of the house of Azim by a blow from an axe. The learned Sessions Judge rejected the evidence of the prosecution witnesses and held that Azim had probably been implicated on account of enmity and acquitted him. It is unnecessary to discuss this evidence since Mr. Nazir Hussain on behalf of the Crown concedes that the evidence of the witnesses is unreliable and has rightly been rejected by the learned Sessions Judge. The only evidence remaining therefore for our consideration is the confession of Kala.

This confession was recorded during the investigation by Mr. Nahr, Sub-Divisional Magistrate, Murree, on September 21, 1938, that is to say, nine days after the occurrence, with all the necessary precautions prescribed by the law. The confession was repeated before the Committing Magistrate but was retracted in the Sessions Court. Counsel for the appellant has suggested that the confession was not made voluntarily and was obtained from the accused by improper inducements on the part of the Police. We can find no foundation on the record for this suggestion. It is clear that the Sub-Divisional Magistrate who recorded the confession observed all the necessary formalities, and satisfied himself by questioning the accused that the confession was voluntary and genuine. This conclusion is corroborated by the facts that Kala adhered to his confession when he was examined by the Committing Magistrate on October 12, 1938, and again on October 24, 1938. It is

only six months later, when he was examined in the Sessions Court, that he retracted his confession. We are satisfied that the confession was recorded with due regard to all the necessary formalities and after observance of the necessary precautions. The confession is corroborated by circumstantial evidence, afforded by the finding of the body at the place indicated in the confession, by the proved manner of Qurban Ali's death, and lastly by the fact admitted by Kala, before the Committing Magistrate, that blood-stained clothes were removed from his person on arrest. We hold that the confession is voluntary and true and that reliance can be placed upon it.

According to this confession the appellant was sitting in the house of his uncle Azim when Qurban Ali, deceased, came there of his own motion to collect some debts alleged to be due from Kala. There was an exchange of abuse but Azim who was then present calmed down the contestants. It is then said that Azim had to leave to obey a call of nature; and that while Azim was away Qurban Ali attacked the appellant with a stick (*soti lekar hamla kiya.*) To defend himself, Kala bent down to pick up a weapon which happened to be at hand and hit Qurban Ali on the head. Kala says that he did not realize at the time that he was using an axe. Such is the confession. The learned Sessions Judge says that the filthiest abuse does not constitute grave and sudden provocation and that, since he cannot accept Kala's version that he did not realize that it was an axe with which he struck Qurban Ali, Kala's offence is murder under s. 302, Indian Penal Code, and he holds that there are no extenuating circumstances which would justify a sentence less than death. It has been held by a Full Bench of the Allahabad High Court of which one of us was a member that

"where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. *Balmakund v. Emperor* (1)."

This is a rule which has been already approved for the Courts of this province and which must be followed in the present case. In the absence of any reliable evidence in the present case, we must accept this confession as a whole, so far as the

(1) 52 A 1011; 129 Ind. Cas. 258; A I R 1931 All. 1; (1931) Cr. Cas. 1; 32 Cr. L J 362; (1930) A L J 1481; Ind. Rul. (1931) All. 130; L R 12 A 33 Cr. (F B).

statements of fact are concerned. These facts are that Qurban Ali came to the house of his uncle of his own motion, demanded his debts, abused the appellant in a filthy manner and later attacked the appellant with a stick, and that it was only in defence that the appellant hit Qurban Ali. On these facts, it is patent that the appellant had a right of private defence against Qurban Ali. The question for our consideration that remains is whether the appellant exceeded his right of private defence. The appellant would only have been justified in causing the death by an axe blow on the head if he had reasonable cause for apprehension that Qurban Ali would in assaulting him cause him death or grievous hurt. The only actual assault attributed to Qurban Ali by the appellant in the confession is abuse and an attack with a stick. The original confession uses the words, *soti lekar hamla kiya.* It does not say that the deceased actually hit the appellant and it only mentions the threat with a *soti* which is usually understood to be a light stick. Actually the appellant did not receive any injury nor does he complain of any injury having been received. The appellant is a young man of 27, employed in the army and, so far as is known, of sound physique. The age of the deceased is nowhere specifically stated but he must have been a good deal older; since two of his sons have given evidence in this case, one Mansabdar being recorded as 25 years of age. It would seem, therefore, that the appellant had the advantage over the deceased, both in age and physique. In these circumstances, even on the appellant's own confession, it is impossible to hold that the appellant was justified in using an axe to cut open Qurban Ali's head.

There is another point. The appellant says in his confession that it was only after he had hit Qurban Ali that he discovered that he had used an axe. We have seen the axe in Court and even making allowances for the fact that the light may have been dim, owing to the time being 8 p. m. we are unable to accept the appellant's explanation that he did not realize at the time the weapon he had picked up was an axe, and that he was using the sharp side for striking Qurban Ali. It is to be noted that in disbelieving this part of the confession we are not rejecting any statements of fact in the confession but only rejecting an inference, which the appellant wishes to be drawn from the facts and which, in our view, is patently untenable.

We hold, therefore, that the appellant had a right of private defence against Qurban Ali, but that he exceeded it. We therefore accept the appeal to the extent of altering the conviction to one under the second part of s. 304, Indian Penal Code and we reduce the sentence to three years' rigorous imprisonment.

D. *Sentence reduced.*

• OUDH CHIEF COURT

Second Civil Appeal No. 148 of 1937

November 15, 1939

HAMILTON, J.

RAUF AHMAD—DEFENDANT

—APPELLANT

versus

Musammât FAHMIDA BEGUM

PLAINTIFF AND ANOTHER—DEFENDANTS

—RESPONDENTS

Pre-emption—Mouza Safipur—Right of pre-emption in respect of grove—Village area included in town—Whether becomes town—Wajib-ul-arz—Interpretation—Custom of pre-emption on transfer of share—If applies to portion of it.

If a village area is incorporated in a town, it does not become a town within the meaning of s. 8 of the Oudh Laws Act so that the right of pre-emption shall not be presumed. *Janki Prasad v. Saheb-un-nissa* (1), relied on.

The *wajib-ul-arz* of Mouza Safipur shows that there exists a custom of pre-emption in that *mouza*, and such a right therefore exists in respect of grove land situated in a *mohal* of that *mouza* and paying revenue.

When a *wajib-ul-arz* says that there is a custom of pre-emption on a transfer of a share, it applies not only to a transfer of a complete share but also to a portion of it.

S. C. A. against the decree of the District Judge, Unao, dated January 20, 1937, setting aside the decree of the Munsif, Safipur, at Unao, dated September 4, 1936.

Messrs. H. Husain and H. H. Zaidi, for the Appellant.

Mr. M. Wasim, for Respondent No. 1.

Judgment.—This is an appeal against a decision of the District Judge of Unao who granted a decree for pre-emption and set aside a decision of the original Court dismissing a suit for pre-emption.

The plaintiff sued for pre-emption of a grove which as described in the plaint was situate in *mohal* Mohan Shah, Qasba Safipur Khas in which *mohal* the plaintiff was a co-sharer but the defendant was not. It was also stated that revenue was paid. The trial Court held that as the land was described as being in Qasba Safipur Khas, it was in a town and there

was, therefore, no presumption of the existence of the right of pre-emption. The lower Appellate Court after allowing the production of additional evidence found that this grove was situate outside the inhabited area and was not within the ambit of the town of Safipur proper and was consequently subject to the right of pre-emption.

There is a *wajib-ul-arz* of Mouza Safipur to the effect that sales of shares by co-sharers are subject to pre-emption. If it applies to this land there is no question of whether a pre-emption arises or not for the *wajib-ul-arz* is sufficient evidence of the custom. In connection with this *wajib-ul-arz* it was held in the year 1866 by the District Judge of Lucknow in whose jurisdiction Unao, where this land is situate also lay, that this custom of pre-emption did not extend to groves, houses and the like. The case went up in appeal to the Judicial Commissioner who rejected the appeal finding that pre-emption extended to shares of co-sharers in the rural area but not to groves in the town area. It is not clear, consequently, whether he based his decision on the fact that the land was a grove and not a share rather than that it was in the town area and not in the rural area. That was a different grove, and if the decision was based on the situation of that particular grove, the only bearing that it would have on the present case is that this grove is not far from that one. It has been held in *Janki Prasad v. Saheb-un-nisa*, (7 O. C. 74) (1) that if a village area is incorporated in a town, it does not become a town within the meaning of s. 8 of the Oudh Laws Act so that the right of pre-emption shall not be presumed. In this case the land is shown to be in a *mohal* and it pays revenue, so even if it eventually lay within the boundaries of the town, there would be a presumption independent of the *wajib-ul-arz*, but as I have stated, in the present case we have the *wajib-ul-arz* of Safipur Mouza, and as this land is in a *mohal* and pays land revenue it can be presumed that this land is in a *mohal* of Mouza Safipur. I have not myself come across any case where there was a *mouza* bearing a certain name and a Qasba bearing the same name which formed two different entities so that one can say that a certain area belonged at the time of the *wajib-ul-arz* to the *mouza* but a certain area consisting of the Qasba was different. It has not been shown that when the *wajib-ul-*

(1) 70 O 74.

arz was prepared Mouza Safipur was a different entity from Qasba Safipur or that in fact any Qasba Safipur existed at all.

It has been held in *Kanhaiya Lal v. Hamid Ali* (7 O. W. N. 271) (2) that a *wajib-ul-arz* was as effective in a town as in a village although it was argued that the *wajib-ul-arz* had no effect because that area known as Pihani was a town. It would appear from this argument and the finding that there, too, the *wajib ul-arz* was of village Pihani but was held to apply to Pihani town.

In *Sheodat Prasad v. Lala Suraj Bali*, (18 O. C. 138) (3) it was held that Kundri though included within the municipal limits of Lucknow was not a *mohalla* of the city but a village as the papers prepared for this area at the time of the settlement were prepared as though it were a village and not a portion of the city.

In my opinion, therefore, the *wajib-ul-arz* does apply to the grove in question.

It has further been argued that the District Judge's decision of 1886 and that of the Judicial Commissioner in 1887, Exs. A-4 and A-3, are authority for holding that the *wajib-ul-arz* does not apply to a grove in the Urban area. The District Judge referring to the *wajib-ul-arz* drew a distinction between the transfer of a share and the transfer of a grove, house or the like. What he meant by the words "the like" I do not know. It might be argued that a house, that is to say, the building as opposed to the site is not a share or even part of a share of a co-sharer, but the only difference that, as far as I can see, could be drawn between a share and a grove is not the fact that trees grow in a grove but that one plot is not a complete share. I do not think that when a *wajib-ul-arz* says that there is a custom of pre-emption on a transfer of a share, it applies only to a transfer of a complete share and not to a portion of it. The whole includes the part and I do not see on what principle one should find that a share of a share is not pre-emptible when the whole share is.

I find, therefore, that the *wajib-ul-arz* shows that there exists a custom of pre-emption in Mouza Safipur and that this land being in Mouza Safipur, it is subject to that custom.

(2) 7 O W N 271; 122 Ind Cas. 774; Ind Rul. (1930) Oudh 134; 14 R D 119; A I R 1930 Oudh 235.

(3) 18 O C 138; 30 Ind. Cas. 295; 2 O L J 305; A I R 1915 Oudh 290.

I, therefore, dismiss the appeal with costs.
s. *Appeal dismissed.*

PATNA HIGH COURT

Letters Patent Appeal No. 11 of 1939

September 21, 1939

HARRIES, O. J. AND FAZL ALI, J.

MUKHAN SINGH AND OTHERS

DEFENDANTS—APPELLANTS

versus

Babu CHANDRIKA PRASAD SINGH *alias*
RAMADHIN SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS

Bihar Tenancy Act (VIII of 1934), ss. 179, 155—Landlord, whether can contract with lessee that right of ejectment under contract shall not be subject to qualifications imposed by s. 155—Principle underlying s. 114, Transfer of Property Act (IV of 1882), is embodied in s. 155.

There is nothing in s. 179, Bihar Ten. Act, to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by s. 155.

The principle underlying s. 114, T. P. Act, is also embodied in s. 155 of the Bihar Ten. Act which is virtually a counterpart of s. 114 of the T. P. Act; and, as the Act itself contains this provision which enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle.

L. P. A. from a decision of the Hon'ble Mr. Justice O. M. Agarwala, dated January 13, 1939, reported as 120 Ind. Cas. 624.

Mr. Phulan Prasad Varma, for the Appellants.

Messrs. Baldeva Sahay, Harinandan Singh and Harians Kumar, for the Respondents.

Fazl Ali, J.—This is a Letters Patent Appeal from a judgment of Agarwala, J. in a second appeal arising out of a suit in ejectment.

It appears that on November 17, 1912, the plaintiffs' predecessors-in-interest granted a permanent *mukarrari* lease to defendant No. 4 at an annual rent of Rs. 19 in which there was a clause to the following effect:—

"If any of the fixed instalments (of rent) remain unpaid, the said proprietors (i.e. the lessor) and their heirs and representatives shall be competent to cancel this *patta* on their own authority and bring the *mukarrari* property into their own direct possession or to settle it with others, to which no objection by me or my heirs and representatives shall be entertained."

On August 29, 1934, the defendant No. 4 transferred the *mukarrari* land to defend-

ants Nos. 1 to 3, and as neither these defendants nor defendant No. 4 paid the rent due for the year 1341 and 1342 F. to the plaintiffs, the latter brought in 1935 the present suit for the ejectment of defendants Nos. 1 to 3 on the ground that the lease had been forfeited. They also claimed compensation for use and occupation of the land by the defendants subsequent to the date of the alleged forfeiture.

The trial Court passed a decree in the following terms :—

"the suit be decreed on contest with costs against defendants Nos. 1 to 3 and *ex parte* against defendant No. 4. Defendants Nos. 1 to 3 are directed to pay to the plaintiffs the sum of Rs. 21-9-6 the amount claimed by them in this suit, as compensation and damages for 1342 F. along with full costs of this suit within fifteen days from this date. In case the money is paid to the plaintiff or is deposited in Court within the aforesaid period, the lessee shall hold the property leased, as if the forfeiture had not occurred, but in case the order is not complied with, the plaintiffs will be entitled to eject the defendants from the holding and recover possession thereof. Defendant No. 4 will be liable for payment of Rs. 21-9-6 to the plaintiffs on account of compensation and damages for 1341 F. Pleaders fee at 8 p. c. Future interest at 6 per cent."

The plaintiffs appealed from the decree of the trial Court and the lower Appellate Court, while maintaining the decree for compensation, gave them an unconditional decree for ejectment. The judgment of the lower Appellate Court was upheld on second appeal and hence this appeal under the Letters Patent.

Section 179 of the Bihar Ten. Act provides that

"Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent *mukarrari* lease on any terms agreed on between him and his tenant."

This section was construed by a Full Bench of this Court in *Nawabzada Syed Moinuddin Mirza v. Sourendra Kumar Roy* (1) and the view expressed in that case was as follows :—

"The true construction of s. 179, is that it is a permission to landlords and tenants, in the case of a creation of a permanent tenure in a permanently settled area, to contract out of the Act and that whereas the general law created by the Bengal Ten. Act as applicable to the relationship of landlord and tenant will apply to a permanent *mukarrari* lease, the parties are at liberty to make a specific provision for the elimination of such terms as may be imposed by the Act as they may select to eliminate."

The same view has been expressed by this Bench in *Muhammad Hasan v. Baidyanath Sahay*, (S. A. No. 388 of 1933 decided on September 4, 1939) (2). In

(1) 13 Pat. 231; 147 Ind. Cas. 655; 6 R P 361; 15 P L T 156; A I R 1934 Pat. 153 (F B).

(2) 184 Ind. Cas. 605; 6 B R 62; 12 R P 253;

that case it was contended that there can be no ejectment for non-payment of rent under the Bihar Ten. Act by reason of ss. 10, 65 and 178, sub-s. (1), cl. (c), but this contention was negatived and my Lord the Chief Justice pointed out in his judgment that s. 179, is by its terms, an exception to the law as laid down in the earlier sections and, therefore, those sections of the Act would not prevent the parties agreeing to whatever terms they thought proper.

Now, the point raised in this appeal is not that the plaintiffs cannot claim ejectment by reason of any specific provisions of the Bihar Ten. Act. On the other hand, it is conceded that they have a right to sue for ejectment in the present case. What is really contended is that before suing for ejectment it was incumbent on the plaintiffs to follow the procedure laid down in s. 155 of the Bihar Ten. Act, and the decree passed in that suit must conform to that section. It is argued that s. 155 merely provides the procedure which must be followed in all suits for ejectment, and so there is no conflict between this section and the right to claim ejectment which may be provided for by any special covenant in a *mukarrari* lease between a tenant and a proprietor or holder of a permanent tenure in a permanently settled area. As this point was neither raised nor decided in *Muhammad Hasan v. Baidyanath Sahay*, S. A. No. 388 of 1938 (2), it is necessary to deal with it specifically in this appeal.

Section 155, provides among other things (1) that a suit for the ejectment of a tenant, on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request; and (2) that a decree passed in favour of the landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the breach, and whether, in the opinion of the Court, the breach is capable of remedy, and shall fix a period during which it

shall be open to the defendant to pay that amount to the plaintiff, and, where the breach is declared to be capable of remedy, to adopt the same.

The first question to be decided is, whether there is anything in the Ten. Act to prevent the parties to a *mukarrari* lease from contracting out of this section or in other words entering into an agreement that if the lessee is to be ejected he may be ejected unconditionally and independently of the provisions of this section. In my opinion, the answer to this question must be in the negative. The words "any terms agreed on between him and his tenant" which occur in s. 179, are very wide and show that the parties to a *mukarrari* lease to which that section applies can contract not only out of ss. 10, 65 and 178 as was held in S. A. No 388 of 1938 *Muhammad Hasan v. Baidyanath Sahay* (2), but also s. 155 of the Bengal Ten. Act. As was pointed out by Agarwala, J., if the provisions of s. 155, are examined, it will be found that the right of ejectment which the landlord may have, is qualified by them in two particulars: first, the landlord is required to give a notice in the prescribed form specifying the breach of contract; and, secondly, the landlord is compelled to accept compensation in lieu of forfeiture in the event of tenants choosing to pay such compensation. But, as has already been pointed out, there is nothing in s. 179 to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by s. 155.

The next question to be considered is whether there is any such contract in the *mukarrari* lease upon which the title of the defendants is based. In my opinion, the relevant clause in this document which has already been referred to, gives the landlord an absolute and unqualified right of re-entry. This is clear from the use of the expression "on their own authority" and also by the provision that no objection to the right of re-entry shall be entertained if any objection is put forward by the lessee or his heirs. The vernacular expression which has been translated to mean "on their own authority" is *Ba-ikhtiare-khud*. In my view, the use of this expression makes it clear that the right of re-entry which the landlord was entitled to exercise under the lease was subject to none of the

qualifications laid down in the Bihar Ten. Act.

It was lastly contended by the learned Advocates for the appellants that the appellants are in any event entitled to a relief under s. 114 of the T. P. Act. This section runs as follows:—

"Where a lease of immovable property has determined by forfeiture for non payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

The lower Appellate Court has, in its judgment, clearly shown that s. 114, can be of no avail to the appellants, because the conditions laid down in this section have not been fulfilled in the present case. But apart from that fact it is quite plain that neither s. 114, nor the principle underlying it can be applied to the present case. Section 114, is not applicable because this case is not governed by the T. P. Act but by the Bihar Ten. Act. As to the principle underlying that section, it is enough to point out, first, that this principle is also embodied in s. 155 of the Bihar Ten. Act which is virtually a counter-part of s. 114 of the T. P. Act; and secondly, that if the Act itself which contains this provision enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle.

In my opinion, the case was correctly decided by Agarwala, J. and I would dismiss this appeal with costs.

Harries, C. J.—I agree.

B.

Appeal dismissed.

OUDH CHIEF COURT

Execution of Decree Appeal No. 48 of 1937
November 21, 1939

THOMAS, O. J. AND RADHA KRISHNA, J.
GOMTI AND OTHERS—JUDGMENT-DEBTORS
—APPELLANTS

versus

JUGAL KISHORE—DEBTOR-HOLDER
—RESPONDENT

U. P. Encumbered Estates Act (XXV of 1934), ss. 7 (1) (a), 14, 18—Transfer of decree for execution to Court in Bengal—Subsequent application by judgment-debtor under s. 4 forwarded under s. 6—Execution pending in Court in Bengal, if can be

stayed—Word "other execution process," meaning of—Decree under s. 14—Effect of.

It is clear from O. XXI, rr. 5 and 6, Civil Procedure Code, that the proceedings in connection with an application for transfer of the decree start with an application for transfer to the Court which passed the decree and end when that Court has complied with the requirements of r. 6 of O. XXI. Thereafter no proceeding remains pending in that Court. It may be that the execution Court does not on an order of transfer lose its jurisdiction over the execution proceedings for certain purposes but it is very different from saying that the execution proceedings remain pending in that Court. Hence where the judgment-debtor makes an application under s. 4, U. P. Encumbered Estates Act, after the decree is transferred for execution by the Court at Unao in Oudh which passed the decree to the Court at Comilla in Bengal and an order has been made by the Collector under s. 6 of that Act, there are no proceedings pending at the date of the order under s. 6 in the Court at Unao and cl. (a) of s. 7 (1) does not apply to the case, and the execution proceedings pending in the Court at Comilla cannot be stayed. 109 Ind. Cas. 417 (1) and 123 Ind. Cas. 881 (5), discussed and distinguished. [p. 282, cols. 1 & 2; p. 283, cols. 1 & 2.]

A mere order of transferring a decree is not issuing a process for the execution thereof, and the words "other execution process" used in the latter part of cl. (a) of s. 7 (1) of the U. P. Encumbered Estates Act do not refer to and cannot cover an order transferring the decree for execution to another Court. [p. 283, col. 2.]

When a decree under s. 14 of the U. P. Encumbered Estates Act, is passed, then by virtue of s. 18 of the Act the effect of the decree passed by the Special Judge would be to extinguish the previously existing rights of the decree-holder-creditor. These rights will be substituted by the decree of the Special Judge. [p. 284, col. 1.]

Ex. D. A. against the order of the Civil Judge, Unao, dated September 3, 1937.

Messrs. Haidar Husain and H. H. Zaidi, for the Applicants.

Mr. M. Wasim, for the Opposite Party.

Judgment.—This is an execution of decree appeal on behalf of the judgment-debtors against whom the respondent at present holds a decree, which he obtained under O. XXXIV, r. 6, of the Code of Civil Procedure. This decree was passed some time in November, 1925. The judgment-debtors have some property situated in the District of Trippera, Bengal. In 1933 the decree-holder applied in the Court of the Civil Judge, then Subordinate Judge, of Unao for transfer of his decree to the Court of the Subordinate Judge of Comilla in Bengal for execution. The decree was therefore sent for execution to that Court and the execution thereof is pending there.

In October, 1936, the judgment-debtors made an application under s. 4 of the U. P. Encumbered Estates Act before the Collector of Unao requesting that the

provisions of that Act be applied to them. The Collector of Unao forwarded the application to the Special Judge of Unao and proceedings before the learned Special Judge are still pending.

On July 24, 1937, the judgment-debtors applied in the Court of the Civil Judge at Unao, i. e., the Court which passed the decree in favour of the respondent-decree-holder praying that by virtue of s. 7 of the U. P. Encumbered Estates Act, the execution proceedings going on in the Court of the First Subordinate Judge at Comilla District Trippera be ordered to be stayed. The Court on July 27, 1937, passed an *ex parte* order staying execution proceedings. On August 3, 1937, the decree-holder applied for setting aside the *ex parte* order of stay on the ground that the Court of the First Subordinate Judge of Comilla was situated outside the United Provinces and the execution proceedings pending in that Court could not be stayed under the provisions of s. 7 of the U. P. Encumbered Estates Act. This application of the decree-holder was allowed and the order of stay passed on July 27, 1937, was vacated. The judgment-debtors have come up in appeal to this Court against the order of the learned Civil Judge of Unao, dated September 3, 1937, cancelling the order of stay of execution proceedings.

The learned Counsel for the appellants has argued that the provisions of s. 7 of the U. P. Encumbered Estates Act are fully applicable and they are entitled to obtain an order staying further execution proceedings in respect of the decree in favour of the decree-holder on two grounds, namely:—

- (1) That the execution proceedings originating in the decree-holder's application for transfer of the decree for execution to the Court in Bengal are still pending in the Unao Court which passed the decree and will terminate when the Bengal Court certifies to that Court the result of the execution under s. 41 of the Code of Civil Procedure. These proceedings must be stayed under the first part of s. 7 (1) (a) resulting in the withdrawal of the decree from the Court in Bengal by the execution Court at Unao in the United Provinces.
- (2) That the order passed by the Unao Court transferring the decree for execution to the Bengal Court was an execution process within the meaning of that expression in the latter part of s. 7 (1) (a) of the U. P. Encumbered Estates Act, and as such, it became null and void and the decree

must be recalled from the Court to which it was sent for execution.

In support of his argument the learned Counsel for the appellant has contended that the Court does not become *functus officio* between the time when it transfers the decree for execution to another Court and the date of certificate under s. 41 of the Code of Civil Procedure and that Court still retains jurisdiction over execution proceedings. He has placed reliance for this contention upon *Jang Bahadur v. Bank of Upper India, Lucknow*, (L. R. 55 I. A. p. 227 = 5 O. W. N. 502) (1), *Seth Shapurji Nanabhai v. Shankar Dat Dube* (I. L. R. 17 Allahabad 431) (2), *Srihary Mondal v. Murari Chowdhury*, (I. L. R. 13 Calcutta 257) (3), *Swaminatha Ayyar v. Vaidyanatha Sastri*, (I. L. R. 23 Madras, 466) (4) and *Balkrishna v. Debi Prasad and others*, (7 O. W. N. 363) (5). He has further referred to *Lang v. Jaswanti Lal*, (I. L. R. 50 Bombay 439) (6) in support of his contention that the Court which passed the decree has power to withdraw the decree at any time from the Court to which the decree has been transferred for execution.

We find ourselves unable to agree with the contentions of the learned Counsel for the appellants. In our opinion the case does not fall either under the first or the second part of s. 7 (1) (a) of the U. P. Encumbered Estates Act.

Section 39 of the Code of Civil Procedure lays down cases in which the Court which passed the decree may send it for execution to another Court. Order XXI, r. 5 and 6 of the Code of Civil Procedure provide for the mode and procedure of transfer of the decree. It is clear from these provisions that the proceedings in connection with an application for transfer of the decree start with an application for transfer to the Court which passed the decree and end when that Court has complied with the requirements of r. 6 of O. XXI. Thereafter no proceeding remains pending in that Court. It may be that the execution Court does not on an order of transfer lose its jurisdiction over the execution proceedings for certain purposes but it is very differ-

ent from saying that the execution proceedings remain pending in that Court. The cases cited by the learned Counsel for the appellant mentioned above do not lend any support to the particular argument addressed before us.

In *Jang Bahadur v. Bank of Upper India, Lucknow* (5 O. W. N. 502) (1) the facts were that the Court of the Subordinate Judge of Lucknow passed a decree absolute for sale on a mortgage in favour of the Bank of the Upper India, Lucknow, against Raja Durga Prasad, the father of Jang Bahadur, appellant. Some property sought to be sold was situated in the District of Hardoi. The Subordinate Judge of Lucknow sent the decree for execution to the Court of the Subordinate Judge of Hardoi under s. 39 of the Code of Civil Procedure and execution proceedings started in that Court. Raja Durga Prasad then died during the pendency of the execution proceedings in the Hardoi Court. The decree-holder then filed an application in the Hardoi Court praying that Jang Bahadur's name be brought on the record as the representative of Raja Durga Prasad, the judgment-debtor. This substitution was allowed by the Hardoi Court. After the execution proceedings had gone on in the Hardoi Court for several years Jang Bahadur made an application before the Sale Officer at Hardoi that the sale proceedings were illegal and without jurisdiction inasmuch as the decree-holder did not get his name entered in the decree in accordance with the provisions of s. 50 of the Code of Civil Procedure.

The Sale Officer referred the matter to the Subordinate Judge of Hardoi who rejected Jang Bahadur's application. The order of the Subordinate Judge of Hardoi was upheld by the Court of the Judicial Commissioner of Oudh. Jang Bahadur went up in appeal to their Lordships of the Judicial Committee. Their Lordships dismissed the appeal. The argument before their Lordships in the Privy Council was that in view of s. 50 of the Code of Civil Procedure the Lucknow Court alone was competent to make the order of substitution. Their Lordships in their judgment observed that the words "which passed it" did not find place in the corresponding section, viz., s. 208 of the Code of Civil Procedure, 1859, but were inserted in s. 232 of the Code of 1877 and were continued in s. 232 of the Code of 1882 and s. 50 of the Code of 1908. In their Lordships' view the effect of the introduction of these words was merely to lay down a rule of procedure as to which

(1) 55 I. A. 227; 109 Ind. Cas. 417; 5 O. W. N. 502; A. I. R. 1928 P. C. 162. 32 O. W. N. 790; 26 A. L. J. 681; 48 O. L. J. 23; 28 L. W. 25; 3 Luck. 314; 30 Bom. L. R. 1373; 55 M. L. J. 515; (1928) M. W. N. 863 (P. O.).

(2) 17 A. 431; A. W. N. 1595, 74.

(3) 13 C. 257.

(4) 23 M. 466.

(5) 7 O. W. N. 363; 123 Ind. Cas. 881; Ind. Rul. (1930) Oudh 177; A. I. R. 1930 Oudh 305.

(6) 50 B. 439; 94 Ind. Cas. 146; 28 Bom. L. R. 381; A. I. R. 1926 Bom. 271.

of the two Courts, i.e. the Court which passed the decree or the Court to which the decree had been transferred for execution, an application for substitution should be made and the non-compliance with such procedure was a defect which might be waived. In the circumstances of the case their Lordships held that it was not open to Jang Bahadur after a lapse of long time to turn round and challenge the legality of the substitution proceedings. In the course of their judgment their Lordships examined s. 39 of the Civil Procedure Code and observed that on such transfer of the decree the Court transferring the decree does not altogether lose seisin of the decree and that the Court of transfer obtains jurisdiction to deal with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure. This decision does not support in any manner the contention of the learned Counsel for the appellants that the execution proceedings remained pending in the Court which passed the decree in spite of the fact that the decree had been transferred to another Court for execution.

In *Balkrishna v. Debi Prasad and others*, (7 O. W. N. 363) (5) a Bench of this Court held that there is nothing to debar a Court which passes a decree from deciding any matters which may arise in execution quite apart from attachment or sale of property. This decision again is a decision which defines the respective limits of the jurisdiction of the Court which passed a decree and the Court to which the decree had been transferred for execution, but is of no help in determining the question involved in the present case.

The other cases need not be considered. The same criticism apply to them.

We are of opinion that there were no proceedings pending at the date of the order under s. 6 of the U. P. Encumbered Estates Act in the Court at Unao and the first part of cl. (a) of s. 7 (1) does not apply.

As regards the second contention that the order transferring the decree by the Unao Court is an execution process and was in force at the date of the order under s. 6 of the Encumbered Estates Act, we are of opinion that it has no force. In our opinion, the words "other execution process" refer to processes analogous to attachment of property, such as warrant of arrest, order

for sale of property, etc. A perusal of the rules of O. XXI of the Code of Civil Procedure will show that that Order deals with several stages during the course of execution of a decree. Rules 1 and 2 deal with the question of payment under decree. Rules 3 to 9 deal with transfer of decree to another Court. Rules 10 to 23 deal with the form of an application for execution, the persons entitled to execute and the procedure in cases of cross-decrees and of cross claims under the same decree, etc. Rule 24 and rules onwards deal with the mode of execution and in this stage it becomes necessary for the Court executing the decree to issue certain processes, such as processes for arrest, detention in the civil prison of the judgment-debtor, attachment of property, order for sale, etc. We consider that it is this stage in the execution of a decree when processes for execution are issued. The heading just before r. 24 is "process for execution" r. 24 (1) reads as follows:—

"When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree".

The language of this clause clearly indicates that the stage in the course of execution contemplated by rr. 1 to 23 is only a preliminary stage, and after the preliminary measures required by rr. 1 to 23 have been taken, the Court is required to issue its process for the execution of the decree. The procedure for an application for transfer of a decree is a preliminary measure, required to be taken before the processes for execution are issued. A mere order of transferring a decree is not issuing a process for the execution thereof, and in our opinion the words "other execution process" used in the latter part of the clause of the Encumbered Estates Act under consideration do not refer to and cannot cover an order transferring the decree for execution to another Court.

We are, therefore, of opinion that s. 7 (1) (a) of the U. P. Encumbered Estates Act has no application to the present case and the execution proceedings pending in the Court of the First Subordinate Judge of Comilla cannot be stayed.

It has to be noted that the decree-holder has presented his written-statement claiming the decretal amount against the appellants under s. 9 of the U. P. Encumbered Estates Act, and the learned Counsel for the appellants has pointed out that if the execution proceedings carried

on in the Court of the First Subordinate Judge, Comilla, are not stated, a very anomalous position will arise because while the decree-holder will be reaping the fruit of his execution in the Bengal Court, he will also be getting a decree on his claim under the U. P. Encumbered Estates Act. In our opinion the consideration of this question is premature. It will be for the learned Special Judge, when examining the claim of the decree-holder and determining the amount of debt due to him under s. 14 to see that the decree-holder does not get any amount twice over. When a decree under s. 14 of the U. P. Encumbered Estates Act is passed, then by virtue of s. 18 of the Act the effect of the decree passed by the Special Judge would be to extinguish the previously existing rights of the respondent. These rights of the respondent will be substituted by the decree of the Special Judge and the decretal amount shall have to be recovered in the manner and to the extent prescribed by the provisions of the U. P. Encumbered Estates Act.

The judgment-debtor-appellants may after a decree is passed by the Special Judge be entitled to raise the question that after the passing of that decree no further execution in the Court of the First Subordinate Judge of Comilla can go on but this question does not arise in the present case and we express no opinion on that point.

The result is that the appeal fails and is dismissed with costs.

a.

Appeal dismissed.

PATNA HIGH COURT

Appeal No. 275 of 1938

February 10, 1939

WORT, J.

JADUNANDAN DAS AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

Musammat MAHO AND OTHERS—DEFENDANTS

—RESPONDENTS

Evidence Act (I of 1872), s. 92—Oral agreement modifying registered contract of lease, is inadmissible—Transfer of Property Act (IV of 1882), ss. 106, 108—Month to month lease—Lessee allowed to construct building—Lessor, if can claim demolition—His remedy—Joint lease—One co-lessor alone cannot enforce covenant.

Subsequent oral agreement modifying a previous contract of a month to month lease which is registered, is not admissible in evidence.

Where in case of such a month to month lease, lessee is allowed to construct a building on the

land leased, it is unjust for the lessor to claim the structure to be demolished. He should give the lessee a notice to quit.

Where a co-proprietor alone sues to enforce a covenant of lease but the other co-proprietor who though does not decline to join as co-plaintiff is impleaded as co-defendant with the lessee, and comes forward with the latter in establishing an oral agreement made by the lessee with his father which modifies the lease, in the circumstances one of the joint lessors or lessees cannot enforce the covenants of the lease. *T. M. Fairclough and Sons Limited v. Berliner* (3), relied on.

A. from the appellate decree of the Sub-Judge, Purnea, dated December 11, 1937.

Mr. J. M. Ghosh, for the Appellants.

Mr. R. S. Chatterjee, for the Respondents.

Judgment.—This appeal by the plaintiff arises out of an action in which he claimed a declaration that the defendant first party had no right to build permanent walls on the land in suit, and also prayed for a mandatory injunction calling upon him to demolish the objectionable buildings. The defence to the action was that as far back as 1923 when the thatched buildings had been destroyed by fire the interested defendants approached the plaintiffs' father and he agreed that the defendants could re-build by constructing what is ordinarily known in this country as *pucca* buildings. The trial Court came to the conclusion that the agreement had not been proved but disallowed the plaintiffs' claim as regards certain rooms but ordered the demolition of the wall. It appears that the reason why there was no order as regards the rooms was that no claim had been included in the plaint with regard to them. The Appellate Court allowed the appeal coming to the conclusion that the agreement put forward by the defendants had been established. In this Court for the first time it is contended that it was not open to the defendant to prove the agreement of 1923 as it was contrary to the provisions of s. 92, Proviso (4), Evi Act. Section 92 prohibits the proof of an oral agreement in variation of a written agreement, but the Proviso allows for the proof of 'any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property,' and there is an exception tagged on to the Proviso that if such 'contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force,' then the Proviso does not apply. It seems to me quite clearly that it is necessary

to decide whether the expression "or has been registered" refers to the fact of registration and not to the requirement of law and therefore, being an agreement although by law not required to be in writing but has been registered, and not an agreement to rescind or modify such contract, is inadmissible in evidence. The question therefore to be determined in the first place is whether the agreement proved by the defendant was an agreement to rescind or modify a contract.

Before dealing with that point, I would refer to another question which arose during the course of the argument and that relates to the form of the lease. It appears that the plaintiff proved no *patta*, called for no *patta* from the defendant, nor did the defendant produce it, nor is there any indication in the record of the case that any such *patta* exists. Therefore the lease was ineffective in law by reason of the decision of this Court in *Ramkrishna Jha v. Jainandan Jha* (1) if it is to be construed as a lease for a year or more than a year. If that be so, it is obvious that the plaintiff cannot prove the covenant to build a thatched house only. I have had the *kabuliyat* translated, and in my opinion, the lease must be construed as a lease from month to month under s. 106, T. P. Act, determinable on fifteen days' notice and not as suggested determinable at will. Any suggestion made by the defendants therefore that they have got a permanent lease is disposed by their Lordships of the Judicial Committee in *G. H. C. Ariff v. Jadunath Majumdar Bahadur* (2) and the subsequent decision of this Court with regard to the matter. That being so, it is quite clear that the plaintiff was entitled to establish or prove the covenant in the agreement or *kabuliyat* which was adduced in evidence in the case. That aspect of the case has certainly an important bearing upon the relief which the plaintiff claimed with which I shall deal in a moment; in the meantime it is necessary for me to decide whether this is a case which the defendant attempted to prove an agreement to rescind or modify any such contract. I must say I find considerable difficulty in coming to a conclusion with regard to the matter. It

might be said that the so-called agreement which the defendant proved was an attempt to prove the case which excused him from what *prima facie* was a breach of contract; in other words, in proving his agreement he might have been understood to say: "Yes, I have broken the terms of my agreement but my reason for doing so was the arrangement made by you that I should be allowed to do so." Whatever else may be said about the case, it seems to me to be very unjust on the part of the plaintiff in this case, the facts being what they are: the father having agreed to allow him to re-build a more substantial building than that which existed on the land before and one of the sons now coming forward and trying to ignore the arrangement made by the father.

The only question that remains is whether it is an agreement which modifies such a contract. With very considerable hesitation I come to the conclusion that it does modify the contract and therefore in that sense was not admissible in evidence. But that does not dispose of the case. The plaintiff, as I have said, was among many joint proprietors and he alone sued as plaintiff. It is not a case in which the plaintiff being one joint proprietors sues for a sum of money and his co-proprietor declines to join as a plaintiff and the plaintiff suing claims the full amount, but a case in which the co-proprietor of the plaintiff who is one of the defendants comes forward to support the defendants in proof of the agreement which the Judge in the Court below allowed the defendants to establish. That can only be construed as meaning that the co-proprietor who is on the side of the defendants is not enforcing the contract contained in the *kabuliyat*. In those circumstances it seems to me that the matter is covered by the decision that one of two joint lessors or lessees cannot enforce covenants of the lease. There are a number of decisions in India, but I refer to the decision in *T. M. Fairclough and Sons, Limited v. Berliner* (3). It is true that in that case Maugham, J. was construing the Law of Property Act of 1925 in England in which the word 'lease' was used, but that is immaterial as it was declaratory of the common law and the question that arose was whether the lessee being entitled to relief against forfeiture out of a number of lessees

(1) 16 P. L. T. 451; 157 Ind. Cas. 98; A. I. R. 1935 Pat. 291; 14 Pat. 672; 1 B. R. 715; 9 R. P. 90 (F. B.).

(2) A. I. R. 1931 P. O. 79; 131 Ind. Cas. 762; 60 M. L. J. 538; 33 L. W. 586; 53 O. L. J. 359; 35 O. W. N. 550; 15 R. D. 354; 8 O. W. N. 739; (1931) M. W. N. 480; Ind. Rul. (1931) P. O. 154; 33 Bom. L. R. 913; 58 O. 1235; 58 I. A. 91 (P. O.).

(3) (1931) 1 Ch. D. 60; 100 L. J. Ch. 29; 144 L. T. 175; 74 S. J. 703; 47 T. L. R. 4.

would be entitled to such relief in the absence of a joint claim by his joint lessors, and it was held that he was not.

It was contended by Mr. Chatterjee on behalf of the respondents in this case that in the circumstances the plaintiff cannot enforce the term of the agreement relating to the erection of a thatched house. I think the contention is right. There is another aspect of the case which I have already stated at the commencement of my judgment, and that is that on the true construction of the *kabuliyat* it can be construed that only a lease from month to month was granted under s. 106. It seems therefore unjust in the circumstances that the plaintiff claimed that the structure to which he objected should be demolished; he should give the defendant a notice to quit. In my judgment the appeal fails and the action should be dismissed with costs.

D.

Appeal dismissed.

CALCUTTA HIGH COURT Special Bench

Application for process for contempt of Court in F. A. No. 1 of 1937

December 2, 1938

COSTELLO, BISWAS AND LODGE, JJ.

Srimati BIBHABATI DEVI AND OTHERS—

DEBENDANTS—APPELLANTS

versus

KUMAR RAMENDRA NARAYAN ROY,

PLAINTIFF AND ANOTHER, DEBENDENT—

RESPONDENTS

Contempt of Court—Publication of pamphlet during pendency of proceedings, when amounts to contempt of Court.

A pamphlet published during the pendency of proceedings is contempt of Court, if (1) it assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in the appeal itself, (2) the document contains reflections of the gravest possible nature upon the conduct and the character of certain of the persons in the appeal, and (3) the pamphlet purports to predict that the appellants will be or are likely to be successful in the appeal and adds the comment in effect that if they are successful, law and justice will be defeated. *St. James Evening Post Case: Roach v. Garvan* (1) and *Tichborne v. Tichborne* (2), relied on.

Mr. Phani Bhusan Chakravarti, for the Petitioner.

Mr. Sarat Chandra Janah, for Nagendra Nath Das.

Costello, J.—This is an application made on behalf of Bibhabati Devi who is one of the appellants in the appeal now pending before this Court or rather not only pending

but proceeding day by day before this Court. The application is also supported by or on behalf of the respondents in the appeal and in effect, therefore, it is a joint application by the principal parties in the appeal. We were asked to issue a rule calling upon one Nagendra Nath Das to show cause why he should not be dealt with by the Court for a contempt constituted by or contained in a pamphlet printed in the Bengali language, the title of which rendered into English is 'Fight between the Rani and the Sannyasi (new series).' The pamphlet relates to what is commonly called the Bhowal *raj* case and upon the outside page or cover of the pamphlet there appears a portrait of the plaintiff in that case in the dress of the Second Kumar of Bhowal. That portrait is one of the actual exhibits in the case being Ex. 58. The pamphlet is, beyond all question, defamatory both of Bibhabati Devi and her brother Satya; I think I should not be overstating the matter to say that it is both disgraceful and dastardly. Our task in adjudicating on this matter is rendered easier from one point of view by the fact that Nagendra Nath Das is not only himself present in Court but is represented by an Advocate, Mr. Janah, and Mr. Janah stated at the outset of the hearing that his client pleaded guilty to the charge brought against him in these proceedings. He clearly and frankly admitted on behalf of the respondent that the pamphlet complained of is undoubtedly a contempt of Court. We have therefore not to consider in any detail the contents of this document which may be described as being in the highest degree scurrilous and contemptible. If, however, this publication had merely amounted to a libel upon Bibhabati and her brother Satya, it might have been possible to argue that it was not a matter which could be dealt with in proceedings for contempt of Court and that the persons aggrieved ought to be left to pursue the appropriate remedy in another place. But this publication contains statements and innuendoes which undoubtedly transcend the character of a libel only. Mr. Chuckerbutty, to whom we are indebted for his very clear and able argument before us, contended, and in our opinion rightly, that this pamphlet comes within the definition of "contempt of Court" on three grounds. First of all, it assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in the appeal.

itself. Secondly, the document contains reflections of the gravest possible nature upon the conduct and the character of certain of the persons in the appeal, viz. Bibhabati Debi herself and her brother Satya who, though not technically a party is a person whose name figures very largely throughout the proceedings. Lastly, the pamphlet purports to predict that the appellants will be or are likely to be successful in the appeal and adds the comment in effect that if they are successful, law and justice will be defeated. These are the points put forward by Mr. Chuckerbutty.

We have been taken through the pamphlet and we have considered it carefully from the beginning to the end and we have no doubt whatever that the first part of it and the last part of it, that is to say, the part which is in a sort of doggerel verse and the part which is in the blank verse both contain statements which entirely justify the propositions put forward by Mr. Chuckerbutty. We are of opinion that this matter falls within the ambit of the classic definition of "contempt of Court" which is contained in the judgment of Lord Hardwick (who was then the Lord Chancellor of England) in *St. James Evening Post Case: Roach v. Garian* (1) decided in the year 1742. The passage is this:

"There are, three different sorts of contempt; one kind of contempt is scandalizing the Court itself. There may be likewise a contempt of this Court in abusing parties who are concerned in causes here. There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard."

And then follows this pregnant observation:

"There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

Those observations of the learned and noble lord find a place in some of the judgments given in cases of contempt of Court decided subsequently, notably in *Tichborne v. Tichborne* (2) where Vice-Chancellor Stuart, after citing the passage to which I have referred, came to the conclusion that by a publication commenting on the position of the claimant in the well-known *Tichborne case* (2) there had been a contempt of Court. I desire to say that we are not in this present proceeding concerned with the dignity or prestige of the Court itself. The publication of the pamphlet now complained of can have and will have

no possible influence upon the proceedings or the decision in the appeal. But what we are concerned with is to take measures to stop, as far as possible, attacks upon the parties to legal proceedings and to prevent irresponsible and scandalous comments on proceedings pending before a Court of law.

Mr. Janah having stated that his client pleaded guilty to having committed a contempt of Court endeavoured to urge in mitigation of the offence that his client is a young man of no great education in that he had only read as far as the seventh standard. It appears, however, that Nagendra Nath Das is not only the printer and publisher of this offending pamphlet, but he is the actual writer of it. The words used are his words. If his ability as a poet or rhymester is not of a very high order, that in our opinion is no reason whatever why he should use such ability as he does possess to compose a pamphlet of this character. It was brought to our knowledge by an admission made voluntarily by the respondent that this is not the first time he has indulged in the malpractice of publishing scurrilous and defamatory pamphlets or, at any rate, commentaries on proceedings pending before a Court. He admitted that he has published a document, apparently more or less similar in character to the one before us, commenting upon a case now pending in a Court at Alipore. The offence with which we are now dealing therefore is not his first offence. Mr. Janah further urged in mitigation that the respondent is a young man. We ascertained that he has reached the age of 30 years and one would have thought that that might be taken to be an age of some discretion and some commonsense when he must have known perfectly well that what he was doing was, to say the least of it, a most improper and risky thing. At the very end of the proceedings Mr. Janah on behalf of his client tendered an apology to the Court and stated that Nagendra Nath Das would give an undertaking to destroy such copies of this production as are still in his possession. We should have appreciated that attitude better, had he also given an undertaking not to repeat an offence of that kind in the future. It is perhaps not without some significance that no written answer to the charge has been put before us and the apology was merely a verbal one given, as I have stated, at a somewhat late stage of the proceedings.

(1) (1742) 2 Atk. 469; 26 E. R. 683.

(2) (1870) 39 L. J. Ch. 398; 22 L. T. 55; 18 W. R. 621.

We regard this matter in the gravest possible light and we desire to make these proceedings an opportunity of letting it to be known publicly and as widely as possible that comments of this kind on pending proceedings or indeed comments of any kind on pending proceedings will not be tolerated. In order to mark our sense of gravity of this offence, after having taken into careful consideration all that has been urged by Mr. Janah on behalf of his client, we are of opinion that we must deal with this man in a way which will not only punish him personally but what is even, in a sense of greater importance will also deter other evilly-minded persons from committing an offence of this kind in the future. We, accordingly, direct that Nagendra Nath Das be committed to civil prison for a period of three calendar months. He will be taken into custody by the Sheriff. We further direct that the copies of the offending pamphlet be made over to the Sheriff.

D.

Order accordingly.

MADRAS HIGH COURT

Appeal No. 9 of 1934

March 22, 1934

LEACH, C. J. AND MADHAVAN NAIR, J.

OFFICIAL RECEIVER, WEST

TANJORE—APPELLANT

versus

SAMUDRAVIJAYAN CHETTIAR

AND OTHERS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 11—Absolute estate—Words repugnant to, should be ignored.

Where an instrument recites that the donor has conveyed properties to the donees on account of affection, in consideration of service being rendered by them to the donor and, because they were the donor's only heirs, and with power to enjoy them with all rights, the intention of the donor is to create absolute estate and any subsequent words which are repugnant to an absolute title must be ignored. 65 Ind. Cas. 974 (1) and 134 Ind. Cas. 648 (2), relied on.

A. against the decree of the Sub-Judge, Kumbakonam, in O. S. No. 28 of 1928.

Mr. K. S. Desikan, for the Appellant.

Messrs. R. Sundaralingam and K. R. Rangaswami Ayyangar, for the Respondents.

Leach, C. J.—The appellant is the Official Receiver of West Tanjore District. He represents the estate of one Ramappa Chettiar, an insolvent. The suit out of which this appeal arises was filed by Ramappa's son, Samudravijayan, for a

declaration that his father has merely a life-interest in certain immovable properties and for an injunction restraining the appellant from offering for sale more than the alleged life-interest. He also sought a decree for partition of other properties. The properties in respect of which the plaintiff alleged his father has a life-interest are described in Sch. A to the plaint and the properties in respect of which partition was sought in Schs. B and C. The suit succeeded so far as it concerned the properties described in Sch. A, but it was dismissed so far as it concerned the other properties. The appellant contends that the learned Subordinate Judge of Kumbakonam who tried the case was wrong in holding that Ramappa's interest in the A schedule properties was limited to a life-estate. He maintains that Ramappa's interest was that of an absolute owner. The appeal is limited to this question. The original owner of the properties was one K. S. Ramu Chettiar, who died in 1873, leaving a widow, Marudevi Ammal, and an adopted son Samudravijayan. The adopted son died in 1897, leaving two sons, Ramappa (the father of the plaintiff) and Surendranath. They were the 38th and 39th defendants in the appeal. Ramu Chettiar left a will under which properties set out in Sch. A were bequeathed to the widow, and it is common ground that she acquired an absolute interest in them. By a deed dated March 15, 1912, she gave these properties to Ramappa and Surendranath, and the dispute is with regard to the effect of this deed, the material portion of which reads as follows:

"On account of the affection I have towards my grandsons aforesaid—(1) Ramappa Chettiar and (2) Surendranath Chettiar—and in consideration of the service that is being rendered by them to me and as only the said two persons are my proper heirs, I have with all my heart and by means of this settlement deed given away this day the properties described in Sch. B thereof, to both of them aforesaid, with power to enjoy them with all rights. But from and out of the income from the said properties, I shall, during my life, pay the Government ~~tax~~ and enjoy the balance left. Afterwards both of them shall divide off the said properties into two moities as they please and enjoy the same. After the death of the said two persons, their (respective) heirs shall succeed thereto. Both of them, individuals numbers 1 and 2 shall enjoy the properties described in Sch. B aforesaid, without making any alienation thereof by way of gift, exchange, sale, etc. The value of the nanja, punja, etc., and house described in Sch. B aforesaid is Rs 16,000. To this effect I have with all my heart and bona fide executed this settlement deed. I have delivered two documents as title deeds hereto. This settlement deed shall remain with Surendranath Chettiar of you."

The appellant's case is that as the donor conveyed the suit properties "with power to enjoy them with all rights" she created an absolute title in the donees and any words which follow are repugnant to an absolute title must be ignored. He relies on s. 11, T. P. Act, which states that where on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such directions. The respondent contends that the document must be looked at as a whole and says that when this is done, it is apparent that the intention of the donor was to give to Ramappa and Surendranath merely a life-interest in the properties. He points to s. 82, Succession Act, and argues that if the meaning of any clause in a will is to be collected from the entire instrument, the same principle must apply when the Court is interpreting a deed of gift.

While the Court must examine the entire instrument in order to see what its effect is, the examination must be carried out in the light of s. 11, T. P. Act, when the instrument is one transferring immovable property. If the examination discloses that the transferor has used words creating an absolute interest, these words must be given effect to, notwithstanding that later words are used which restrict the right of full ownership. In the present case the properties were conveyed to Ramappa and Surendranath on account of affection, in consideration of "service" and, because they were the donor's only heirs, and the words "with power to enjoy them with all rights" can only imply full ownership. It is conceded by the respondent that if the instrument stopped there, it would operate to create an absolute estate in the donees. This being so, it is arguable that by reason of s. 11, T. P. Act, anything which comes after should be ignored. The words of gift are, however, followed immediately by these words:

"But from and out of the income from the said properties I shall, during my life, pay the Government ~~tax~~ and enjoy the balance." and we consider that they must be read in conjunction with the words of gift. Reading the document in this way, there is a conveyance to Ramappa and Surendranath absolutely, subject to the

condition that the donor should enjoy the income during her life. In other words, she reserved to herself a life-interest. This is emphasized by the words which come next:

"Afterwards both of them shall divide off the said properties into two moities as they please and enjoy the same."

"Afterwards" means the donor's death, and on this event the properties are to be divided equally between the two donees without any restriction. The respondent would have it that the provision against alienation which comes later means that the donees were to have only a life-interest. It appears to us that this provision was inserted in order to prevent the donees selling the property during the donor's life-time as the sale would deprive her of the income. Be that as it may, the words prohibiting alienation must be disregarded because they limit the absolute estate which the donor conveyed to the donees with effect from her death. I should mention that the donor died in 1918, and as the result of partition agreements between Ramappa and Surendranath the properties conveyed by the deed were allotted to Ramappa.

In *Bhaidas Sirdas v. Bai Gulab* (1) the Judicial Committee had to consider a will left by a Hindu, who appointed his wife his executrix, constituted her the owner of his property and provided that she should leave whatever might remain after her death to her two daughters "as she liked." By cl. 18 of the will he directed his widow to defray the expenses of a religious object out of the rents of the property left to her, and authorized her to apply the surplus income for the maintenance of herself and her daughters. She was given an express power to mortgage or sell and by another clause the daughters were to be the executrices upon her death with power to deal with and manage the entire property. Their Lordships held that the widow took an absolute estate. The limitations which followed were not sufficient to displace the effect of the clause which constituted her the absolute owner of the property.

In *Saraju Bala Debi v. Jyotismoyee Debi* (2) which was also decided by the

(1) 48 B 153; 85 Ind. Cas. 974; A I R 1922 P O 193; 49 I A 1; 26 O W N 129; 15 L W 412; 20 A L J 289; 42 M L J 385; 35 O L J 314; 24 Bom. L R 551 (P O).

(2) 59 O 142; 134 Ind. Cas. 648; A I R 1931 P O 179; 58 I A 270; (1931) A L J 575; 35 O W N 903; 34 L W 51; 8 O W N 944; 33 Bom. L R 1257; (1931) M W N 989; 61 M L J 501; Ind. Rul. (1931) P O 296; 54 O L J 333 (P O).

Privy Council a Hindu executed three documents, whereby he conveyed to his daughter, her sons, and their sons successively and her daughters immovable properties subject to a fixed rent with the right to transfer by sale or gift under certain conditions. The conditions were: (1) The properties were not to pass to the heirs of the grantee's daughters; (2) they were not to be transferred by gift except to a limited extent for religious purposes, and (3) the grantor and his heirs were to have a right of pre-emption in certain circumstances. The Privy Council held that the grantee took an absolute estate. Their Lordships examined the conditions and held that they were to be disregarded as being repugnant restrictions. That is the position here. There is no doubt that it was the intention of the donor to convey the properties to Ramappa and Surendra-nath absolutely and the instrument was worded to give effect to this intention. Therefore, the restriction on alienation must be ignored. For the reasons indicated, we are of the opinion that the learned trial Judge was wrong in holding that Ramappa had merely a life-interest, and we allow this appeal.

The learned Advocate for the appellant has also contended that the suit was bad as notice had not been given in accordance with s. 80, Civil P. C. In view of our decision on the main question in the appeal, it is not necessary to decide whether the suit was properly instituted. The plaintiff-respondent will pay the appellant's costs in this Court and in the Court below. The plaintiff-respondent will also pay to the appellant the court-fee which the appellant had to pay as the result of the suit having been filed *in forma pauperis*.

N-S.

Appeal allowed.

ODDH CHIEF COURT

First Civil Appeal No. 109 of 1937

November 16, 1939

ZIA-UL HASAN AND RADHA KRISHNA, JJ.
ANAND BEHARI LAL KHANDLWAL
— PLAINTIFF—APPELLANT

versus

DEPUTY COMMISSIONER, BARA
BANKI, IN CHARGE OF ASDAMAU

ESTATE—DEFENDANT—RESPONDENT

U. P. Court of Wards Act (IV of 1912), ss 21 (3),
17 to 23, 52—Exclusion of period under—How calculated—Court of Wards, if can acknowledge or pay off
time-barred debt of its ward—Claim notified under

s. 17—Creditor or decree-holder, whether precluded from suing or executing decree—Court of Wards, if under statutory liability to discharge debt or decree even if time-barred—S. 52, applicability—Words "without discharging..... in Chap. IV", meaning of—Contract Act (IX of 1872), s. 25 (3)—Manager of Court of Wards, whether agent generally or specially authorised to pay time barred debt—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Manager, Court of Wards agreeing to pay decree-holder without seeing whether decree was barred by time—Decree barred by time then—Agreement, if enforceable.

Section 21, U. P. Court of Wards Act lays down that the time shall not run against the decree-holder so far as the execution of the decree is concerned in respect of which the creditor has notified his claim during the period mentioned in cl. (3):

Held, that the application for execution was barred much before the date when the application under s. 4 of the U. P. Encumbered Estates Act was made. [p. 292, col. 2.]

There is no provision in the Court of Wards Act which would entitle the Court of Wards to acknowledge or pay off a time-barred debt of its ward. [p. 293, col. 1.]

There is nothing in ss. 17 to 23, U. P. Court of Wards Act which would justify the argument that remedies under the general law are suspended as soon as a claim is notified under s. 17 of the Act. There is nothing in the provisions of the Act which would show that a creditor or decree-holder is precluded from instituting the suit or executing the decree after notifying his claim under s. 17 or that the Court of Wards is placed under a statutory liability to discharge that debt or decree in spite of the fact that the enforcement of that debt or decree in a Civil Court may become in the meantime barred by time. 166 Ind. Cas. 928 (1), relied on. [p. 293, col. 2.]

Section 52, applies to cases where the estate is released from the superintendence by the Court of Wards before the ascertainment of debts, and ss. 20 and 21 apply where the debts are ascertained by the Collector under Chap. IV of the Act. Chapter IV of the Court of Wards deals not with discharging the liabilities of the ward but with their ascertainment only, and the words "without discharging the liabilities thereof in the manner provided in Chap. IV" in s. 52 mean and stand for "without ascertaining the liabilities thereof in the manner provided in Chap. IV." [p. 293, col. 1.]

The Deputy Commissioner, acting on behalf of the Court of Wards, is not an agent generally or especially authorised to pay a time barred debt of the ward.

Where a Manager of Court of Wards does not apply his mind to the question whether the decree-holder's claim was within time or not, an agreement entered into by him with the decree-holder to pay a certain amount in full satisfaction of the decree which had by that time become barred by time, is not a lawful agreement capable of enforcement by Court under the provisions of O. XXIII, r. 3 of the Code of Civil Procedure, and the Manager is not estopped in any manner from resiling from the settlement. [p. 293, col. 1.]

F. C. A. against the order of the Special Judge, First Grade, Bara Banki, dated September 10, 1937.

Messrs. D. K. Seth and Mohammad Naziruddin, for the Appellant.

Mr. H. S. Gupta, the Government Advocate, for the Respondent.

Judgment.—This is a creditor's appeal under s. 45 of the Encumbered Estates Act against the order of the Special Judge, First Grade, District Bara Banki, dismissing his claim with costs.

Munshi Murlidhar held a decree for a sum of Rs. 1,470-11-0 and costs against Pandit Pyare Lal Pande, *Taluqdar*. The estate of the judgment-debtor was taken under the superintendence of the Court of Wards and the notification required by s. 17 of the U. P. Court of Wards Act was issued on March 31, 1931, and published in the *U. P. Gazette* on April 11, 1931. The creditor notified his claim and it was accepted by the Board of Revenue for a sum of Rs. 1,604-11-0 (*vide* Ex. A-1, a letter of the Deputy Commissioner of Bara Banki, dated March 29, 1932). Munshi Murlidhar died in April, 1934, and was succeeded by his widow *Mst. Basanti Devi*.

Thereafter an application under s. 4 of the Encumbered Estates Act was made by the Deputy Commissioner, in charge of the Court of Wards, on November 25, 1935, and in this application *Mst. Basanti Devi's* decree was admitted as a subsisting debt. After the application had been forwarded to the Special Judge by the Collector under s. 6, the Deputy Commissioner in charge of the estate filed the written statement under s. 8 of the Encumbered Estates Act, and in this written statement also the decree in favour of *Mst. Basanti Devi* was admitted as a subsisting debt. *Mst. Basanti Devi* filed her claim on the basis of the said decree under s. 9 of the Encumbered Estates Act on April 25, 1936, after obtaining a certificate as required by s. 21 (a) of the U. P. Court of Wards Act from the Deputy Commissioner of Bara Banki. In the replication filed by the Court of Wards on September 14, 1936, the debt was again admitted to be subsisting.

During the pendency of these Encumbered Estates proceedings, negotiations were carried on between the Court of Wards and the decree-holder for payment of the decree and it appears that in February, 1937, it was agreed upon that Rs. 1,600 would be paid and accepted in full satisfaction of the decree. A cheque for the amount seems to have been drawn up by the Court of Wards the same day, which was cancelled later on.

An application under O. VI, r. 17 of the Civil P. C., was made by the Deputy Commissioner of Bara Banki, in charge of the estate, for the amendment

of his application dated November 25, 1935, as well as the replication dated September 14, 1936, on the allegation that the claim under the decree mentioned above was barred by time and the name of Munshi Murlidhar should be deleted from the list of creditors. The learned Special Judge allowed the application and held that the execution of the decree had become barred by time before the application under s. 4 of the Encumbered Estates Act was made, and dismissed the claim.

It appears that after the order passed by the Court below *Mst. Basanti Devi* died and the present appellant has appealed as the legal representative of the decree-holder.

The learned Counsel for the appellant has argued that

(1) the execution of the decree was not barred before the order passed by the Collector under s. 6 of the Encumbered Estates Act,

(2) that it was not open to the respondent to go back upon the settlement dated February 23, 1937, and the amendment asked for should not have been allowed by the Court below,

(3) that after admitting the claim of the creditor under s. 19 of the Court of Wards Act, the respondent was under a statutory liability to discharge the debt out of the estate,

(4) that there can be no question of limitation after the admission of the claim as is clear from the provisions of s. 52 of the U. P. Court of Wards Act and that the appellant cannot be put in a worse position during the continuance of the superintendence of the Court of Wards than if the estate were released now.

1st Point.—As regards the first point, i.e. the question whether an application for the execution of the decree was barred by time before the order passed under s. 6 or the application under s. 4 of the U. P. Encumbered Estates Act, the question depends upon a proper computation of the period of limitation available with reference to the provision of s. 21 (3) of the U. P. Court of Wards Act and the effect of the acknowledgment of liability contained in the letter dated March 29, 1932, by which the claim of the creditor was admitted by the Court of Wards. The learned Counsel for the appellant argued that an acknowledgment of liability in writing was made on March 29, 1932, before the expiration of the period prescribed for execution application and that entitled him under

s. 19 of the Indian Lim. Act to a fresh limitation from the time when the acknowledgment was signed and that the acknowledgment bears the date of March 29, 1932, and so an application for execution could, under the law of limitation applicable, be made up to March 29, 1935. He then adds the days between March 31, 1931, the date of the notice under s. 17 of the U. P. Court of Wards Act, and March 29, 1932, (March 29, 1932, is taken roughly for the purposes of this case as the date of confirmation by the Court of Wards of the Collector's decision under s. 19 of the U. P. Court of Wards Act) and thus says that the application for execution was in time up to March 27, 1936, i. e., a date long after the date of the application under s. 4 or the order of the Collector under s. 6 of the U. P. Encumbered Estates Act. It may be noted that there is no evidence as to the date on which the order under s. 6 of the U. P. Encumbered Estates Act was passed by the Collector but the parties have agreed that the date of the application under s. 4 be taken as the date of the order under s. 6 of the U. P. Encumbered Estates Act.

This method of calculation, in our opinion, is incorrect and not according to law. Section 21 (3) of the U. P. Court of Wards Act, runs as follows:—

"(3) In computing the period of limitation prescribed by the Indian Lim. Act, 1908, or s. 48 of the Civil P. O., for any application for the execution of a decree proceedings in which have been stayed or temporarily barred under sub-s. (1) the time from the date of notice or of the decree, if it was passed subsequently to the publication of the notice, to the date when the Collector's decision under s. 19 is confirmed by the Court of Wards, shall be excluded."

This section provides for exclusion of time between the date of the notice under s. 17 of the Court of Wards Act and the date of confirmation, in other words, this section lays down that the time shall not run against the decree-holder so far as the execution of the decree is concerned in respect of which the creditor has notified his claim during the period mentioned in cl. (3). The calculation made by the learned Counsel for the appellant has the effect, not of excluding the said period, but that of adding that period at the end of the limitation calculated on the basis of the provisions of the Indian Lim. Act. The correct calculation, in our opinion, should proceed as follows:—

The decree was dated April 30, 1930. The notification under s. 17 of the U. P. Court of Wards Act was issued on March

31, 1931, by which date one day short of 11 months had expired. A period of two days less than a year, from March 31, 1931, up to March 29, 1932, remains suspended by virtue of the provisions contained in cl. (3) of s. 21 of the U. P. Court of Wards Act. Time started to run again against the decree-holder from March 30, 1932, and from that date he was entitled to the remaining period of 25 months and one day, which would be completed on or about May 1, 1934. This date falls long before the date on which the application under s. 4 of the Encumbered Estates Act was made. It may be that in between the date of the decree, i. e., April 30, 1930, and the last day of limitation, i. e., May 1, 1934, there was an acknowledgment of liability in writing by the Court of Wards but by virtue of s. 19 of the Indian Lim. Act, the longest period to which the decree-holder would be entitled would be three years of the date of the acknowledgment. The acknowledgment is of March 20, 1932, and the period of limitation would be extended up to March 29, 1935. This date again falls long before the date on which the application under s. 4 of the Encumbered Estates Act was made. So in neither case the application for execution of the decree was within time by the time the Court of Wards applied to obtain the benefit of the Encumbered Estates Act.

We have shown above that the error in the calculation made by the learned Counsel for the appellant consists in not excluding the period prescribed by s. 21 (3) of the U. P. Court of Wards Act, but adding that period to the end of the period calculated from the date of the acknowledgment. The effect of this is to claim a larger period under s. 19 of the Indian Lim. Act than the period provided by that section, which is contrary to law. We hold, therefore, that the application for execution was barred much before the date when the application under s. 4 of the Encumbered Estates Act was made.

2nd Point.—We have shown above in the narration of facts that a compromise was agreed upon between the parties by which it was agreed that Rs. 1,600 would be paid in full satisfaction of the decree and a cheque was drawn on that date but cancelled later on. It is true that under s. 25 (3) of the Indian Contract Act an agreement or compromise, made in writing and signed by the person to be charged there-

with, or by his agent generally or especially authorised in that behalf, to pay the debt of which the creditor could have enforced payment but for the law of limitation, is a contract, and as such, enforceable between the parties. But the question in the present case is that the Deputy Commissioner, acting on behalf of the Court of Wards, was not an agent generally or especially authorised to pay a time-barred debt. We do not know of any provision in the Court of Wards Act which would entitle the Court of Wards to acknowledge or pay off a time barred debt of its ward. The action of the Court of Wards in agreeing to pay Rs. 1,600 was not for the benefit of the minor. The Deputy Commissioner did not apply his mind to the question whether the decree-holder's claim was within time or not and an agreement entered into by him in these circumstances was not, in our opinion, a lawful agreement capable of enforcement by Court under the provisions of O. XXIII, r. 3 of the Civil P. O. We are, therefore, of opinion that the respondent was not estopped in any manner from resiling from the settlement.

3rd Point.—Chapter IV of the Court of Wards Act lays down the provisions for the "ascertainment of debts" after a particular estate is taken under the Court of Wards. Section 17 lays down the procedure for the publication of notice to claimants and for the manner in which the creditors should present their claims. Section 18 provides for the effect of failure to notify claim. Section 19 lays down the powers of the Collector in regard to claims notified or deemed to have been notified under ss. 17 and 18 as regards allowing or disallowing claims in whole or in part; Section 20 lays down clearly that nothing in ss. 18 and 19 shall be construed to prevent any person from instituting or continuing in any competent Court any suit or proceeding in respect of any claim which has been disallowed and s. 21 lays down for conditions under which a fresh proceeding in execution of any decree against the ward may be instituted and for exclusion of time between the date of notice under s. 17 and the confirmation of the decision of the Collector by the Court of Wards. Section 22 provides that documents not produced before the Collector would be inadmissible in evidence in certain cases and s. 23 provides for the stay of process of execution in a Civil Court against the property of the ward. There is

nothing in these sections which would justify the argument that remedies under the general law are suspended as soon as a claim is notified under s. 17 of the U. P. Court of Wards Act. We find nothing in the provisions of the Court of Wards Act which would show that a creditor or decree-holder is precluded from instituting the suit or executing the decree after notifying his claim under s. 17 or that the Court of Wards is placed under a statutory liability to discharge that debt or decree in spite of the fact that the enforcement of that debt or decree in a Civil Court may become in the meantime barred by time. A decision of this Court reported in *Mathura Prasad v. The Deputy Commissioner of Kheri, Manager of the Court of Wards, Mahewa Estate* (1937 O. W. N., p. 165) (1) fully supports our view and we are of opinion that this contention of the learned Counsel for the appellant has no force.

4th Point.—In support of this contention the learned Counsel for the appellant has referred us to the provisions of s. 52 of the Court of Wards Act which runs as follows:—

"When the Court of Wards after assuming the superintendence of the property of a ward releases the same without discharging the liabilities thereof in the manner provided in Chap. IV, the time from the publication of notice under s. 17 to the date of such release shall be excluded in computing the period of limitation applicable to suits or applications for the recovery of all claims outstanding against the ward at the date of such notice."

His contention is that if the Court of Wards were to release the estate from its superintendence without discharging the decree in favour of the appellant, then by virtue of the above provision the period between the publication of notice under s. 17 and the date of such release shall be excluded in computing the period of limitation applicable to his application for execution. If the Court of Wards were to release the estate to-day, his application for execution would be within time and so it would be anomalous to suppose that it could be barred by time before the release. In our view the contention of the learned Counsel for the appellant on this point is based upon a misconception of the provisions of s. 52 of the U. P. Court of Wards Act. The confusion is created by the use of the word "discharging" in s. 52. After a careful consideration of the language of the relevant sections we are of opinion that

(1) 1937 O W N 165; 166 Ind Cas. 928; 1937 O L R 77; 9 R O 351; A I R 1937 Oudh 282; 13 Luck. 171.

s. 52 applies to cases where the estate is released from the superintendence by the Court of Wards before the ascertainment of debts, and ss. 20 and 21 apply where the debts are ascertained by the Collector under Chap IV of the Act. Chapter IV of the Court of Wards deals not with discharging the liabilities of the ward but with their ascertainment only, and in our opinion the words "without discharging the liabilities thereof in the manner provided in Chap. IV" in s. 52 mean and stand for "without ascertaining the liabilities thereof in the manner provided in Chap. IV". We are, therefore, of opinion that the argument of the learned Counsel for the appellant, which is based upon a misconception of the meaning and application of s. 52 of the U. P. Court of Wards Act, has no force.

The result is that the appeal fails and is dismissed with costs

S.

Appeal dismissed.

FEDERAL COURT

Appeal from the High Court at Patna
October 12, 1939

GWYER, C. J., SULAIMAN AND
VARADACHARIAR, JJ.

JAGDISH JHA AND OTHERS

—APPELLANTS

versus

AMAN KHAN—RESPONDENT

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7—S. 7 which re-enacts s. 11, Bihar Money-lenders Act (III of 1938), is valid.

Section 11 of the Bihar Money-lenders Act (III of 1938), has now been re-enacted as s. 7 of the Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939); and, as this Act has been passed in conformity with the procedure prescribed in s. 107 (2) of the Government of India Act, 1935, its validity is not open to question.

Judgment.—This appeal arises out of a suit instituted by the respondent for the recovery of money claimed to be due under a mortgage-bond executed in his favour by some of the appellants on April 16, 1921. The other defendants are minor members of the mortgagors' family. The bond provided for payment of compound interest at Re. 1-1-0 per cent. per mensem with yearly rests. Certain of the defendants did not contest the case, but the others put the plaintiff to proof of his claim generally; they also contended that the rate of interest was excessive and not justified by necessity.

The question of the interest seems to have been the main point in controversy in the litigation. The trial Court allowed only simple interest at Re. 1-4-0 per cent. per mensem; but on appeal by the plaintiff, the lower Appellate Court allowed compound interest in accordance with the terms of the mortgage-bond. The third defendant carried the matter in second appeal to the Patna High Court, and during the pendency of the appeal before the High Court, the Bihar Legislature passed the Bihar Money-lenders Act, 1938 (No. III of 1938). Section 11 of that Act provided that

"no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise is greater than the amounts of the loan advanced".

The appellant naturally relied upon this enactment in support of the second appeal. When the second appeal came on for hearing, the learned Judges of the High Court seem to have expressed themselves against the contention of the defendants as it stood independently of the Money-lenders Act; the contention based on s. 11 of the Act was referred to a Full Bench which upheld the mortgagee's contention that that section was void under s. 107 of the Constitution Act, as being repugnant to an existing Indian Law; the decision is reported in *Sadanand Jha v. Aman Khan* (1). It is against the decree of the High Court dismissing the second appeal on this ground that this appeal has been preferred by the defendants.

Section 11 of the Bihar Money-lenders Act, 1938 (No. III of 1938), has now been re-enacted as s. 7 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (No. VII of 1939), and, as this Act has been passed in conformity with the procedure prescribed in s. 107 (2) of the Constitution Act, its validity is not open to question. Section 7 of the new Act has in terms been made applicable even to suits instituted before the commencement of the Act and the appellants are accordingly entitled to claim the benefit of the section. It is therefore unnecessary to consider whether s. 11 of the Bihar Money-lenders Act, 1938 (No. III of 1938), was or was not void, on the grounds raised before the High Court.

(1) 12 Pat. 13; 179 Ind. Cas. 379; A I R 1939 Pat 55; 20 P L T 1; 5 B R 265; 11 R P 357.

We, therefore, allow this appeal. The case is remitted to the High Court with a direction to pass a preliminary decree for Rs. 400 principal, and Rs. 119 (that is, Rs. 400 less Rs. 281 already paid) for interest up to February 26, 1934, the date of the institution of the suit. There will be further interest at the rate of six per cent. per mensem on Rs. 400, the principal amount, from February 26, 1934, up to the date to be fixed by the High Court for payment; after that date, interest at six per cent. per annum will be payable on the consolidated amount up to the date of payment. The plaintiff will retain the costs awarded to him in the first two Courts, that is to say, the Munsif's Court and the District Judge's Court; there will be no order as to costs in the High Court and in this Court.

s.

*Appeal allowed.***OUDH CHIEF COURT**

Appeal No. 1 of 1937

November 22, 1939

YORKH AND RADHA KRISHNA, JJ.

**Musammât SAKINA BEGUM—PLAINTIFF—
APPELLANT***versus***Pandit DURGA SAHAI AND OTHERS**

—DEFENDANTS—RESPONDENTS

*Oudh Rent Act (XXII of 1886), s. 19 (1)—Applicability—Remission claimed on account of slump in prices**—Section, if applies—Sanction of Deputy Commissioner, if must be taken in each and every case.*

Section 19 (1) of the Oudh Rent Act has no application to a case where an under-proprietor claims remission on account of the slump in prices due to abundance in produce of the land.

The only construction to which the language of s. 19 (1), Oudh Rent Act lends itself is that a separate previous sanction of the Deputy Commissioner for remission should be obtained in each case by a Court seised of a suit for arrears of rent before it can allow that remission from the rent payable by an under-proprietor. The section clearly means that what the Court has to do in each case, when considering the question of remission, is first to determine as to what would be the amount to be allowed as a remission on equitable grounds and then to obtain the sanction of the Deputy Commissioner in respect thereof. The sanction of the Deputy Commissioner would naturally depend upon what the Court has determined to be an equitable remission. Both the Court and the Deputy Commissioner have to determine the question of remission judicially after giving due consideration to the facts of each individual case, and it is hardly conceivable that a general order of allowing remission in a particular locality was in the contemplation of the Legislature when it used the words "with the previous sanction of the Deputy Commissioner" in the section. [p. 296, col. 2]

A. against the order of Mr. Justice Zia-ul Hasan, Lucknow, dated December 17, 1936.

Messrs. *Ghulam Inam and Kalbe Abbas* (Rae Barali), for the Appellant.

Mr. L. S. *Misra*, for the Respondents.

Judgment.—This is a plaintiff's appeal under s. 12 (2) of the Oudh Courts Act from an appellate decree of a learned Single Judge of this Court in a Second Rent Appeal.

The plaintiff-appellant brought a suit for recovery of Rs. 937-9-0 under s. 103 (2) of the Oudh Rent Act for arrears of rent for 1339 to 1341 *Fasli* against the defendants-respondents. It may be noted that the plaintiff allowed a remission to the defendants for the years in suit to the extent of the remission made in the land revenue in her favour. The trial Court allowed remissions in the rent to the defendants to the extent of Rs. 6-9-5-9, which was double the amount of revenue remitted to the plaintiff. The trial Court was of opinion that such remissions were allowable to the defendants under s. 19-A of the Oudh Rent Act.

On an appeal by the plaintiff, the learned District Judge took the view that s. 19-A of the Oudh Rent Act had no application in the case of the defendants, who were admitted before him to carry the status of under-proprietors. He raised the amount of the decree by a sum of Rs. 317-4-9 on the view that under the terms of the perpetual lease (Ex. A-1), the title deed of the defendants, remission only to the extent of the remission in revenue could be allowed.

In second appeal, which came on before a Single Judge of this Court, it was held that although s. 19-A was not applicable, yet the defendants-respondents were entitled to an appropriate reduction in their rent under s. 19 (1) of the Oudh Rent Act. A reduction in rent was, therefore, allowed to the defendants at the rate of 1½ times the remission allowed by the Government in the land revenue plus cesses calculated according to s. 8 of the Local Rates Act. There were other points in contest between the parties but we are no longer concerned with them in this appeal.

The only point which has been taken in this appeal is that s. 19 (1) of the Oudh Rent Act has no application to the present case.

A faint attempt was made on behalf of the appellant to urge that the status of the defendants-respondents was not that of under-proprietors and that they were mere *thekadars* as recorded in the *khewat*. From the judgment of the learned District Judge

it is clear that it was the appellant's own case that the respondents were under-proprietors and we find that the decision of the learned District Judge as well as the decision in Second Rent Appeal No. 23 of 1935 in this Court proceeded on that footing. It is too late for the appellant to raise this question now and we disallow it.

As regards the chief point in controversy in this appeal, the learned Counsel for the appellant has urged that s. 19 (1), is not applicable, that that section applies only when there has been a diminution in the area of the land in the occupation of the under-proprietor by diluvian or otherwise, or if the produce of that land has been diminished by drought, hail, or other calamity beyond his control. It is further contended that no remission from the rent payable can be allowed by a Court unless previous sanction of the Deputy Commissioner has been obtained. Section 19 (1) of the Oudh Rent Act reads as follows :—

"Notwithstanding anything in the last foregoing section, a Court when it makes a decree for an arrear of rent, may, with the previous sanction of the Deputy Commissioner, allow such remission from the rent payable by any under-proprietor or tenant as appears equitable, if the area of the land in his occupation has been materially diminished by diluvian or otherwise, or if the produce of that land has been diminished by drought, hail, or other calamity beyond his control, to such an extent that the full amount of rent payable by him cannot, in the opinion of the Court, be paid."

On a perusal of the record of the present case it appears that the defendants claimed remission on account of slump in prices, which slump was due to abundance in produce of the land, and so it is clear that the case does not fall within the clause reproduced above. It is rather surprising that this contention in the form in which it has been addressed to us was not presented before our learned brother, who decided the Second Rent Appeal, and that accounts for the absence of any reference to it in the judgment under appeal. It was urged on behalf of the respondents that Ex. 2, which was prepared by the *patwari* under the supervision of the *Qanungo*, allows remission on grounds other than slump in prices also and that the defendants were entitled to remission in respect of those grounds. There is no independent evidence at all on the record to establish any ground for remission other than the slump in prices. The defendants must be held bound by their pleadings and in their pleadings the ground upon which they claimed remission was the slump in

prices. We are of opinion, that on the facts of the case, s. 19 (1) of the Oudh Rent Act does not arise for application.

On the second point, the view taken by the learned Single Judge was that s. 19 (1) of the Oudh Rent Act did not contemplate that the sanction of the Deputy Commissioner should be obtained in each and every case by the Court deciding the case for arrears of rent, and it was quite sufficient if the Deputy Commissioner had passed general orders with regard to remissions in rent of under-proprietors in respect of a particular area. The learned Judge was of opinion, that such general orders must be deemed to exist in view of the fact that the statement (Ex. 2) was prepared by the *patwari* on that footing. We regret we do not find ourselves in agreement with this view of the learned Judge. In our view, the only construction to which the language of s. 19 (1) lends itself is that a separate previous sanction of the Deputy Commissioner for remission should be obtained in each case by a Court seized of a suit for arrears of rent before it can allow that remission from the rent payable by an under-proprietor. The words "A Court when it makes a decree for an arrear of rent, may, with the previous sanction of the Deputy Commissioner, allow such remission from the rent payable by any under-proprietor or tenant as appears equitable" clearly mean that what the Court has to do in each case, when considering the question of remission, is first to determine as to what would be the amount to be allowed as a remission on equitable grounds and then to obtain the sanction of the Deputy Commissioner in respect thereof. The sanction of the Deputy Commissioner would naturally depend upon what the Court has determined to be an equitable remission. Both the Court and the Deputy Commissioner have to determine the question of remission judicially after giving due consideration to the facts of each individual case, and it is hardly conceivable that a general order of allowing remission in a particular locality was in the contemplation of the Legislature when it used the words "with the previous sanction of the Deputy Commissioner" in s. 19 (1) of the Oudh Rent Act. In this connection it may be noted that s. 120 of the Oudh Rent Act provides for an appeal from an order of the Deputy Commissioner sanctioning a remission of rent under s. 19 of the Oudh Rent Act. How can a general order of the Deputy Commissioner

allowing remission of rent in a particular locality be the subject of an appeal under this section is not easy to contemplate. The provision contained in s. 120 for an appeal against the order of sanction by the Deputy Commissioner strongly supports the view that we have expressed above. We also get support for our view from the Board of Revenue Circular No. 11 (Department II) in Volume I of 1918 referred to us. It lays down that the file of the sanction of the Deputy Commissioner will be kept separate from the file of the rent suit. This circular seems to have been enacted for the facility of appeals under s. 120 of the Oudh Rent Act. An appeal under s. 120 of the Oudh Rent Act lies to the Commissioner, while an appeal from a decree in the suit itself lies to the District Judge, if the value of the suit does not exceed Rs. 5,000 and to the Chief Court if the value of the suit exceeds Rs. 5,000 (*vide* s. 119 of the Oudh Rent Act). Neither s. 120 of the Oudh Rent Act nor the circular of the Board of Revenue referred to above was brought to the notice of our learned brother in the Second Rent Appeal. We have further examined Ex. 2, the statement of the *patwari*, and find no reference in it to any general order in respect of the remission in the locality in which the land in suit is situated such as has been referred to in support of the application under s. 19 of the Oudh Rent Act. We hold further that for this reason also s. 19 (1) of the Oudh Rent Act has no application.

Lastly, it has been argued by the learned Counsel for the respondent that under s. 2 of the U. P. Regularization of Remissions Act (XIV of 1938) the general order of the Deputy Commissioner allowing remission cannot be questioned in any Civil or Revenue Court. The application of this section does not arise for consideration in view of the fact, as observed above, that in the present case there is no evidence of any such order as has been relied upon.

The result is that this appeal succeeds. The appellant was satisfied with the decree of the first Appellate Court and did not appeal against it and so that decree is upheld. The appellant will get costs in this Court of this appeal and the Second Rent Appeal from the respondents.

s.

Appeal allowed.

PATNA HIGH COURT

Appeal from Original Decree No. 40 of 1937
September 8, 1939

DHAVLE, AND MANOHAR LALL, JJ.

A. JAMES—DEFENDANT—APPELLANT

*versus*Ch. ACHAIBAR SINGH *alias*

AKHAJ SINGH AND OTHERS—(DEFENDANTS)

AND BASDEO SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS

Contribution—Suit for—Liabilities of all parties must be determined once for all—Necessary party not impleaded—Effect.

In a suit for contribution, the respective liabilities of all the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. Hence a suit for contribution would fail *in limine* where a person who is a necessary party and in whose absence the liabilities of the parties to the suit cannot be satisfactorily ascertained, is not impleaded in the suit. [p. 299, col. 1.]

In a suit for contribution the consideration that the plaintiffs were no parties to the contract between defendants *inter se* is by no means conclusive of the matter. 14 Ind. Cas. 179 (1), referred to. [p. 298, col. 2.]

A. From a decision of the Additional Subordinate Judge of Gaya, dated December 22, 1936.

Sir Manmatha Nath Mukherji and Mr. K. N. Varma, for the Appellant.

Dr. D. N. Mitter and Messrs. Sarjoo Prasad, Dhyan Chandra, A. N. Lall and Lal Narayan Sinha, for the Respondents.

Dhavle, J.—This is an appeal by defendant No. 13 in a suit for recovery of Rs. 5,879-5-0 which the plaintiffs said they had to deposit under pressure of execution proceedings and which they claimed ought to have been paid by defendants Nos. 1 to 12 and 13.

In May, 1922, one Janki Lal mortgaged his entire *jagirdari* right in *Mauza* Lenjhua and his interest in six other villages to Ramkrit Narain. In May, 1924, he entered into an agreement with the representatives of defendants Nos. 1 to 12 to sell Lenjhua to them, leaving it to them to pay off the mortgage of 1922. The case of the plaintiffs was that defendants Nos. 1 to 12 took the plaintiffs in as co-partners for a moiety in the proposed sale and gave them an express assurance and undertaking that the defendants Nos. 1 to 12 would play their part properly in obtaining the discharge of the mortgage and would see that the plaintiffs did not have to pay more than a moiety of the mortgage debt. On September 12, 1924, Janki executed two *kabalas* for eight annas each of *Mauza*

Lenjhua, one in favour of the plaintiffs and the other in favour of defendants Nos. 1 to 12. Out of the consideration money Rs. 12,083-15-0 was left with each set of vendees to pay in discharge of the mortgage of Ramkrit Narain, Janki representing that these two sums of Rs. 12,083-15-0 each represented all that was due upon the mortgage, the rest having already been paid of by him. When the plaintiffs attempted to pay the mortgagee it was discovered that the mortgagee claimed Rs. 1,200 more than had been admitted by Janki Lal to his vendees to be due to the mortgagee. In March 1929 defendants Nos. 1 to 12 transferred their moiety of *Mauza* Lenjhua to defendant No. 13 for Rs. 22,000 which was to be paid by defendant No. 13 to the mortgagee as the proportionate share of the outstanding mortgage debt. Shortly after this the mortgagee sued to enforce his mortgage, and in March, 1930, he obtained a decree for Rs. 54,631-12-6 inclusive of costs. A question had been raised during the trial of the mortgage suit regarding the order in which the mortgaged properties were to be brought to sale and the Court had decided that unless the decretal amount was paid within five months of the date of the preliminary decree, the two sets of vendees of Janki Lal were to be at liberty within one month after the expiry of the said period of five months to deposit in Court to the credit of the mortgagee Rs. 12,083-15-0 besides interests at 12 per cent. with quarterly rests from September 12, 1924, to the date of deposit. The Court directed that if such deposits were made, the mortgaged properties were to be sold in the same order as that given in the mortgage bond—I may observe in passing that in this document *Mauza* Lenjhua figures as Item No. 6. The Court further directed that if such deposits were not made by the two sets of vendees or by any set out of them, then the whole *Mauza* of Lenjhua or the moiety of the defaulting set of vendees as the case may be should be sold first and the remaining mortgaged properties or a sufficient part thereof be sold in the same order as given in the mortgage bond. Acting in accordance with this part of the mortgage decree, the plaintiffs deposited Rs. 24,476-12-6 on the due date, but defendant No. 13 did nothing of the kind. The result was that the defendants' moiety of *Mauza* Lenjhua was brought to sale first and sold for Rs. 11,100. The other six *mauza* covered by the mortgage were then

put up to sale and fetched Rs. 18,671. I have already said that *Mauza* Lenjhua was No. 6 in the list of properties, but the plaintiffs had obtained from the High Court an order staying the sale of their moiety in the *mauza*, with the result that *Mauza* Bahera, which appeared later in the mortgage bond, was sold before the plaintiffs' moiety. The plaintiffs' deposit and the execution sales thus brought in a little over Rs. 54,000, and the amount for which execution was being levied was Rs. 5,879-5-0 in excess of the amount already realised. When the executing Court wanted to proceed against the plaintiffs' moiety in order to realise this balance, they averted the sale by paying the amount. They then brought the present suit and the foundation of the suit appears from such paragraphs as Nos. 5, 6, 7 and 18 of the plaint to have been that the plaintiffs took their moiety on the clear guarantee given by defendants Nos. 1 to 12 that they would not have to run any risk or losses with respect to their purchase and on the express assurance and undertaking given by them that they would pay their quota of the mortgage debt, etc. (to quote from para. 18 of the plaint). Defendants Nos. 1 to 12 denied giving any such undertaking, and the issue framed on the point ran. "Was there any assurance given by defendants Nos. 1 to 3 as pleaded in para. 7 of the plaint?" The learned Subordinate Judge answered this issue against the plaintiffs, and it has not been contended before us on behalf of the plaintiff-respondents that the finding is open to any exception. Janki was not impleaded in the suit and, though the defendants contended that the suit was bad for his non-joinder, the learned Subordinate Judge held that Janki was not a necessary party to this suit, as it appeared that in the execution proceedings he had paid more than he was liable to pay and therefore the ultimate liability was upon defendant No. 13. The suit was accordingly decreed against defendant No. 13.

Sir Manmatha Nath Mukherji who appears for this defendant No. 13, the appellant, contended that the sale deed taken by this defendant from defendants Nos. 1 to 12 did not make him liable at all in the circumstances and certainly not liable to the plaintiffs as they were strangers to the contract. But the suit is in essence a contribution suit, and the consideration that the plaintiffs were no parties to the contract between defendants Nos. 1 to 12 and defendant No. 13 is by no means

conclusive of the matter, for in the case of *Shah Muhammad Abbas v. Muhammad Hamid*, 14 Ind. Cas. 179 (1) which was noticed by their Lordships of the Judicial Committee in *Ganeshi Lal v. Charan Singh* (2) there was a contract to which the defendants were no parties and yet it could be said that there had passed to them the benefit of the contract with the plaintiffs, the prior purchasers of a part of the mortgaged properties, who had undertaken to apply the consideration money towards the payment of the mortgage.

The real difficulties of the case, however, came to light when Dr. Mitter began replying for the plaintiffs respondents and appealed to the doctrine of contribution as bot-tomed and fixed on the general principles of justice, and not as springing from contract, though contract may qualify it *Dering v. Earl of Winchelsea* (3). Now this doctrine of contribution was developed in the Courts of equity because these Courts could much more effectually than the common law Courts adjust losses so that they fell in due proportion upon all the persons liable. It thus became a fixed principle that in a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. In the present case, however, Janki Lal has not been impleaded by the plaintiff respondents, and the defect is not merely formal. In the first place, it appears that by the terms of the sale deed which the plaintiffs took from Janki Lal, they had something in the nature of an indemnity from Janki Lal in respect of any sums that they may have to pay to the mortgagee in excess of the amount of Rs. 12,083-15-0 with interest which they had agreed to pay. Secondly, the amount decreed in the mortgage suit includes Rs. 2,592-12-0 as costs awarded to the mortgagee but obviously not apportioned among the various sets of defendants in that suit and in particular Janki, our plaintiffs, our defendants Nos. 1 to 12 and also our defendant No. 13. The total decretal amount, moreover, was

Rs. 54,631-2-6, while the amount for which execution has been levied is Rs. 60,127-1-6, and the difference between these two amounts has also yet to be apportioned. It is obvious that in both these items the plaintiffs must bear a share, but what that share may be it is impossible to determine in the absence of Janki. If, as the lower Court has said, Janki has paid more than he was liable to pay, a suit for contribution not based on any contract between the plaintiffs and defendants Nos. 1 to 12 and 13 ought to settle once for all what Janki is entitled to. It will be wrong to leave defendant No. 13 exposed to another suit by Janki Lal. Nor does it appear that the suit as framed raised the question of the liability of defendant No. 13 to defendants Nos. 1 to 12 in the form in which it ought to have been raised and decided. The suit was therefore not properly constituted, and the lower Court was plainly in error in holding defendant No. 13 liable for the entire amount claimed while his exact liability cannot be determined in the absence of Janki Lal.

This was so plain that Dr. Mitter at once asked for leave to implead Janki Lal at this stage and for a remand. In my opinion this prayer ought not to be allowed for the double reason that the plaintiffs deliberately left out Janki Lal in spite of the direct indemnity they had from him and that they founded the suit upon an alleged assurance from defendants Nos. 1 to 12 which they failed to prove and which appears to be a figment of their imagination.

I would therefore allow this appeal, set aside the decree of the lower Court and dismiss the suit. In the circumstances, I would make no order about costs.

Manohar Lall, J.—I agree. In my opinion the suit being a suit for contribution fails *in limine* on the simple ground that Janki Lal, the vendor of the plaintiffs, who is necessary party, is not before the Court and in his absence the liabilities of the parties cannot be satisfactorily ascertained. I do not think this Court would be exercising a wise discretion in allowing the plaintiffs to add Janki Lal as a defendant at this late stage.

s.

Appeal allowed.

(1) 14 Ind. Cas. 179; 9 A L J 499.

(2) 52 A 358; 124 Ind. Cas. 911; 57 I A 189; (1930) A L J 753; 31 O W N 661; Ind. Rul. (1930) P O 287; A I R 1930 P O 183; 32 Bom. L R 1146; 59 M L J 177; 52 O L J 117; 32 L W 19 (P O).

(3) (1787) W & T Leading Cases in Eq. II (9th Ed.) p. 488; 1 Cox Eq. Cas. 318; 29 E R 1184.

CALCUTTA HIGH COURT

Civil Rule No. 1018 of 1938

November 9, 1938

S. K. GHOSH AND LODGE, JJ.
NANI GOPAL MUKHERJEE—
JUDGMENT-DEBTOR—PETITIONER

versus

SRISH CHANDRA NANDY AND OTHERS—
JUDGMENT-DEBTORS—OPPOSITE PARTY

*Civil Procedure Code (Act V of 1908), s. 42—
 Ordinary Civil Court passing rent decree in rent suit
 under Bengal Tenancy Act (VIII of 1885)—Decree
 transferred to Small Cause Court for execution—
 latter Court, if can execute it*

Where an ordinary Civil Court, in a suit for rent under Bengal Ten. Act, passes a decree for rent and that decree is transferred for execution to the Court of Small Causes, the latter Court has jurisdiction to execute it.

O. Rule issued from an order of the Small Cause Court Judge, Sealdah, 24-Parganas, dated June 11, 1938.

Messrs. Rishindra Nath Sircar and Subodh Chandra Dutt, for the Petitioner.

Dr. Basak and Mr. Rama Prosad Mukherjee, for the Opposite Party.

S. K. Ghose, J. — This Rule is directed against an order of the learned Small Cause Court Judge at Sealdah overruling the petitioners' objection as to the execution of the decree. It appears that the opposite party landlord brought a rent suit No. 1022 of 1930, in the Court of the Munsif at Ranaghat and impleading the petitioner as one of the defendants-tenants. A decree was obtained and in execution thereof, opposite party No. 1 purchased the suit lands on March 8, 1934, the sale being confirmed on April 24, 1934. Before that date, opposite party No. 1 brought another rent suit against the same persons, being Rent Suit No. 790 of 1934 for the recovery of arrears of rent for the period 1337 to 1340. A decree was obtained on July 26, 1934. On November 29, 1937, this decree was transferred for execution to the District Judge of the 24-Parganas who again transferred it to the Court of Small Causes at Sealdah. The latter Court directed attachment of the movable properties of the petitioner. The petitioner thereupon filed an objection which was however overruled by the Small Cause Court by his order dated June 11, 1938. Against that order the present Rule has been obtained. It appears from the order complained against that the only point which was pressed in the lower Court was that the execution case is barred by the special law of limitation under Art. 6, Part 3, Sch. (iii), Bengal Ten. Act. The learned Judge held that the decree obtained

is not a rent decree but a money decree and so the execution case is not barred by limitation. It is contended in this Court that at least the ordinary law of limitation should apply. But we are not satisfied from any evidence on the record that the present application for execution was filed more than three years after the previous application. The point does not appear to have been pressed in the lower Court and the question of fact was not investigated. Then, as to the special law of limitation under the Bengal Ten. Act, it is conceded by the learned Advocate for the petitioner that the present decree is not executable under s. 65, Bengal Ten. Act, there being no relationship of landlord and tenant between the parties at the time of the decree. That being so, the petitioner is not entitled to plead limitation as specially provided for in the Bengal Ten. Act.

It is, however, strongly contended that the decree was a decree for rent and the suit would come under cl. 8, Sch. II, Provincial Small Cause Courts Act, as a suit which is excepted from the cognizance of a Court of Small Causes. This point again does not appear to have been pressed in the lower Court. Clause 8 aforesaid is subject to an exception where the Judge of the Court of Small Causes has been expressly invested with the authority of exercising jurisdiction with respect to suits for the recovery of rent. Here, again, there is a question of fact which might well have been raised and decided in the lower Court, but it was not so investigated. The learned Advocate for the opposite party said that there was no reason to suppose that the learned Judge in the Court below was so invested. But conceding that the suit comes under the exception, what we have got here is a decree which has already been passed and is sought to be executed. Dr. Basak has contended that s. 7, Civil P. C., read with s. 39 of the same Code does not prohibit an ordinary Civil Court from transferring a decree to a Court of Small Causes for execution, and once such decree has been so transferred, the Small Cause Court would, under s. 42, be entitled to deal with it. That a decree made in a suit which is excepted from the cognizance of a Court of Small Causes may be transferred to a Court of Small Causes for execution is contemplated by the fact that there are separate clauses, sub-cl. (i) and (ii) in cl. (a), s. 7, Civil P. C. Moreover, s. 34, Provincial Small Cause Courts Act, specifically lays down a procedure to be observed in the case

of transfer of decrees as between a Court of Small Causes and a Court of ordinary jurisdiction. From this point of view, it may be said that the Court of Small Causes was within its jurisdiction in proceeding to execute a decree which had been transferred to it by a Court of competent civil jurisdiction. The learned Advocate for the petitioner has contended that the decree cannot be executed by the landlord, because the relationship of landlord and tenant did not subsist at the time of the decree. It is not, however, open to him to take up this position, having regard to the fact that the decree was transferred to the executing Court. In these circumstances the petitioner has not been able to satisfy us that there is a case for revision. The Rule accordingly is discharged with costs, three gold mohurs.

Lodge, J.—I agree.

D. Rule discharged.

OUDH CHIEF COURT

Application No. 9 of 1937

November 23, 1939

HAMILTON, J.

DURGA PRASAD—DEBTEE-HOLDER

—APPLICANT

versus

SEETTA PRASAD TEWARI—

JUDGMENT-DEBTOR AND ANOTHER—

DEBTEE HOLDER—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 10—Applicability, where property attached before judgment is cash—Attachment—Before judgment—Priority.

The principle of O. XXXVIII, r. 10, Civil P. C., also applies to a case where property attached before judgment is cash. Where therefore a sum of money is attached before judgment by a person in his suit and another decree-holder attaches the same sum in execution of his decree, the person who has obtained attachment before judgment cannot claim priority after his suit is decreed. 91 Ind. Cas. 93 (3), referred to.

App. for revision of the order of the Judge of Small Cause Court, Lucknow, dated October 6, 1936.

Mr. Govind Behari Lal, for the Applicant.

Mr. R. P. Shukla, for Opposite Party No. 2.

Judgment.—This is an application in revision against a decision of a Judge of the Small Cause Court.

The applicant obtained a decree on May 26, 1936, and on the following day, May 27, 1936, applied for attachment of a sum of money standing in deposit in a

Bank in the name of his judgment-debtor. The attachment order was passed on July 6, 1936, and in answer to that order the money was actually paid into Court by the Bank on July 22, 1936. On May 11, 1936, that is to say, before the decree of the applicant, the opposite party had before judgment attached that money in the Bank and it was not till August 21, 1936, that his suit was decreed. On September 11, 1936, he then applied for execution of his decree by calling for the money from the Bank and on the following day he claimed priority. The learned Small Cause Court Judge considered that the opposite party was entitled to priority because his attachment was earlier although it was attachment before judgment only. He held that O. XXXVIII, r. 10, does not apply. It is true that O. XXXVIII, r. 10, states that an attachment before judgment does not bar a person holding a decree from applying for the sale of the property under attachment and in the present case there is no question of sale of property because cash was attached, but I do not see why the principle should not be followed merely because the attached property is cash in one case and something else in the other. *Bisheshar Das v. Ambika Prasad* (I. L. R. 37 All. 575) (1) and *Profulla Nath Tagore v. Asia Khatun* (A. I. R. 1934 Calcutta 426) (2) refer to cases of sale of property to which O. XXXVIII, r. 10 applies but *S. Cassam v. K. S. M. M. Abdul Kader* (A. I. R. 1926 Rangoon, 85) (3) referred to a sum of money, and O. XXXVIII, r. 10, was referred to by way of analogy. I am satisfied, therefore, that the person who first obtains his attachment cannot claim priority if the attachment is one before judgment.

I therefore allow the application and set aside the order of the Court below, with costs and send the case back for further steps.

s.

Application allowed.

(1) 37 A 575; 29 Ind. Cas. 622; 13 A L J 733; A I R 1915 All. 275.

(2) A I R 1934 Cal. 426; 151 Ind. Cas. 317; 59 O L J 18; 7 R O 105 (3).

(3) A I R 1926 Rang. 85; 91 Ind. Cas. 93.

ALLAHABAD HIGH COURT

Criminal Miscellaneous No. 467 of 1939

September 15, 1939

MULLA, J.

ISRAR HUSAIN—APPLICANT*versus***EMPEROR—OPPOSITE PARTY**

Criminal Procedure Code (Act V of 1898), s. 491—Powers of High Court under, to enquire into conduct of Political Agent before issuing warrant of arrest under s. 7, Extradition Act.

The powers of the High Court under s. 491, Criminal P. O., are limited and they do not authorize the High Court to enter as it were upon an enquiry into the conduct of the Political Agent before issuing a warrant of arrest under s. 7, Extradition Act. All that the High Court is concerned with while exercising its power under s. 491, is to see that the authority under which a person is being detained is on the face of it legal and valid. If there are any formal defects in the warrant under which the applicant is arrested, the High Court can certainly take notice of them and can upon that basis hold that the warrant is on the face of it invalid. It would necessarily follow in that event that the detention of the applicant was unlawful, but this is the limit beyond which the High Court cannot go in the exercise of its power under s. 491. 134 Ind. Cas. 594 (1), 91 Ind. Cas. 69 (2) and 1 Ind. Cas. 198 (3), relied on, 151 Ind. Cas. 279 (4), explained and distinguished.

Mr. M. A. Aziz, for the Applicant.

The Government Advocate, for the Crown.

Order.—This is an application under s. 491, Criminal P. O., by one Israr Husain who has been arrested by the District Magistrate of Basti under a warrant issued by the Political Agent of Bhopal in accordance with s. 7, Extradition Act, (Act No. XV of 1903). The applicant was until May 11, 1938, in the service of the Bhopal State as a Nazir and it appears that the State has preferred a charge against him under s. 409, I. P. O., which is the law of that State also. An offence under s. 409, I. P. O., is an extraditable offence within the meaning of s. 7, Extradition Act, inasmuch it is one of the offences mentioned in Sch. I to the Act. It is not alleged that the applicant is not a person against whom a warrant can be issued under s. 7, Extradition Act. Nor is there any allegation that there is any formal defect in the warrant itself. The whole basis of the present application is the allegation that the Political Agent before issuing the warrant in question did not observe the procedure laid down in the rules framed by the Governor-General in Council under s. 22, Extradition Act. It is contended that the failure to follow that procedure which was mandatory renders the warrant illegal and invalid and hence this Court can

in the exercise of its powers under s. 491, Criminal P. O., hold that the applicant is being detained in unlawful custody and can set him at liberty. I have carefully considered this contention but I find no force in it. It is true that there is no material before this Court to show that the Political Agent followed the necessary procedure before issuing the warrant in question but that does not by any means lead to the conclusion that the procedure was not followed at all. It is quite impossible for this Court to hold merely on the basis of the applicant's allegation that the procedure required under the rules was not followed by the Political Agent before issuing the warrant in question. Again I am strongly of the opinion that the powers of this Court under s. 491, Criminal P. O., are limited and they do not authorize this Court to enter as it were upon an enquiry into the conduct of the Political Agent. What the applicant wants this Court to do is to investigate into the proceedings of the Political Agent, but in my opinion this Court has no power to make any such investigation under s. 491, Criminal P. O. All that this Court is concerned with while exercising its power under s. 491, Criminal P. O., is to see that the authority under which a person is being detained is on the face of it legal and valid. If there are any formal defects in the warrant under which the applicant is arrested, this Court can certainly take notice of them and can upon that basis hold that the warrant is on the face of it invalid. It would necessarily follow in that event that the detention of the applicant was unlawful, but in my view this is the limit beyond which this Court cannot go in the exercise of its power under s. 491, Criminal P. O. I find that the view which I have taken is supported by several decisions of other Courts, for example, *Baijnath v. Emperor*, 134 Ind. Cas. 594 (1), *Jamna v. Emperor*, 91 Ind. Cas. 69 (2) and *Giyan Chand v. Emperor* (3). The learned Counsel for the applicant has relied upon the decision of a Bench of this Court in *Sandal Singh v. District Magistrate and Superintendent, Dehra Dun* (4). In that case it was held,

(1) 134 Ind. Cas. 594; A I R 1931 Oudh 394; (1931) Cr. Cas. 826; 32 Cr. L J 1243; 8 O W N 933; Ind. Rul. (1931) Oudh 326.

(2) 91 Ind. Cas. 69; A I R 1926 Sind 126; 27 Cr. L J 37; 20 S L R 128.

(3) 3 P R 1909 Cr.; 1 Ind. Cas. 198; 9 Cr. L J 3; 36 P W R 1908 Cr.

(4) (1934) A L J 556; 151 Ind. Cas. 279; A I R 1934 All. 148; (1934) Cr. Cas. 214; 35 Cr. L J 1296; 56 A 409; 7 R A 128 (2).

that

"the power of the High Court, however, to interfere under s. 491, Criminal P. O. remains untouched by the Extradition Act, and the High Court is entitled to enquire into the question whether a person arrested under an extradition warrant was illegally or improperly detained in public or private custody, and if the High Court is satisfied that he was so detained, to order that he be set at liberty."

A close examination of the decision will show that the point which arose for consideration in that case was that one of the three conditions precedent for the issue of a legal warrant under s. 7, Extradition Act, had not been fulfilled and this Court decided that it had the power to hold that in the absence of that condition precedent, the Political Agent had no authority to issue a warrant under s. 7, Extradition Act. I do not find any conflict at all between that decision and the view which I have taken in the present case. There was no question raised in that case that the Political Agent had not followed the rules and in consequence thereof the warrant issued by him was invalid. It does not afford any authority for the proposition that this Court can enter upon an enquiry into the conduct of the Political Agent before issuing a warrant of arrest under s. 7, Extradition Act. The result therefore is that I see no reason to interfere and dismiss this application. The stay order is discharged and the District Magistrate of Basti can now proceed to execute the warrant in accordance with the law.

8. Application dismissed.

RANGOON HIGH COURT

Criminal Appeal No. 641 of 1939

August 21, 1939

DUNKLEY AND WRIGHT, JJ.

NGA SAR KEE—APPELLANT

versus

THE KING—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 537, 239—Two persons charged with same offence of murder—Prosecution evidence mutually exclusive—Joint trial, legality—Criminal trial—Duty of prosecution—Public prosecutor should not withhold evidence.

When one accused is charged with having murdered a certain person at a certain place, and another accused is charged with having murdered the same person at the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed, one of the accused will have to be convicted, whereas if the other set of evidence is believed, the other accused will have to be convicted; it cannot be said that those persons are charged with the same offence committed in the course of the same transaction

within the meaning of s. 239, Criminal P. O. "The same offence" means an offence arising out of the same act or series of acts and can mean nothing else. When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together; and the joint trial of the two persons is not a mere irregularity which can be cured under s. 537, Criminal P. O., it is an illegality which goes to the very root of the trial. 21 Ind. Cas. 183 (1) and *Subramania Ayyar v. Emperor* (2), followed. [p 304, col. 7.]

It is the duty of a Public Prosecutor to conduct the case for the Crown fairly; his object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. It is his bounden duty to place before the Court for the adjudication of the Court, all the evidence against the accused persons and should not withhold certain evidence by not calling the principal witness on the ground that he did not believe the witness's evidence. It is for the Judge not for the Public Prosecutor to decide whether the evidence should be believed or not. *Nga Aung Gyi v. King-Emperor* (3), relied on. [p. 305, col. 1.]

Or. A. from an order of the Sessions Judge, Thaton, dated July 25, 1939.

Mr. C. A. Soorma, for the Appellant.

Mr. U Tun Byu, for the Govt. Advocate, for the Crown.

Dunkley, J.—We have with reluctance, come to the conclusion that we must order a re-trial of the appellant before another Sessions Judge, owing to the illegality of his original trial. The appellant was charged before the learned Sessions Judge of Thaton with having committed the offence of murder by causing the death of a person named Maung Kywe. Without any doubt, Maung Kywe met his death on the night of January 31, 1939, by reason of being cut and stabbed with some sharp-edged and sharp-pointed instrument. It was in evidence before the learned Sessions Judge that the first statements that were recorded in the investigation of the offence, which resulted in Maung Kywe's death led to the suspicion that this offence was committed by a man named Maung Yaung. Subsequently, further investigation elicited that there was evidence also that the appellant Sar Kee, had committed this offence. The consequence was that the Police sent up for trial, in one and the same trial, both Maung Yaung and Maung Sar Kee. Each of them was separately charged with the offence of murder, under s. 302, I. P. O. by causing the death of Maung Kywe on the night of January 31, 1939, and both of them were committed to stand their trial before the Sessions Court on this charge. The

trial before the Sessions Court was a joint trial of the two appellants. The learned Sessions Judge, at the beginning of his judgment, has stated that the case presented difficulties from the outset as the two accused were not charged with having murdered the deceased jointly, but there were two sets of conflicting evidence one to prove that accused No. 1 Maung Yaung, was the assailant of the deceased, Maung Kywe, and the other to establish the guilt of Sar Kee, accused No. 2, "for the same offence." With due respect to the learned Sessions Judge, there was no evidence to establish that Sar Kee was guilty of the same offence as Maung Yaung. It was attempted to establish that he was guilty of the murder of Maung Kywe, but that does not make it the same offence as the offence of Maung Yaung, presupposing that Maung Yaung had committed this murder. The trial before the learned Sessions Judge was an illegal trial *ab initio*. The authority for this proposition—an authority which has never been doubted and has, in fact, been followed in several unreported decisions of this Court—is *Azim-ud-din v. Emperor* (1) and this case was binding upon the learned Sessions Judge and ought to have been followed by him. Had he referred to it, it would have been at once apparent to him that the two accused, Maung Yaung and Maung Sar Kee could not be tried together. The head-note of *Azim-ud-din's case* (1) reads as follows:

"Two persons accused of an offence cannot be tried together if the prosecution cases against them are mutually exclusive. The words 'accused of the same offence' in s. 239, Criminal P. O., imply that the co-accused have acted in concert or association."

Referring to the provisions of the Criminal P. O., in which this decision is based, s. 232 of the Code specifically lays down that for every distinct offence of which any person is accused, there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in ss. 234, 235, 236 and 239. Consequently, when there is one charge against one person and another charge against another person, those charges must be the subject of separate trials, unless the Criminal P. O. points that the two charges and therefore the two accused may be jointly tried. Section 239 lays down the only circumstances in which accused persons may be jointly tried. Clause (a) of this section says:

"The following persons may be charged and tried

together, namely persons accused of the same offence committed in the course of the same transaction."

When one accused is charged with having murdered a certain person at a certain place, and another accused is charged with having murdered the same person at the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed, one of the accused will have to be convicted, whereas if the other set of evidence is believed, the other accused will have to be convicted, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction. "The same offence" means an offence arising out of the same act or series of acts and can mean nothing else. This is clear from the words of the clause "committed in the course of the same transaction." When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together; and the joint trial of the two persons is not a mere irregularity which can be cured under s. 537, Criminal P. O., it is an illegality which goes to the very root of the trial. In *Subramania Ayyar v. Emperor* (2), their Lordships of the Privy Council held that the disregard of an express provision of the law as to the mode of trial was not a mere irregularity such as could be remedied by s. 537, Criminal P. O., and that such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one judgment. For myself, I can see no distinction between trying one person on a multiplicity of charges such as is not allowed by law, and trying two persons in one and the same trial where such joint trial is not allowed by law. I am therefore compelled to hold that the trial of this case before the learned Sessions Judge of Thaton was an illegal trial, and hence there must be a fresh trial of the appellant before some other Sessions Court.

It is unfortunately necessary, before we part with this case, to make some reference to the impropriety of the manner in which the learned Public Prosecutor for Thaton conducted the prosecution. There were for

(1) 7 L. B. R. 68, 21 Ind. Cas. 163; 14 Cr. L. J. 563; 6 Bur. L. T. 191.

(2) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 8 Sar. 160; 2 Weir 271; 3 Bom. L. R. 510; 5 O. W. N. 866 (P. O.).

trial before the Sessions Court two persons, namely, Maung Yaung and the appellant. It is laid down in *Nga Aung Gyi v. King-Emperor* (3) that it is the duty of a Public Prosecutor to conduct the case for the Crown fairly; his object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. It therefore was in this case his bounden duty to place before the Court for the adjudication of the Court, all the evidence against both these accused persons. Yet he asked the permission of the Court not to call the principal witness against the accused, Maung Yaung, on the ground that he did not believe this witness's evidence. As the learned Sessions Judge has stated in the course of his judgment, this action on the part of the learned Public Prosecutor was constituting himself the Judge of the case, that is, coming to a conclusion, in regard to the guilt or innocence of one accused and therefore pressing unduly for a conviction of the other accused, namely the present appellant. If the learned Public Prosecutor had come to the conclusion after the proceedings in the committing Court, that there was no creditable evidence against Maung Yaung his proper procedure was to have made an application to the learned Sessions Judge for permission to withdraw the case against Maung Yaung. In my view, if he had made such an application, it would necessarily have been rejected, because the trial showed that there was considerable evidence against Maung Yaung and it was for the Judge, and not for the Public Prosecutor, to decide whether that evidence should be believed or not and it was therefore essential that the Public Prosecutor should place the whole of this evidence before the Court. The learned Sessions Judge, has in the course of his judgement, commented on the fact that neither of the accused persons called any defence evidence. The answer is that they were not able to do so because the defence evidence of each was the prosecution evidence against the other, and had therefore been called as prosecution evidence in the case. It is undesirable that we should express any opinion regarding the evidence against the present appellant or its credibility at this stage, because as I have already said, it is clearly essential that there should be a re-trial and therefore we

accept this appeal, set aside the conviction and sentence of the appellant and order the re-trial of the appellant before the Sessions Court of Moulmein on the same charge.

Wright, J.—I agree.

D.

Appeal accepted.

PRIVY COUNCIL

Appeal from the Oudh Chief Court

October 10, 1939

LORD MACMILLAN, SIR GEORGE RANKIN

AND MR. M. R. JAYAKAR.

Babu BHAGWAN DIN AND OTHERS.

—APPELLANTS

versus

GIR HAR SAROOP AND OTHERS

—RESPONDENTS

Charitable and Religious Trusts Act (XIV of 1920), ss. 3, 5, 6, 12—Application under s. 3—Proceedings, nature of—Res judicata—Decision, if operates as res judicata to bar regular suit even in case of person party to proceedings—S. 6, intention of—"If a trustee . . . fails to comply," construction—Trust—Public trust—Dedication—Nature of evidence to prove—Inference from user—Value of public user as evidence of dedication—Held, that grant was not made by way of trust for public religious purpose but to grantee and his heirs in perpetuity.

The decision of the District Judge under the Charitable and Religious Trusts Act—a decision from which by s. 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; it has not been made final by any provision in the Act; and the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. [p. 307, col. 2.]

The existence of a public trust is the foundation of the proceedings authorised by s. 3 of the Act: *prima facie* while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot by an erroneous decision thereon give himself jurisdiction. No matter how long or how peaceably an individual may have been in possession and enjoyment of property, it is always possible for persons claiming to be acting for the public to lay claim to the property as having been impressed with a trust of a charitable or religious nature. It would be both drastic and anomalous to provide that a person in possession, if not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. [*Ibid.*]

The terms of s. 6 of the Act are intended to define the consequences of an order made by the District Judge directing the persons to furnish particulars of the property, etc., but the words "if a trustee without reasonable excuse fails to comply" in s. 6 cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under s. 92 of the Oivi. P. O. [p. 308, col. 1.]

It would be an error in method if the subsequent history of the temple is not looked at in the light of the grant of the property. While it is certainly

possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. Where the general effect of the evidence is that the family have treated the temple as family property, dividing the various forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, and erecting *samadhs* to the honour of its dead, in these circumstances, it is not enough to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual *mela*. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol: they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference, if made from the fact of user by the public, is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should, in all circumstances, desire to discourage popularity. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. 151 Ind. Cas. 329 (5), referred to, 81 Ind. Cas. 518 (4), distinguished.

Held, that the grant was not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant was to the grantee and his heirs in perpetuity. The reference to the grantee's heirs, and the Arabic terminology *naslan ba'da naslan wa bainan ba'da bainan* (descendant after descendant and generation after generation) were not reconcilable with the view that the grantor was in effect making a *waf* for a Hindu religious purpose, even if it be assumed that this was not otherwise an untenable hypothesis. [p. 309, col. 1.]

Mr. P. V. Subba Row, for the Appellants.

Mr. Y. B. W. Ramsay, for the Respondents.

Sir George Rankin.—On April 14, 1930, the first two appellants (uncle and nephew) filed before the District Judge at Lucknow an application under s. 3 of the Charitable and Religious Trusts Act (XIV of 1920) for an order directing accounts to be furnished in respect of a certain temple in Lucknow together with land and houses adjacent thereto and occupied therewith. The principal deity is Bhaironji and from this idol the temple takes its name but there are other idols also in different parts

of the temple compound, which is now of an area variously stated as about four *bighas* or 16 *biswas*. The respondents to the application were five in number, three men and two women: with certain other members of their family, they are now respondents before the Board in this consolidated appeal. They claim to be direct descendants of one Daryao Gir to whom a grant was made in 1781 of the land now in question by the then reigning Nawab of Oudh. It has been found and it does not appear to be in doubt that the members of this family are *grihastha fakirs* being at once *goshains* and householders. The family comes from the Bijnore District "on the Dhampur side" and is a joint Hindu family of the usual type. At the time of the application to the District Judge members of the family had been continuously in occupation and control of the temple and a number of *samadhs* or tombs had been set up containing the ashes of *goshains* who had belonged to the family. No interference with the management of the temple or the conduct of its worship whether on behalf of the public or otherwise had at any time taken place. It was not alleged in the application that the family had been guilty of any neglect or mis-management and the contrary has now been held by the Courts in India. The District Judge gave to the five respondents before him an option to bring a suit for a declaration that the property was not subject to a trust for a public purpose of a charitable or religious nature but they did not take this course. Accordingly he threw upon them the burden of disproving this allegation and after hearing nine witnesses for the applicants and two of the respondent *goshains*, and after considering certain documents, he held that there was a strong *prima facie* case that the temple formed the subject of a public trust and that the *goshains* had failed to establish the opposite. He therefore directed the *goshains* before him to furnish particulars of the extent of the property, the nature of the buildings and the income for the past year (October 1, 1930). This order was not complied with, and on September 16, 1931, the first two appellants brought in the Court of the Subordinate Judge, Mohanlalganj. Suit No. 108-7 of 1931 against the same five members of the respondents' family. The suit was framed under s. 92, Civil P. C.; relying upon the failure to furnish particulars as ordered by the District Judge, the plaint asked for removal of the defendants, the

appointment of new trustees and the framing of a scheme for the management of the temple. Before judgment had been given in this suit, another suit—No. 8-130 of 1931—was on December 23, 1931, brought in the same Court by 14 plaintiffs, claiming that they and four of the persons impleaded as defendants were members of the joint Hindu family to whom the temple belonged. This meant that 13 persons who had not been made parties to the proceedings before the District Judge were now putting their rights in suit as descendants of Daryao Gir and his co-parceners. The contesting defendants to this suit included the first two appellants—that is the uncle and nephew who had initiated the proceedings before the District Judge. Judgment in the former of these Suits (No. 108-7) was given on February 22, 1932, by the learned Subordinate Judge at Mohanlalganj. He held that the five *goshains*, defendants before him, had not proved that 13 other members of their family were interested and he left this to be determined in the other suit. He considered that the order of the District Judge concluded the question whether the temple was or was not the subject of a public religious trust and he decreed the suit, removing the five defendants, appointing new trustees and approving a scheme. About a year later (February 28, 1933), judgment in Suit No. 8-130 of 1931 was delivered by another Subordinate Judge (at Malihabad) holding that the temple property was the private and personal property of the 18 persons (14 plaintiffs and four defendants) of the respondents' family on behalf of whom it had been claimed. Both of these decisions were taken on appeal to the Chief Court at Lucknow and on October 23, 1934, Nanuvutty and Zia-ul Hasan, JJ. delivered one judgment covering the two appeals. They held that the temple property was not impressed with a public trust but was private property belonging to the joint family of the *goshains*. Hence the two appeals, which are now before the Board as a consolidated appeal.

The first question is whether the order of the District Judge made under the Charitable and Religious Trusts Act, 1920, precludes the respondents from disputing that the temple is the subject of a public religious trust. That order was made in the presence of five members only of the family and it is not shown that the other members are bound by it according to any principle of representation. Hence it

is difficult to see how these other members can be prevented from claiming the property as belonging to their joint family. The Chief Court have refused for other reasons also to regard the District Judge's order as conclusive. In this they have followed, the decisions of a Bench of the Lahore High Court in *Prem Nath v. Har Ram* (1) and a Single Judge of the Bombay High Court in *Haidarali v. Gulammohiuddin* (2) and have agreed with the view of Niamutulla, J. in *Mahadeo Bharthi v. Mahadeo Rai* (3) in preference to the opinion of Mukerji, J. in the case last-mentioned. Their Lordships agree with the Chief Court. They hold that the decision of the District Judge under the Act of 1920—a decision from which by s. 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; that it has not been made final by any provision in the Act; and that the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The existence of a public trust is the foundation of the proceedings authorised by s. 3 of the Act: *prima facie* while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdiction, he cannot, by an erroneous decision thereon, give himself jurisdiction. To produce this result there must be some provision in the Act which requires a contrary construction. No matter how long or how peaceably an individual may have been in possession and enjoyment of property, it is always possible for persons claiming to be acting for the public to lay claim to the property as having been impressed with a trust of a charitable or religious nature. It is readily intelligible that the District Judge should be required to stay proceedings under the Act in any case in which the person against whom they have been taken is willing to bring a suit. But it would be both drastic and anomalous to provide that a person in possession, is not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character.

(1) A I R 1934 Lah. 771; 154 Ind. Cas. 229; 36 P L R 13; 7 R L 531; 16 L 83.

(2) 58 B 623, 152 Ind. Cas. 781; 36 Bom. L R 687; A I R 1934 Bom. 343; 7 R B 180.

(3) 51 A 805; 118 Ind. Cas. 513; A I R 1929 Lah. 506; (1929) A L J 653; Ind. Rul. (1929) All. 865.

The terms of s. 6 of the Act are intended, in their Lordships' view, to define the consequences of such an order as was made in this case by the District Judge on October 1, 1930, but the words "if a trustee without reasonable excuse fails to comply" cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under s. 92 of the Code.

Upon the merits, it is desirable to consider first the documents. The main document of title has already been mentioned. It is exhibit No. 4 dated April 2, 1781, whereby the Nawab of Oudh granted the property now in question to the respondents' ancestor, Daryao Gir. The grant runs as follows:—

"The present and future state officials of Haveli Lucknow, suburbs and the province of Akhtar-nagar, Oudh, should know that five *pucca bighas* waste land, free from Government revenue, *mal* and *sewa*, in the immediate vicinity of village Nawagaon, included in the said Haveli whereon lies the house of Bhairon, has been granted along with the said house, in the name of Daryao Gir *goshain*, the *mahant*, free of all dues and shall not be shown in the record: that the said land shall, generation after generation and descent after descent, be left in the possession and enjoyment of the said person and his heirs and they (officials) should not interfere and meddle with the same for any reason so that the said person having remained in possession of the said land and constructed a house, etc., should with contentment and devotion remain engaged in praying for His Highness."

This grant was construed by a Court of the Nawab in 1843 when members of the respondents' family took proceedings to eject certain *dhobis* (washermen) who had been allowed to set up and live in a thatched hut in the courtyard of the temple. It was held to be a grant of five *bighas* of the waste land to Daryao Gir, ancestor of the *fakirs*, to be held generation after generation as a *muafi* (revenue free grant) and that the *fakirs* had been long in possession. There is also the *Khasra* compiled after 1857 at the time of the First Settlement of the city of Lucknow soon after the annexation of Oudh by the British. This shows the plot as "mud house of Bhaironji" and under the heading "name of owner by virtue of possession" are inserted "Kosri Gir and Jawahir Gir and Kalyan Gir disciples of Daryao Gir". These are the main documents in the case but there are in addition a number of *sarkhats*, or leases of shop rooms on the outskirts of the temple property. These are expressed to be granted by individual members of the respondents' family: as

the trial Judge (in Suit No. 8-130) has pointed out, the lessors were representative of each of the three branches of the family. The Chief Court noticed that there is no lease in the name of the idol as distinct from the names of individual *goshains*. In these leases the *goshains* are sometimes referred to as "owners" of the shop or *kothri*: in one at least, as owners of the *asthan Sri Bhaironji*.

It will be convenient to indicate the main features of the evidence before attempting to draw any inferences from the documents. The appellants rely strongly on the fact that for many years Hindu members of the public have resorted to the temple for worship and *darshan* without let or hindrance. About 46 years before the trial, a *mela* or fair had been started by some musicians and dancers and had become an annual function towards which public subscriptions were collected. There was some evidence that part of these monies had been spent upon whitewashing and repairing the temple but the Chief Court does not consider this to be established; though it is certain that the temple and its *goshains* profited from the increased resort to the temple during the *mela*.

The appellants maintain that upon a review of the history of the temple, they have established that it was held out to the public as a public temple and that the Courts in India should have applied to it the reasoning of the Board in the Madras case of *Pujari Lakshmana Goundan v. Subramania Ayyar* (4). The facts which have been held by the Courts below to tell in favour of the respondents are that there had been no previous interference with the temple on behalf of the public; that the *goshains* took the offerings for themselves; that they divided them according to their shares as members of different branches of the family; that they spent money on repairs; that they gave leases in their individual names and not in the name of the idol; that they closed the temple when they had occasion to go to their native village for family ceremonies, e. g., marriages; and that tombs to certain members of the family were put up though they could not claim to be famous saints.

(4) 29 O W N 112; 81 Ind. Cas. 518; A I R 1924 P O 44; 19 L W 255; 22 A L J 169; (1924) M W N 278; 10 O & A L R 608; L R 5 A (P O) 125 (P O).

Their Lordships agree with the Chief Court in holding that the grant of 1781 is not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant is to Daryao Gir and his heirs in perpetuity. Had it been intended as an endowment for an idol it would have been very differently expressed: the reference to the grantee's heirs, and the Arabic terminology *naslan ba'da naslin wa batnan ba'da batnin* (descendant after descendant and generation after generation) are not reconcilable with the view that the grantor was in effect making a *waqf* for a Hindu religious purpose, even if it be assumed that this is not otherwise an untenable hypothesis. While it is true that the origin of the idol is not completely traced—the respondents' allegation that it was founded or set up by Kishore Gir, father of the grantee, not being established by evidence—the grant of 1781 discloses the existence of a *fakir* with an idol in a mud hut squatting upon waste land which did not belong to him and which was given to him for the first time by the grant. It would, in their Lordships' opinion be an error in method if the subsequent history of the little temple was not looked at in the light of this grant. While it is certainly possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. Their Lordships consider that in Suit No. 8-130, the Courts in India have followed a proper method and arrived at a correct conclusion upon the point. The decision of 1843 shows the position to have then been as in 1781 and the *khassra* at the time of the Settlement of Lucknow shows no variation—there is still a mud hut with an idol in it and the "owners" are members of the respondents' family, though described as "disciples of Daryao Gir". The general effect of the evidence is that the family have treated the temple as family property, dividing the various forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, and erecting *samadhs* to the honour of its dead. In these circumstances it is not enough, in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been

turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual *mela*. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol: they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a Public Trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind, it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. Thus in *Mundancheri Koman v. Achuthan Nair* (5), the Board expressed itself as being slow to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. Their Lordships do not consider that the case before them is in general outline the same as the case of the Madras temple, *Pujari Lakshmana Goundan v. Subramania Ayyar* (*supra*) (4) in which it was held that the founder who had enlarged the house in which the idol had been installed by him, constructed circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple. The Chief Court have, in the opinion of the Board, correctly estimated the particular facts of the case before them and have rightly negatived the contentions that the temple is a public temple and that the property in suit is impressed with a trust of a public religious character.

Their Lordships will humbly advise His Majesty that this consolidated appeal should
 (5) 61 I A 405; 151 Ind. Cas. 329; 7 R P O 55; A I R 1934 P O 230; 11 O W N 1150; 40 L W 428; (1934) M W N 1055; 67 M L J 788; 60 O L J 344; 58 M 91; 1934 A L R 898; 1934 O L R 764; 39 O W N 518 (P O).

be dismissed. The appellants must pay the respondents' costs.

s. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *H. S. L. Polak & Co.*

Solicitors for the Respondents:—Messrs. *James Gray & Co.*

NAGPUR HIGH COURT

Criminal Appeal No. 215 of 1939

August 18, 1939

NIYOGI AND GRUBE, JJ.

MOTILAL AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT

Criminal trial—Identification—Articles not mixed with similar articles—Value of identification—Evidence Act (I of 1872), s. 27—Criminal Procedure Code (Act V of 1898), ss. 162, 342—Provisions of, if contradictory—S. 162, if alters s. 27, Evidence Act—Statement of accused to Police that he would point out ornaments of deceased, admissibility—Confession in dock under s. 342—If can be taken against co-accused under s. 30 Evidence Act.

Where during the identification of articles recovered from the accused, they were not mixed with similar articles, this omission would not make the identification inadmissible although it would detract from the weight that would otherwise be attached to that evidence. [p. 312, col. 1.]

The provisions of s. 27 of the Evi. Act are quite independent of s. 162 of the Criminal P. O., and the amendment of that section made in 1923, was not intended to abrogate or impair the effect of s. 27 of the Evi. Act. The statement made by the accused that he would produce deceased's ornaments which distinctly led to the discovery of the ornaments falls within the ambit of s. 27. 114 Ind. Cas. 273 (3), followed. [p. 312, col. 2.]

Section 27 contemplates the discovery of material evidence. The material discovered would have no value unless it is relevant to the fact in issue and connected in some manner with the crime under investigation. Any information given by an accused person showing the relevancy of a fact to the crime must form an integral part of the discovery of the fact itself, namely material evidence, although it may indirectly amount to a confession. Consequently, the statement made by the accused that he would point out the deceased's ornaments would be admissible. That would only show his knowledge of the ornaments belonging to the deceased but would not prove by itself his complicity in the crime of murder. [p. 313, col. 2.]

[Case-law referred to.]

Quære—Whether a confession made by an accused in the dock, when examined under s. 342 of the Criminal P. O., can be taken into consideration under s. 30 Evi. Act against the other accused persons.

[Case-law referred to.]

Or. A. from the order of the Court of the Additional Sessions Judge, Balaghat, dated June 27, 1939.

Mr. W. C. Dutt, for the Appellants.

Mr. W. R. Puranik, for the Crown.

Judgment.—Motilal, his brother Mojilal, and Saktya, their servant, and Jhullu, Benya and Sudama, were tried in the Court of the Additional Sessions Judge, Balaghat, on the charge of murdering one Ghudnya, son of Langdya Mahar of village Datta on the night of February 10, 1939, and also of robbing him of his ornaments—offences punishable respectively under ss. 302 and 396, read with s. 34, I. P. O. Motilal, Mojilal and Saktya were convicted of both the offences and the first two were sentenced to death subject to confirmation by this Court and also to transportation for life; Saktya was sentenced to transportation for life and five years' rigorous imprisonment which was to run concurrently, and the others were acquitted. Motilal and Mojilal have preferred a joint appeal, Criminal Appeal No. 215 of 1939, and Saktya filed a separate appeal, Criminal Appeal No. 219 of 1939. This judgment governs the disposal of both.

The deceased Ghudnya worked as a labourer on the field of Motilal and Mojilal. He was the only son of his father and had been married two years before his murder. He was in the habit of wearing three gold earrings and a pair of silver Kadas on his wrist. On Friday, February 10, 1939, he and his wife worked as usual in the field of Motilal and Mojilal and returned in the evening. He took his meals along with his father and then left his house. At midnight when his wife got up from sleep and found that Ghudnya had not returned home she woke up her father-in-law. They made search for him in the night but in vain. The search made on the next day also proved fruitless. On Sunday, that is February 12, 1939, one Gopal brought the news that a blood-stained cloth was seen in the field of one Bhola Kumbhar. The deceased's father and his wife went to the field and discovered the trunk of a dead body which was kept away in the recess of an embankment of Bhola Kumbhar's field. The head was missing. They forthwith reported the matter to the *Mukaddam* Anantsingh stating that on Friday Ghudnya after taking his meals had left his house at about 10 o'clock and that he had three gold Balis (earrings) weighing 1½ tola worth Rs. 42-8-0 and two silver Kadas weighing 7 tolas worth Rs. 3-8-0. The report was sent to the Kirnapur Police Station on the same day and Sikandar Khan, Sub-Inspector arrived at the village Datta on February 13, 1939, for investigation. He found the head

in the adjoining field. The clothes found on the body were seized as also a bunch of keys attached to a thread tied round his waist. As the body was in an advanced state of decomposition, Dr. Ghadge, Assistant Medical Officer, Balaghat, who held the *post mortem* examination, was unable to pronounce any opinion as to the cause of death.

On February 15, 1939, that is Wednesday, an axe known as *Pharsa*, an iron file, a *dhoti*, a *bandi* and the handle of the axe were seized from Motilal. On the next day two shirts were seized from the accused Mojilal and a blood-stained *dhoti* and a shirt from Saktya. On that day Motilal led the Sub-Inspector to his house and produced three gold earrings and a pair of silver *kadas* which had been tied in a piece of cloth, which he had dug out from a corner of the *chhapri* of a dilapidated house standing in his *badi*. These ornaments were recognised by the deceased's wife and father as those which had been worn by the deceased when he had left his house on the fateful night.

It may be useful to describe the place where the murder is alleged to have been committed. Some distance away from the village; towards the north-west there lies a hillock by the side of which flows a river called Deo Nadi. Bbola Kumbhar's field where the dead body was found is to the east of the hillock and to the north-west of the village. At the western end of the village there is a Chaori along which the road passes towards the hillock. *Musammam* Kumharin (P. W. No. 8) who lives close to the Chaori saw in the afternoon preceding the day on which Ghudnya disappeared Motilal and Mojilal and others including Ghudnya gathered near the Chaori and Jhullu. One of the accused had come to her to ask for fire presumably for smoke. In the evening of the material night she saw Jhullu, Saktya and Ghudnya the deceased on the road near her house. Ghudnya had a pot in his hand. Arjun (P. W. No. 15) who lives in the neighbourhood of the deceased saw Ghudnya going past his yard and at the same time heard the voice of Jhullu saying that Ghudnya had come which was the signal for Benya, Sudama and Saktya to come out of their house and go towards the west out of the village. Sakhan Marar (P. W. No. 12) who is the servant of Anantsingh Patel had carried meals to his father in his field laying in the same direction and was returning home. He first met at some distance outside the village Motilal

and Mojilal going along the fields of Kanhaiya and Bbola Kumbhar. As he proceeded further he saw Benya, Sudama and the deceased Ghudnya sitting on a log of wood near a well. Still later in his progress back to his house he met Jhullu and Saktya with whom he had some talk. They were going in the direction in which Benya, Sudama and Ghudnya were sitting. Later in the night Kanhaiya (P. W. No. 13) and Laxman (P. W. No. 14) heard voices of Motilal and Mojilal and Ghudnya. These two witnesses have their plantations in the river flowing by the hillock. The gist of their evidence is that Ghudnya in plaintive tones was imploring them to take away the ornaments but save his life as he was the only son of his father. His voice ended with the words "Oh mother" which was followed by a hush. The witnesses observed the figures of the people which were at a distance of about 300 feet.

The ornaments produced by Motilal were identified by the deceased's father Langdya (P. W. No. 9) and his wife Bunda (P. W. No. 11) as well as Nandram goldsmith, (P. W. No. 16), the goldsmith who had made the ornaments. Kanhaiya (P. W. No. 13), Arjun (P. W. No. 15) and Suratsingh *malguzar* (P. W. No. 19) testified that Ghudnya was in the habit of wearing three earrings and two *Kadas*. Mojilal denied knowledge of the ornaments belonging to Ghudnya. Motilal, however, pleaded that they had belonged to his deceased father and that he had buried them in his house to conceal them from his brother Mojilal because he had already unjustly appropriated all the ornaments of their mother. Motilal, however, did not give any evidence to substantiate his plea. The articles were sent to the Chemical Examiner and the Imperial Serologist. The Chemical Examiner detected blood on the iron axe blade and the iron file recovered from Motilal by applying benzidine test, but the presence of blood could not be confirmed by the spectroscopic method. He detected bloodstains by spectroscopic test on *dhoti*, *bandi* and the handle of the axe recovered from Motilal and two shirts recovered from Mojilal and the *dhoti* and shirt recovered from Saktya. The Serologist was unable to determine the origin of the bloodstains as they were disintegrated. Both Motilal and Mojilal admitted that Saktya and the other accused (acquitted) were their servants, but they denied the commission of the crime. Saktya, however, admitted that Motilal, Mojilal, Ghudnya and himself assembled near the

hillock towards the river and that Motilal murdered Ghudnya and stripped him of his ornaments and kept them to himself. Although he admitted his presence, he was cautious enough to deny that he took part in committing the murder.

The assessors unanimously gave their opinion that Motilal and Mojilal were guilty of murder and robbery. In regard to Saktya, one of the four assessors declared him guilty of both the offences, while the rest declared him not guilty.

On behalf of Motilal it is contended that the identification of the ornaments made by Langdya (P. W. No. 9), the deceased's father and Bunda (P. W. No. 11) the deceased's wife, was inconclusive for the reason that the ornaments were not mixed with other similar ornaments. It is true that there has been an omission to take this step but that would not make the identification inadmissible although it would detract from the weight that would otherwise be attached to that evidence. There are, however, circumstances to show that these ornaments were those which had been worn by Ghudnya. In the first information report, Ex. P-1, which Ghudnya's father made to the Patel, there is mention of three *balis* and two *kadas*. Kanhaiya (P. W. No. 13), Arjun (P. W. No. 15), Nandram (P. W. No. 14) and Suratsingh (P. W. No. 19) affirmed that Ghudnya used to wear these ornaments. Although Nandram (P. W. No. 16) was not able to state the distinctive marks on those ornaments he was definite that he made those ornaments for Ghudnya. The ornaments were of a nature which are worn only by men, a fact which derives confirmation from the plea raised by Motilal that they belonged to his father. The actual weight of the ornament and their value materially agrees with those stated by the deceased's father in his report to the Patel. No attempt was made by Motilal to substantiate his plea that the ornaments had belonged to his father and it is significant that Mojilal who must also have seen his father wearing these ornaments did not take the plea. All these facts taken together and considered as a whole leave no room for doubt that these ornaments belonged to the deceased Ghudnya. Moreover, there is evidence to prove that Motilal stated to the Sub-Inspector that he would produce Ghudnya's ornaments: see Suratsingh (P. W. No. 19) and Sikandar Khan (P. W. No. 20) and that he led the Sub-Inspector to his house and produced the

ornaments. It is strenuously contended that the statement made by Motilal that he would produce Ghudnya's ornaments is inadmissible for the reason that it was not an information which distinctly led to the discovery of the ornaments but that it was a mere statement which could not be proved in view of s. 162, Criminal P. O. It is true, as held by their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor* (1), that the words of s. 162, Criminal P. O. are wide enough to exclude a confessional statement made to a Police Officer in the course of investigation whether a discovery is made or not. Their Lordships, however, left the question open whether or not such a statement would be admissible under s. 27 of the Evi. Act which is a special law within the meaning of s. 1 (2), Criminal P. O. In *Emperor v. Faujdar* (2) it was pointed out that there is no contradiction between s. 162 of the Criminal P. O. and s. 27 of the Evi. Act and that by virtue of s. 1 (2) of the Criminal P. O. any provision of the Evi. Act which is a special law as defined by s. 4 of the Code, cannot be affected by the Criminal P. O. in the absence of a specific provision to the contrary made in that Code; and that there is no such specific provision modifying or altering s. 27 of the Evi. Act. The terms of s. 162 of the Criminal P. O. as amended by Act XVIII of 1923 do not alter the provisions of s. 27 of the Evi. Act. That was the view taken by a Bench of two Judges of the late Court of Judicial Commissioner in a case reported in *Gola v. Emperor* (3) where it was laid down that the provisions of s. 27 of the Evi. Act are quite independent of s. 162 of the Criminal P. O. and that the amendment of that section made in 1923 was not intended to abrogate or impair the effect of s. 27 of the Evi. Act. We are in respectful agreement with this view and hold that the statement falls within the ambit of s. 27 of the Evi. Act. It is urged that when Motilal himself produced the incriminating articles and did not give any infor-

(1) A I R 1930 P O 47; 180 Ind. Cas. 1; 1930 O L R 134; (1930) M W N 185; 40 Cr. L J 364; 11 R P O 166; 1930 O W N 283; 20 P L T 265; 49 L W 349; 43 O W N 473; (1930) A L J 298; 41 Bom. L R 428; 41 P L R 273; 69 O L J 273; 5 B R 449; (1930) 1 M L J 756; 18 Pat. 234; 66 I A 66 (P O).

(2) 55 A 463; 144 Ind. Cas. 1021 (2); L R 14 A 153 Cr.; A I R 1933 All. 440; (1933) Cr. Cas. 746; 6 R A 43; 34 Cr. L J 875; (1933) A L J 1518.

(3) 24 N L R 158; 114 Ind. Cas. 273; A I R 1929 Nag. 17; 30 Cr. L J 258; Ind. Rul. (1929) Nag. 49 (F B).

mation to enable the Police to discover them, any statement made by him would not be covered by s. 27 of the Evi. Act and that in any case the statement made by him that he would point out Ghudnya's ornaments was not admissible as it was in the nature of a confession. In *Nahru v. Emperor* (4) it was pointed out that the statement that the accused had deposited two *kadas* belonging to the deceased in a certain place and offered to show the Police the spot is admissible under s. 8 of the Evi Act. The statement therefore is not admissible. The contention is, moreover, untenable in view of the plain terms of s. 27. The relevant words are: when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer so much of such information whether it amounts to a confession or not as relates distinctly to the fact thereby discovered may be proved. The word used is "information" not "statement". The information may be conveyed by words or by conduct. If an accused person says: "Come with me, I shall show certain property" and he leads the Police with him, he is undoubtedly giving information which puts the Police in motion, and consequently the information given by him coupled with his conduct must fall within the purview of s. 27. As to the extent to which a confession involved in the information supplied by the accused can be proved, there has been no doubt some divergence of judicial opinion as will be evident by a reference to *Sukhan v. Emperor* (5) and *Athappa Goundan v. Emperor* (6). In *Maganlal v. Emperor* (7) it was pointed out that although the interpretation of s. 27 has now been held to allow the admissibility of such statements as "I buried the knife with which I committed the murder in such and such field", that doctrine has never been extended to include statements concerning the source from which an article recovered was obtained. A statement

such as "this is the revolver which was stolen" is admissible for the obvious reason that the statement actually leading to the recovery without an admission as to what the property is would be unintelligible. This view appears to reflect faithfully the intention of the legislature. Section 27 contemplates the discovery of material evidence. The material discovered would have no value unless it is relevant to the fact in issue and connected in some manner with the crime under investigation. Any information given by an accused person showing the relevancy of a fact to the crime must form an integral part of the discovery of the fact itself, namely material evidence, although it may indirectly amount to a confession. Consequently the statement made by Motilal that he would point out Ghudnya's ornaments would be admissible. That would only show his knowledge of the ornaments belonging to Ghudnya but would not prove by itself his complicity in the crime of murder.

Considering the evidence bearing on the identification of ornaments together with the statement made by Motilal, it must be held that the ornaments were taken away from the person of Ghudnya.

The credibility of the evidence of Kanhaiya (P. W. No. 13), Laxman (P. W. No. 14) and Arjun (P. W. No. 15) is sought to be impeached on the ground that they did not disclose their information until the Sub-Inspector enquired of them. Such conduct is by no means unusual with the villagers who persuade themselves that it would be inviting trouble on themselves to disclose their knowledge to anybody in the village. The evidence of Kumharin (P. W. No. 8) and Sakhan (P. W. No. 12) clearly indicates the association of Motilal and Mojilal and Saktya with the deceased Ghudnya on the night of the murder. The iron axe blade and iron file, *dhoti* and *bandi* and the handle of the axe which were recovered from Motilal were found to be blood-stained by the Chemical Examiner. The first two articles reacted to the benzidine test and blood on the rest of the articles was detected by spectroscopic test. Two shirts Ar.s. G-1 and G-2 recovered from Mojilal also indicated the presence of blood when subjected to spectroscopic test by the Chemical Examiner.

The evidence reviewed above clearly brings the guilt home to Motilal and Mojilal. The lower Court took into consideration under s. 30 of the Evi. Act, the

(4) 1 L R (1937) Nag. 268 at p. 273; 168 Ind. Cas. 962; 38 Cr. L J 642; 9 R N 281; A I R 1937 Nag. 220.

(5) 10 L R 283; 115 Ind. Cas. 6; A I R 1929 Lah. 344; 30 P L R 197; 30 Cr. L J 414; 11 L L J 159; Ind. Rul. (1929) Lah. 342 (F B).

(6) 1 L R (1937) Mad. 695; 171 Ind. Cas. 245; A I R 1937 Mad. 618; (1937) M W N 442; 46 L W 152; (1937) 2 M L J 60; 10 R M 321; 38 Cr. L J 1027 (F B).

(7) 30 N L R 269 at p. 281; 150 Ind. Cas. 623; (1934) Cr. Cas. 276; A I R 1934 Nag. 71; 7 R N 10; 35 Cr. L J 1097.

confession made by Saktya against Motilal and Mojilal. There is divergence of judicial opinion whether a confession made by an accused in the dock, when examined under s. 342 of the Criminal P. O. can be taken into consideration under s. 30 against the other accused persons. In *Ganpat v. Emperor* (8) it was held that it could be so taken into consideration, but the judicial opinion on the point is not unanimous as will appear from *Dial Singh v. Emperor* (9), *Emperor v. Mahadeo Prasad* (10), *Emperor v. William Cooper* (11) and *In re Marudamethu Padayachi* (12). It is unnecessary to go into this question as we are of opinion that owing to the wavering nature of the statement and the late stage at which it was given which no doubt took the other accused by surprise, we should exercise our discretion by not taking the statement into consideration against the other accused, even if we are legally entitled to do so.

Excluding Saktya's statement from consideration we find that the evidence on record fully warrants the convictions of Motilal and Mojilal.

Saktya on his own admission participated in the crime. He is, therefore, clearly guilty along with the two others of both the offences.

We affirm the convictions and sentences passed against Motilal and Mojilal and dismiss their appeal.

As to Saktya, he is not yet out of his teens and being a servant of Motilal and Mojilal he must have been pressed to join their masters. Although he accompanied his masters it does not appear that he took actual part in the murder; nor did he derive any benefit out of the crime. We therefore recommend his case to the Provincial Gov. for the exercise of clemency under s. 401, Criminal P. O.

D. *Appeal dismissed.*

(8) 27 N L R 163; 134 Ind. Cas. 686; A I R 1931 Nag. 169; 32 Cr. L J 1222; Ind. Rul. (1931) Nag. 174; (1931) Cr. Cas. 830

(9) 16 L 651; 161 Ind. Cas. 898; A I R 1936 Lah 337; 37 P L R 806; 8 R L 814; (1936, Cr. Cas. 258; 37 Cr. L J 508.

(10) 45 A 323; 76 Ind. Cas. 1025; 21 A L J 179; A I R 1923 All. 323; 25 Cr. L J 305.

(11) 54 B 531; 127 Ind. Cas. 105; 32 Bom. L R 747; A I R 1930 Bom. 354; 3 Cr. L J 1137; Ind. Rul. (1930) Bom. 489; (1930) Cr. Cas. 786.

(12) 54 M 788; 134 Ind. Cas. 63; 34 L W 162; (1931) M W N 886; 61 M L J 358; 32 Cr. L J 1099; Ind. Rul. (1931) Mad. 815; A I R 1931 Mad. 820 (F B).

LAHORE HIGH COURT

Case No. 239 of 1937

November 25, 1938

YOUNG, C. J.

In the matter of PEOPLES BANK OF
NORTHERN INDIA, LTD., LAHORE
(IN LIQUIDATION)

Companies Act (VII of 1913), s. 234—Lahore High Court's Rules and Orders, Vol. II, Chap. I—R. 68—Liquidator must make out case that compromise will be beneficial—Unwilling liquidator, if can be compelled to compromise debt due to Company.

The liquidator cannot consider a mere matter of pity or mercy. He must make out a case that the compromise will be beneficial to the Company; for example, that there is a contested claim, and if the compromise is entered into, the payment would be made very much sooner than if the claim was contested; or on similar grounds.

The Court has no jurisdiction to compel an unwilling liquidator to compromise a debt due to the Company in liquidation. *In re East of England Banking Co. (Pearson's case)* (1) and *In re The International Contract Co., (Hankey's case)* (2), relied on.

Messrs. Mohammad Monir and Besant Krishen, for the Petitioners.

Messrs. Bhagwati Shankar, Official Liquidator and Lakshman Saroop, for the Respondent.

Order—This is a petition by Khan Bahadur Mian Chiragh Din praying that the Court should make an order reducing the amount payable by him to the Liquidator of the Peoples Bank of Northern India. Before the Bank closed its doors, the Khan Bahadur owed the Bank money on three accounts. When the Company was wound up in May, 1935, and an Official Liquidator was appointed, on a report by the Liquidator, the Court reduced the interest payable on the amount due to six per cent. as from the compulsory order and the Court further reduced the interest from $9\frac{1}{2}$ and $9\frac{1}{4}$ to $8\frac{1}{4}$ and $7\frac{1}{2}$ per cent. as from the date of the suspension of the business of the Bank in September 1931 up to the date of the compulsory order. The Khan Bahadur has paid Rs. 13,000 in part payment of the amount due. He now petitions the Court to make a further reduction in his favour. The Liquidator opposes any reduction. The position in law appears to be clear. Rule 68 of this Court's Rules and Orders, Vol. II, Chap. I, is as follows:

"Every application for the sanction of the Judge to a compromise with any contributory or other person indebted to the Company shall be supported by the affidavit of the Official Liquidator stating that he has investigated the affairs of such contributory or person and believes that the proposed compromise will be beneficial to

the Company, and giving his reasons for such belief."

It is clear from this Rule that the Liquidator cannot consider a mere matter of pity or mercy. He must make out a case that the compromise will be beneficial to the Company; for example, that there is a contested claim, and if the compromise is entered into, the payment would be made very much sooner than if the claim was contested; or on similar grounds. It would be difficult, if the Liquidator is satisfied, that the whole amount can easily be paid by the debtor, for him to file an affidavit as contemplated by r. 68. Further, s. 234, Companies Act, is as follows:

"The Liquidator may, with the sanction of the Court when the Company is being wound up by the Court do the following things or any of them;—
(iii) compromise.... debts and liabilities and all claims....."

This section is the equivalent of s. 160, English Companies Act, 1862. The English section has had the consideration of the Courts in England. In *In re East of England Banking Co. (Pearson's case)* (1) it was held that the Court had no jurisdiction to order the Liquidator in a winding up to consent to a compromise with a contributory. In that case the Company Judge had taken a strong view that the contributory was in a very poverty-stricken condition and that the Liquidator ought to accept a compromise which had been offered. The Court of Appeal set aside the order of the Company Judge and held that:

"the Court has no more power to compel the Liquidator to accept a compromise than to compel an ordinary suitor to take less than is due to him. I am of opinion that the only power is in the Liquidator with the sanction of the Court, and that there is no power in the Court to order a compromise, whether the Liquidator recommends it or not."

In *In re The International Contract Co. (Hankey's case)*, (2) it was held in the case of a suggested compromise of a creditor's claim that the Court had no jurisdiction to compel the Liquidator of a Company to accept a compromise of a creditor's disputed claims against the Company. It is quite clear from these authorities that in this case the Court has no jurisdiction to compel an unwilling Liquidator to compromise a debt due to the Company in liquidation. The Liquidator in this case is not in a position to file an affidavit that the proposed

reduction in the debt will be beneficial to the Company in liquidation. The petition, therefore, must be dismissed.

D. *Petition dismissed.*

BOMBAY HIGH COURT

Criminal Appeal No. 43 of 1939

June 12, 1939

BROOMFIELD, AG. C. J. AND SEN, J.

EMPEROR—PROSECUTOR

versus

KALLAPPA GURAPPA KOTAGUNSHI

AND OTHERS—ACCUSED

Bombay Prevention of Gambling Act (IV of 1887), ss. 13, 4—Game of cards called pettin-ata, if comes within mischief of Act—Club and common gaming house, distinction.

"Mere skill" means pure skill, skill and nothing else. A game in which there is a substantial element of chance cannot be described as a game of mere skill or pure skill. As the Bombay Prevention of Gambling Act now stands, and in particular in view of the provisions of s. 13 it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a game of mere skill, that is to say, a game in which there is no element of chance at all. Of course, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. A game of cards called *pettin-ata* played for money stake is not a game of mere skill, and comes within the mischief of the Bombay Prevention of Gambling Act. 189 Ind. Cas 35 (1), commented upon. [p. 316, cols. 1 & 2.]

In the case of a club, it is not usual for a charge to be made for the profit and benefit of the owner or occupier of the premises. In the case of a common gaming house, all those participating in the game pay certain amount for the benefit of the owner of the premises. The other point is that in the case of a club the place is not open to any member of the public, but only to members of the club and perhaps their guests.

Mr. R. A. Jahagirdar, the Government Pleader, for the Crown.

Messrs. S. A. Desai, C. A. Desai and G. R. Madbhavi, for all accused and accused No. 1, respectively.

Broomfield, Ag. C. J.—The accused in this case were charged with offences under ss. 4 and 5, Bombay Prevention of Gambling Act, 1887, and were convicted and ordered to pay fines of varying amount. On appeal, the Sessions Judge of Dharwar set aside the convictions and acquitted the accused. The Government of Bombay has now appealed against the order of acquittal. The facts need only be mentioned very briefly. The Police Sub-Inspector of Hubli, having received information that

(1) (1872) 7 Ch. A 309; 41 L J Ch. 524; 26 L T 379; 20 W R 394.

(2) (1872) 41 L J Ch. 385; 26 L T 358; 20 W R 508.

accused No. 1 was using his house at Hubli as a common gaming house, obtained a special warrant from the Magistrate and searched the house on February 9, 1938. At the time of the raid seven persons were found sitting in the room and playing a game of cards called *pettin-ata* for money stakes. One of the seven persons absconded, and of the six who were charged in the case, one accused No. 2, was examined as a witness. The Magistrate acquitted accused No. 6, and convicted Nos. 1, 3, 4 and 5.

The only point that was argued in the appeal before the Sessions Judge was whether this game *pettin-ata* is a gambling game or not. The game has been thus described by accused No. 2 who, as I say, was examined as a witness in the case, and who gave a demonstration of the game before the Magistrate and the Sessions Judge. The game is played by four or six persons, each player being dealt eight cards. After the cards are dealt, the players make a call in turn contracting to make so many tricks. The maker of the highest call declares the trump suit. Each of the players contributes a certain stake, usually one anna, to the pool. If the player who makes the highest call makes the number of tricks he contracts to make, he takes the amount of the pool; but if he fails he has to contribute an equal amount to the pool. So that after the hand is played, if the highest bidder is unsuccessful, the pool is doubled. The game consists of three deals. If in the third hand the highest bidder is successful, he takes the whole of the pool; if he fails, the pool is divided equally among all the players including the unsuccessful final bidder.

The view taken by the learned Sessions Judge is that it cannot be regarded as a game of mere chance, and that there is an element of skill in it. That is perfectly true, but, unfortunately, it is not the point which arises on the construction of the Act. Section 13, which is the important section, says that nothing in this Act shall be held to apply to any game of mere skill wherever played. "Mere skill" means pure skill, skill and nothing else. It is sufficiently obvious, we think, without reference to any authorities, that a game in which there is a substantial element of chance cannot be described as a game of mere skill or pure skill. The game, which has been described in this case, is similar to the well-known game of nap. It is a rather elaborate form of nap, having some similarity, no doubt, to contract bridge. I should say

myself that there is far more chance than skill in the game. But, in any case, it cannot possibly be denied that there is a very substantial element of chance in it. That being so, it is not a game of mere skill, and comes within the mischief of the Bombay Prevention of Gambling Act. The learned Sessions Judge appears to have relied on some observations of the learned Judicial Commissioner of Sind in *Mahomed Hassan v. Emperor* (1). The Court was there dealing with a game called Corinthian bagatelle, not a card game, and the observation of the learned Judicial Commissioner, on which the Sessions Judge relied, was as follows (p. 99*):

".....no game can be a game of skill alone, that in any game in which even great skill is required, chance must play a certain part, and we think there is force in this argument. Even a skilled player in a game of mere skill may be lucky or unlucky, so that we think that even in a game of mere skill chance must play its part. But we do not think that it is necessary to decide in terms of mathematical precision the relative proportion of chance to skill when deciding whether a game is a game of mere skill within the provisions of s. 13. We are satisfied in this particular case that it cannot be said that the game before us is a game of mere skill, because it is quite clear to us that the elements of chance most strongly preponderate. We think, therefore, on the point that the game is a game of mere skill."

It is not very clear I think that the learned Judge meant to lay down the proposition that the question whether a game is a gambling game or not depends on whether chance or skill preponderates in it. But, if that is the meaning of the observations cited, we can only say respectfully, but emphatically, that we do not agree. It has been pointed out in *Emperor v. Ajun Singh* (2) and *Emperor v. Musa* (3) that, under the provisions of the gambling law as they formerly stood before amendment, the question whether skill or chance predominates in a game was of importance. As the Act now stands, and in particular in view of the provisions of s. 13 it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a game of mere skill, that is to say, a game in which there is no element

(1) A I R 1937 Sind 99; 169 Ind. Cas. 35; 31 S L R 44; 38 Cr. L J 668; 9 R S 255.

(2) 57 O 520; 125 Ind. Cas. 643; A I R 1929 Cal. 769; (1929) Cr. Cas. 513; 31 Cr. L J 901; 33 O W N 910; Ind. Rul. (1930) Cal. 563.

(3) 40 M 556; 36 Ind. Cas. 839; A I R 1917 Mad 124; 18 Cr. L J 7; 31 M L J 285; (1916) M W N 196; 4 L W 503.

* Page of A I R 1937 Sind—[Ed.]

of chance at all. Of course, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. But that is not the case with the game with which we are concerned here.

The learned Sessions Judge has observed, in the course of his judgment, that the game is just like auction or contract bridge played in respectable clubs. He has, however, omitted to observe two very important distinctions. The first is, that in the case of a club it is not usual for a charge to be made for the profit and benefit of the owner or occupier of the premises. In the present case it is proved that all those participating in the game pay four annas for the benefit of accused No. 1, the owner of the premises. The other point is that in the case of a club, the place is not open to any member of the public, but only to members of the club and perhaps their guests. The facts here clearly bring the case within the definition of a common gaming house in s. 1. Mr. Desai, who appears for the accused, took exception to the Magistrate's order for confiscation of a sum of Rs. 48 which appears to have been found lying on the carpet round which the accused were sitting. He says that the prosecution have not shown the connection between this money and the gambling. The point does not appear to have been taken before the Sessions Judge, and in any case, we think, there is no substance in it. As the accused were playing cards for money, and this money was lying on the carpet on which they were playing, the connection between the money and the gambling is sufficiently obvious. We think the convictions of the accused were right, and the Sessions Judge was not justified in interfering. We therefore set aside the order of acquittal passed by the Sessions Judge and restore the convictions and sentences of all the accused.

B.

Convictions restored.

LAHORE HIGH COURT

Civil Revision No. 151 of 1939

July 5, 1939

RAM LALL, J.

JAGAN NATH—DEBTEE—HOLDER—

PETITIONER

versus

ALLAH DAD—JUDGMENT-DEBTOR—

RESPONDENT

Civil Procedure Code (Act V of 1908), s. 60(1) (i)
—Employee contracting himself out of benefits of

s. 60, by agreeing to pay decretal amount in instalments—Salary, if can be attached.

Where a railway employee agrees to a compromise decree in favour of his creditor agreeing to pay the decretal amount by monthly instalments, he contracts himself out of any benefits of s. 60, Civil P. C., in the matter of the attachment of his salary. *Chittar Mal v. Ram Devi* (1), applied.

O. R. of an order of the Judge, Small Cause Court, Rawalpindi Cantonment, dated December 20, 1938.

Mr. Qabul Chand Mital, for the Petitioner.

Order.—Jagan Nath, petitioner, obtained a decree against Allah Dad, respondent, who is employed by the North Western Railway in the power house at Rawalpindi. The decree was obtained on April 4, 1938, as a result of a compromise, the relevant conditions of which were to the effect that a sum of Rs. 80 was held to be due which was agreed to be paid by five instalments, the first four being of Rs. 15 per mensem and the last of Rs. 20. It was also stipulated that if there was a default in the payment of these instalments the whole sum would be payable at once. Apparently these instalments were not paid and the decree-holder sued out execution of the whole of the decretal amount. An objection was taken that the pay of a railway employee could not be attached if it was below Rs. 100. This objection was allowed and the application for execution was dismissed and consigned to the record room the decree not having been satisfied. Against this order dated December 20, 1938, a revision petition has been filed in this Court and the principal ground urged before me is that the compromise on which the decree was passed constituted a contract between the parties by which the judgment-debtor had waived any legal right to object to the attachment of his pay. Objection to such an attachment could be taken under s. 60, Civil P. C. which would exempt the salary of the judgment-debtor in this case from attachment, but the provisions of this section confer a benefit which a person can contract himself out of. In *Chittar Mal v. Ram Devi* (1), Young, C. J., in delivering the judgment of a Division Bench held that there was nothing in s. 60, Civil P. C. to prevent an agriculturist voluntarily selling or otherwise alienating his house and that if an agriculturist mortgaged his house, he was deemed to have waived the privileges given to him by this section. Applying this principle it appears to me that by entering into a compromise the judgment-

(1) A I R 1935 Lah. 164.

debtor-respondent had contracted himself out of any benefit that s. 60 conferred on him in the matter of the attachment of his salary. In these circumstances I would accept this revision petition but make no order as to costs.

D.

Petition accepted.

NAGPUR HIGH COURT
Criminal Revision No. 295 of 1939
September 12, 1939

NIYOGI, J.

EMPEROR—APPLICANT*versus***(SURETY) KARBALAI HUSSAIN—****NON-APPLICANT**

Criminal Procedure Code (Act V of 1898), ss. 496, 109, 117—Surety bond for proceedings under s. 109—S. 496, if applies to proceedings under s. 109—Form of bond.

Section 496, Criminal P. O., applies to proceedings under s. 109 of the Code. Section 496 does not merely refer to an accused person but generally to "any person other than a person accused of a non-bailable offence who appears or is brought before a Court." 145 Ind. Cas 344 (1), relied on.

In the absence of any special form prescribed by law with reference to the preventive sections of the Criminal P. O., there is nothing to prevent the use of the printed form prescribed for appearance under ss. 496—499, specially when the bond makes it clear what the nature of the proceedings was and in which Court accused was to appear.

Or. Ref. made by the Additional Sessions Judge, Jubbulpore, on July 13, 1939.

Mr. Fida Hussain, for the Non-Applicant (Surety).

Order.—On March 13, 1939, proceedings under s. 109 of the Criminal P. O. were initiated against Premlal Ahir of Dewas before Mr. S. C. Rai, Magistrate, I Class, Jubbulpore, camping at Tripuri. Premlal was produced from custody and the Magistrate, after examining four witnesses, adjourned the case to March 21, 1939, at Jubbulpore. He was not released on bail on that day as he had no surety to offer bail. Premlal produced a surety on March 20, 1939, and obtained an order from the Magistrate for his release on executing a bail bond with a surety for the sum of Rs. 200. On March 21, 1939, which was the date of hearing, Premlal was absent and as it was found that he had absconded, the proceedings against him were withdrawn.

The non-applicant Karbalai Hussain stood surety for Premlal and executed the bail bond on March 20, 1939, in the sum of Rs. 200

giving security for Premlal's attendance in the Court. He was therefore called upon to show cause why the whole amount of Rs. 200 should not be recovered from him and he was ordered to pay Rs. 200 as the bond had been forfeited. His appeal in the Court of the District Magistrate, Jubbulpore, proved unsuccessful. On an application made by Karbalai Hussain for the revision of the District Magistrate's order, the Additional Sessions Judge, Jubbulpore, has reported this case under s. 438, Criminal P. O., with a recommendation that as the bail bond was not according to law, the order of forfeiture of the bond should be quashed.

The learned Additional Sessions Judge appears to be of the opinion that s. 496 does not apply to proceedings under s. 109, Criminal P. O. In view of the plain terms of that section. I cannot agree with his opinion. Section 496 does not merely refer to an accused person but generally to "any person other than a person accused of a non-bailable offence who appears or is brought before a Court." The proviso to that section makes it clear that the substantive part of the section applies to s. 117, sub-s. 3. Section 117 has to be read with s. 112 which in turn refers to ss. 107, 108, 109 and 110. The order contemplated by s. 112 is a preliminary order which is followed by an enquiry under s. 117. That section directs that when the order under s. 112 requires security for good behaviour, the procedure prescribed for conducting trials in the warrant case should be followed save that no charge need be framed. Pending the completion of the enquiry the Magistrate is invested with power to direct the person concerned to execute a bond forthwith, with or without sureties, for maintaining good behaviour until the completion of the enquiry. The proviso to s. 496 refers to this power of the Magistrate and leaves it unaffected by anything that is said in that section. I feel no doubt at all that s. 496 authorises the Magistrate conducting an enquiry under s. 117, Criminal P. O., to release the person concerned in the enquiry on bail with or without surety to ensure his attendance in Court. I am fortified in this view by a case reported in *U Gandama v. Emperor* (1).

It is urged here that the bond which the non-applicant was called upon to execute was inappropriate for the proceedings under

(1) A I R 1933 Rang. 164; 145 Ind. Cas. 344; (1933) Cr. Cas. 763; 6 R. Rang. 41; 34 Cr. L J 950 (2).

s. 109, Criminal P. O. It is true that the form which was used was the prescribed printed form of bail bond for appearance before a Magistrate, under ss. 496 and 499, and the wording of it indicates that it is to be used in the committal proceedings, but, in the absence of any special form prescribed by law with reference to the preventive sections of the Criminal P. O. there is nothing to suppose that the use of the prescribed printed form would be illegal and therefore invalid. The bond in the present case makes clear what the nature of the proceedings was and in which Court Premlal was to appear. The non-applicant cannot be heard to say that he was in any way misled by the terms of the bond which he had executed. Having signed the form he must be presumed to know that he had given security for the attendance of Premlal in the Court of Mr. S. C. Raj, Magistrate, 1st Class, Jubbulpore, in the proceedings under s. 109, Criminal P. O.

For the foregoing reasons I do not see my way to accept the reference. I affirm the District Magistrate's order.

D.

Revision dismissed.

CALCUTTA HIGH COURT

Government Appeal No. 6 and Criminal
Revision No. 599 of 1939

August 14, 1939

McNAIR AND KHUNDKAR, JJ.
SUPERINTENDENT AND REMEM-
BRANCER OF LEGAL AFFAIRS,
BENGAL—APPELLANT

versus

L. N. BIRLA AND ANOTHER—ACCUSED—
RESPONDENTS

Factories Act (XXV of 1934), s. 71—Procedure contemplated by s. 71 (1)—Admission of offence by alleged actual offender—Whether proof that manager or occupier used due diligence or that the offence was committed without his connivance—S. 71 (2), scope of—Exception to general rule that person primarily responsible is manager or occupier.

The complaint is made in the first instance by the Inspector of Factories against the manager or occupier under s. 60, Factories Act. The manager or occupier is then entitled under s. 71 to complain against the actual offender and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against; for, the section contemplates both sets of complainants and accused being before the Court at the same time. The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offence has been committed. Both parties complained against are concerned with the finding on this issue and both are entitled to cross-examine the prosecution witnesses at this stage, and to lead evi-

dence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves. If the prosecution fails to prove the offence, both the accused must be acquitted. If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under s. 60 of the Act. Section 71, however, affords the manager or occupier an opportunity of escaping liability provided he can give satisfactory proof of the facts required by s. 71 (1) (a) and (b). The onus of proof, however, is now shifted to the manager or occupier and he is entitled to call evidence or to give evidence himself. The actual offender, who is, the ultimate accused, would be entitled to call evidence, but not to give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the occupier or manager at this stage, besides being an accused, has to discharge the onus of positive proof required by s. 71 (1) (a) and (b), and in all probability he alone is capable of proving certain facts of which proof is thereby required. The Crown, which has initiated the proceedings, and has throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence. 117 Ind. Cas. 673 (1), referred to. [p. 322, cols. 1 & 2.]

The Magistrate cannot convict the alleged actual offender or discharge the manager or occupier until the proof envisaged by s. 71 (1) (a) and (b) is before him. It is true that s. 342 (3), Criminal P. O., permits the Court to take into consideration the answers given by the accused. But an admission of the offence by one of the accused is no proof that the other accused had used due diligence to prevent the offence, or that the offence was committed without his connivance. [p. 321, col. 1.]

Section 71 (2), is by way of exception to the general rule that the person primarily responsible is the manager or occupier. The whole scheme of the Factories Act is to bring pressure on the controlling authority to see that the provisions which the Legislature has made for the safety and welfare of employees are carried out. [p. 322, col. 1.]

Sir A. K. Roy, Advocate-General and Mr. Anil Ch Roy Choudhury, for the Crown.

Messrs. N. K. Basu, S. K. Basu and Ajit Kumar Basu, for L. N. Birla.

Mr. Sudhansu S. Mukherjee, for B. K. Rana.

McNair, J. — The Local Govt. has appealed against the discharge of L. N. Birla in a case under ss. 60 (a) (iii), 32 (a) and 24 (1) (c), Factories Act, 1934, and r. 46, of the Bengal Factories Rules, 1935. In the connected proceeding, Revision No. 599 of 1939, a Rule has been issued at the instance of the Local Govt. calling upon B. K. Rana to show cause why the order of conviction and sentence passed upon him under the same sections of the Factories Act and the Factories Rules should not be set aside and such

further or other order be made as to this Court may seem fit and proper. These cases are two out of six cases instituted by the Local Govt. against L. N. Birla for various alleged contraventions of the Factories Act and the rules made thereunder. The Keshoram Cotton Mills, Ltd., is the occupier of the factory and L. N. Birla is admittedly one of the directors of that company. Proceedings have been instituted against Birla as the person responsible for the alleged offences, and Birla has in each case before us complained against Rana as the "actual offender" and has claimed discharge from liability under the provisions of s. 71 of the Act. The Local Govt. contend that the procedure adopted by the trying Magistrate was irregular and that the conviction of Rana and the acquittal of Birla was in each case without jurisdiction and illegal. We have called for the records in all the connected cases and we are satisfied that the learned Magistrate adopted the same procedure at each trial.

The proceedings arose out of an inspection by Mr. R. O. Parsons, Inspector of Factories, Bengal, of the Keshoram Cotton Mills on August 1 and 3, 1938, when he found that various provisions of the Factories Act had been contravened. In the appeal before us the contravention related to inadequate fencing of the mill machinery. Under s. 60 of the Act, the "manager and occupier shall each be punishable for such contravention." Mr. Wright, who was the manager at the time of the inspection, had already left. Section 70 (2) of the Act provides that

"where the occupier of a factory is a company, any one of the directors thereof... may be prosecuted and punished... for any offence for which the occupier of the factory is punishable"

The company had not given notice as permitted by the proviso to s. 70 (2) nominating a director to be "the occupier," and Birla was therefore *prima facie* punishable as one of the directors. Section 71 (1), Factories Act, provides:

"Where the occupier or manager of a factory is charged with an offence against this Act, he shall be entitled upon complaint duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory proves to the satisfaction of the Court—

(a) that he has used due diligence to enforce the execution of this Act, and

(b) that the said other person committed the offence in question without his knowledge, consent or connivance

that other person shall be convicted of the offence and shall be liable to the like fine as if he were the occupier or manager, and the occupier or manager shall be discharged from any liability under this Act."

The Inspector's complaint was received on October 10, 1938. On November 19, Birla availed himself of the provisions of s. 71 (1), Factories Act, and complained against Rana praying that he might be brought before the Court at the hearing of Birla's case. Notice was issued to Rana on some date between November 22 and 27. On February 20, 1939, the Magistrate heard law points. Rana was absent and the defence undertook to produce him. After various adjournments the case again came on for trial on March 28, when Birla was represented under the provisions of s. 205, Criminal P. O., by his *mukhtar*, Nani Lal Ghosh, who was examined under s. 242 and pleaded not guilty. Inspector Parsons then gave evidence of the commission of the offence and was cross-examined on behalf of Birla. Rana was offered an opportunity to cross-examine the witness but refused. The learned Magistrate then further examined Nani Lal Ghosh under s. 342, Criminal P. O. when he stated:

"I am innocent. Rana was in charge, it is he who committed the offence; I had no knowledge about the matter or gave consent in the matter."

The learned Magistrate held that the offence had been committed. He then started a fresh order-sheet and proceeded with the trial of Rana on the complaint of Birla. Rana on being examined under s. 242, Criminal P. O., pleaded guilty. The learned Advocate for the Crown at that stage contended that in view of the provisions of ss. 60 and 71 (1), Factories Act, Rana could not be convicted nor Birla discharged until Birla had proved the matters set out in cls. (a) and (b) of s. 71 (1), *viz.*, that he had used due diligence to enforce the execution of the Act, and that Rana had committed the offence without his knowledge, consent or connivance. The Magistrate overruled this plea and refused to allow the learned Advocate for the Crown to adduce evidence that no due diligence had been exercised by the occupier of the factory in connection with these offences.

The learned Advocate for Birla contends that the latter plea does not appear on the record and that although the petition contains a statement to that effect, the petition is not verified by an affidavit. We find from the connected records that the Crown has in some instances put in a petition praying for leave to adduce evi-

dence and we see no reason for disbelieving the statement in the petition that the learned Magistrate said that he would note the plea of the Crown and that it was unnecessary to put in a petition in each case. Rana was convicted on his plea of guilty and fined Rs. 50 and Birla was discharged. The contention on behalf of the Crown is that Birla is the "occupier", and as such, primarily liable if an offence has been committed, and that he can only avoid punishment by proving due diligence and lack of knowledge, &c. as provided by s. 71 (1) (a) and (b), Factories Act. Until he has given such proof to the satisfaction of the Court, he cannot be discharged. In the present instance Birla has not given evidence himself and he has not called evidence on which the learned Magistrate could come to a finding that Birla had proved to his satisfaction the facts required by s. 71 (1) (a) and (b). The words of s. 71, Factories Act, 1934, are identical with the words of s. 42, Factories Act, 1911, and it was held in *Government of Bengal v. J. A. Murray* (1) where the procedure under s. 42 of the former Act was explained, that, it was incumbent on the manager or occupier to give evidence himself in order to discharge the onus which is upon him when he avails himself of the provisions of the Act which alone grant him exemption from liability. In *Government of Bengal v. J. A. Murray* (1) the manager Murray gave evidence on oath and was acquitted on his own sworn testimony. The Crown appealed on the ground amongst others, that Murray as an accused could not give evidence. This Court held that the procedure adopted by the Magistrate was not irregular and on this point stated as follows:

"The structure of the portion of the section quoted above (i. e., s. 41 (1) of the Act of 1911) indicates that one proceeding is split up into two proceedings and that while the manager or occupier is accused of having committed an offence under the Act, he is also a complainant on his complaint against the other person or persons he has brought in. In the proceeding in which the manager or the occupier is the complainant, he is liable to be cross-examined by the other person or persons who has or have been brought before the Court on his complaint. This, of course, must mean that the manager or occupier *qua* complainant must give evidence himself. The procedure indicated above is a special one prescribed by the Act and it would appear from an examination of the record in this case that the Magistrate has in no way departed from that procedure. In our opinion, there is no substance in the objection that the manager or

occupier who initially is charged with an offence against the Act cannot go into the witness-box and give evidence himself. In the circumstances contemplated in the latter part of the section quoted above, he goes into the witness-box not as an accused in the case originally started against him but in his own right as a complainant on his complaint against the other person or persons whom he has brought in."

As stated by the learned Judge in the judgment quoted—"The procedure is a special one provided by the Act."

The offence is a statutory offence and the Legislature has laid down the procedure to be adopted in ascertaining whether the offence has or has not been committed and the person or persons responsible. The learned Advocate-General has drawn our attention to the words of s. 141, English Factory and Workshop Act, 1901, which, except for a provision as to costs, is almost identical with the words of ss. 71 of the Indian Act. Undoubtedly, the draftsman of the Indian Act took the English section as his model, but apparently he was unmindful at the time of the very considerable difference in the criminal procedure of the two countries, which in England, permits the accused to give evidence on oath. Be that as it may, the procedure to be adopted in the trial of cases under the Factories Act has been laid down by that Act and a Bench of this Court has held that according to that procedure the manager or occupier is not only a competent witness but "*qua* complainant he must give evidence himself." It is difficult to conceive how otherwise he could satisfy the Court that the "other person committed the offence without his knowledge, consent or connivance." It is certainly not proved by the statements of Nani Lal Ghosh under ss. 242 or 342, Criminal P. O. It is true that s. 342 (3) permits the Court to take into consideration the answers given by the accused. That is is very different to saying that an admission of the offence by one of the accused is proof that the other accused had used due diligence to prevent the offence, or that the offence was committed without his connivance. For the defence, reference has been made to a number of cases to support the contention that the statement by Nani Lal Ghosh may be taken for all purposes as the statement of Birla. Admitting that to be so, the authorities do not assist us in the present inquiry, for they do not contemplate a provision such as that contained in s. 71 (1) requiring the "occupier" to adduce proof. In the case before us the Magistrate had no power to

(1) 56 C 400; 117 Ind. Cas. 673; A I R 1928 Cal. 557; 30 Or. L J 818; 32 O W N 923; Ind. Rul. (1929) Cal. 561.

convict Rana or discharge Birla until the proof envisaged by ss. 71 (1) (a) and (b) was before him. No such proof was given and no findings on those matters are recorded.

Mr. N. K. Basu for Birla complains that there should be an appeal by the Crown from the acquittal of his client when the actual offender has been convicted and he argues that the general policy of the law is to proceed against the person actually responsible for the offence. In support of this argument he refers to s. 72 (2), Factories Act, which empowers the Inspector to proceed against the actual offender without first proceeding against the occupier or manager. But s. 71 (2) is by way of exception to the general rule that the person primarily responsible is the manager or occupier. The whole scheme of the Factories Act appears to be to bring pressure on the controlling authority to see that the provisions which the Legislature has made for the safety and welfare of employees are carried out. Section 9 provides for the nomination of a "manager," s. 2 (1) defines "occupier," s. 70 provides for the determination of the occupier in the case of a firm or company, s. 60 provides that if there is any contravention of the Act, the manager and occupier shall each be punished. Clearly, the primary responsibility is laid upon the person in ultimate control and he can only avoid liability by giving the proof required by s. 71; and that section requires proof not only of the actual offender but proof that the controlling authority has not shirked his responsibility. Then and not till then can he be discharged. This Court has already pointed out in *Government of Bengal v. J. A. Murray* (1) that the offence is an offence created by the statute and that the statute also provides the procedure for determining the offender. That procedure is in many ways different to the procedure contemplated by the Criminal Procedure Code and no doubt that is the reason why the lower Court has failed to appreciate the interpretation of the statute which has already been given in the case to which I have referred. It appears, therefore, desirable once again to set forth the procedure which in our view is contemplated by the Legislature in s. 71 (1), Factories Act, 1934.

The complaint is made in the first instance by the Inspector of Factories against the manager or occupier under s. 60, Factories Act. The manager or occupier is then entitled under s. 71 to complain against the actual offender and if he does so, the

actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against; for, as stated in *Government of Bengal v. J. A. Murray* (1) at p. 405* "the section contemplates both sets of complainants and accused being before the Court at the same time." The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offence has been committed. Both parties complained against are concerned with the finding on this issue and both are entitled to cross-examine the prosecution witnesses at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves. If the prosecution fails to prove the offence both the accused must be acquitted. If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under s. 60 of the Act. Section 71, however, affords the manager or occupier an opportunity of escaping liability provided he can give satisfactory proof of the facts required by s. 71 (1) (a) and (b). The onus of proof, however, is now shifted to the manager or occupier and he is entitled to call evidence or to give evidence himself. The actual offender, who is, if I may so name him, the ultimate accused, would be entitled to call evidence, but not to give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the occupier or manager at this stage, besides being an accused, has to discharge the onus being an accused, has to discharge the onus of positive proof required by s. 71 (1) (a) and (b), and in all probability he alone is capable of proving certain facts of which proof is thereby required.

In our view the Crown, which has initiated the proceedings, and has throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence. The relevant section of the English Act on which the Indian section is based has placed the matter beyond all doubt by the insertion of the following proviso in the English Factories Act, 1937.

"The prosecution shall have the right in any such case to cross-examine the occupier or owner if he gives evidence and any witnesses called by him in support of his charge, and to call rebutting evidence."

It is true that no such proviso appears in the Indian Act but it appears to us to be beyond doubt that such would be the rights of the prosecution in India as well as in England in the procedure contemplated by both the English and the Indian Acts. In the result the appeal of the Legal Remembrancer is allowed, and the Rule in Revision No. 599 of 1939 is made absolute. The conviction of Rana and the discharge of Birla are both set aside. The learned Advocate for Birla has stated that his client pleads guilty and prays that this Court will now deal with the case. The Crown has no objection. We find Birla guilty. He is convicted of the offence and fined Rs. 100 or in default, simple imprisonment for one month. Rana is acquitted and the fine, if paid by him, must be refunded.

Khundkar, J.—I agree.

D. Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT

Reference No. 34 of 1937

May 30, 1939

DAVIS, J. C. AND TYABJI, J.
COMMISSIONER OF INCOME-TAX,
BOMBAY PRESIDENCY, SIND AND
BALUCHISTAN—APPLICANT

versus

KARACHI CHAMBER OF COMMERCE

—ASSEESSEE—OPPONENT

Income Tax Act (XI of 1922), ss. 2 (4), 10—Karachi Chamber of Commerce realising measurement fees from its members—Such realisation whether taxable as profits.

Where the members of the Karachi Chamber of Commerce provide for themselves certain facilities in trade and pay for these facilities such as a measurer of merchandise, they combine as a Chamber and provide these facilities for themselves as members of that Chamber and when they pay more than is actually necessary for the provision of these services, then the surplus, whether it is handed back or not, is not a profit on trade within the meaning of ss. 2 (4) and 10, Income Tax Act. It is not a profit but it is savings and not taxable income, though interest in these savings would be income liable to taxation. The fact that the public measurer serves also the public or that the members are incorporated as a Chamber under s. 20, Companies Act, does not destroy the mutuality between the Association and its members. *Oarissle and Silloth Golf Club v. Smith* (6), relied on, *Liverpool Corn Trade Association, Ltd. v. Monks* (1), distinguished. [p. 314, col. 2]

Before there can be mutuality between an Association and its members, the services must be supplied by the Association to its members as such, services for which the members themselves pay from which payments any surplus is saving and not profits or gains. The nature of the services is not the

test. The test is not the purpose of the Association but its nature. If the Association is of the nature of a club and its services are solely for the benefit of its members or, if not solely for the benefit of its members, the services for its members and the costs thereof are clearly separable from its services to non-members and the costs thereof, then there is no profit but merely a surplus or saving; if no, then there is a taxable profit or gain. There is in principle no difference between a club which provides a marker for tennis on payment by the individual club members and a Chamber of Commerce which supplies a measurer of merchandise on payment by its members. Both are employees of the Association provided at the cost of and for the benefit of its members, and if there is a surplus or saving on the year's working, it is not taxable profit or gain. It may be handed back; it may be kept for some future contingency; the test is whether it is the members' money. [p. 325, col. 1.]

Ref. made by the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, dated April 3, 1937.

Mr. Partabrai D. Punwani, Advocate-General, for the Applicant.

Mr. D. N. O'Sullivan, for the Opponent.

Davis, J. C.—The learned Commissioner of Income-tax for Bombay and Sind has stated a case under s. 66 (2), Income Tax Act, and has referred to us the question arising in the following terms:

"Are the measurement fees and/or charges realized by the Karachi Chamber of Commerce from its members taxable income in view of the constitution of the said Chamber and/or its Memorandum and Articles of Association?"

The opinion of the learned Commissioner is that such fees are taxable because they are the profits of a business or trade within the meaning of ss. 2 (4) and 10, Income Tax Act, and that the assessee has admitted this by admitting as subject to taxation the fees collected from outsiders; and there is in the opinion of the Commissioner nothing to distinguish these fees from the fees collected from members of the Chamber for whom the Chamber performs the same service of measuring and granting measurement, certificates on merchandise to be shipped from the Port of Karachi. The learned Commissioner relies as an authority principally on the case in *Liverpool Corn Trade Association, Ltd. v. Monks* (1) distinguishing the well-known case in *New York Life Insurance Co. v. Styles* (2) as being a case merely of payments into and drawings from a common fund and *National Association of Local Government Officers v. Watkins* (3) at p. 503, as being a case of an

(1) (1926) 2 K B 110; 95 L J K B 519; 131 L T 736; 10 Tax Cas. 442; 42 T L R 393.

(2) (1889) 14 A C 381; 2 Tax Cas. 460; 59 L J Q B 291.

(3) (1931) 18 Tax Cas. 499 at p. 503.

members for which facilities the members pay themselves; and it matters not that payments are not made in lump sums at one time, but in proportion to the services rendered from time to time. The case of the Liverpool Corn Trade Association is distinguished from this case by the fact that in this case there are no shares and no share-holders and no dividends and reliance is placed particularly upon the case in *Carlisle and Silloth Golf Club v. Smith* (6) and *National Association of Local Government Officers v. Watkins* (3) at p. 503*; it is further urged that it makes no difference that the Chamber is incorporated under s. 26, Companies Act, and that in the two cases last named, the Associations were unincorporated because even between a legal entity and its constituent members there may be complete mutuality; and that where, as in this case, the fees for the performances rendered by members and non-members can be easily separable, the complete mutuality which exists between the Chamber and its members is not destroyed. In these class of cases the word "mutual" is a word to conjure with. In *Municipal Mutual Insurance, Ltd. v. Hills* (5) Rowlatt, J. said:

"Now I do not think that one can make cases on this point turn upon an analysis of the word 'mutual,' a word that is very much abused ... But for the purposes of these decisions, the point is as I have pointed out before, and I think the Solicitor-General adopted what I said, whether there is any profit, that is to say, whether you get more than this, that a

(4) (1885) 2 Tax Cas. 100; 55 L J Q B 92; 53 L T 634; 34 W R 233; 50 J P 116; 10 A C 438.

(5) (1932) 16 Tax Cas. 430; 147 L T 62; 48 T L R 301; 42 Ll. L Rep. 173.

(6) (1912) 2 K B 177; 81 L J K B 581.

*Page of (1934) 18 Tax. Cas.—[Ed.]

carrying its share-holders, or if any other trading company by trading with its share-holders even if it is limited to trading with them, makes a profit, that profit belongs to the share-holders in a sense, but it belongs to them *qua* share-holders. It does not come back to them as purchasers or customers; it comes back to them as share-holders upon their shares. Where all that a company does is to collect, money from a certain number of people, it matters not whether they are called members of the company or participating policy-holders, and apply it for the benefit of those same people, not as share-holders in the company but as the people who subscribed it, then, as I understand *Style's case* (2) there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference; there is still no profit. This is not because the entity of the company is to be disregarded; it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of share-holders, but in the character of those who have paid it. That as I understand, is the effect of the decision in *Style's case* (2)."

If, therefore, the members of the Karachi Chamber of Commerce provide for themselves certain facilities in trade and pay for these facilities, then it matters not that they are incorporated under s. 26, Companies Act. If they combine as a Chamber and provide these facilities for themselves as members of that Chamber and they pay more than is actually necessary for the provision of these services, then the surplus, whether it is handed back or not, does not appear to me to be a profit on trade within the meaning of ss. 2 (4) and 10, Income Tax Act. It is not a profit but it is savings; interest on these savings would indeed be income liable to taxation, and this is not

(7) (1927) 1 K B 33; 95 L J K B 990; 135 L T 673; 42 T L R 703; 11 Tax Cas. 790.

*Page of (1927) 1 K. B.—[Ed.]

denied, but the surplus or what is saved is the Chamber's own money, the members' own money paid by them to themselves, though incorporated as a Chamber, for service to be rendered to themselves by themselves though incorporated as a Chamber, not as customers of the Chamber but as members of the Chamber itself. There would be no difficulty, I think, in this interpretation of the assessee's case but for the fact that the office of the Public Measurer serves not only members of the Chamber but members of the public as well. Now, does this destroy the mutual basis of the members dealing with the Chamber? The learned Commissioner is of the opinion that this is fatal to the assessee's case; the assessee argues that the Public Measurer is first the Chamber Measurer; it may be that according to s. 26, Companies Act, they should not perform this service to members of the public, but that does not destroy the mutuality of these services as between the Chamber and its members, the value of which in fees can be easily ascertained and separated from the fees paid by outsiders.

My own opinion is that in the particular circumstances of this case, this provision of a service to the public is not fatal to the assessee's case, I do not think any importance is to be attached to the fact that the services rendered by the Chamber to its members relate to business or trade. The nature of the services is not the test. A tennis or a golf club may be owned by a company which may have share-holders and may have dividends, but it nevertheless makes a taxable profit. The test, in my opinion, is not the purpose of the Association but its nature. Is it of the nature of a club? Are its services solely for the benefit of its members or, if not solely for the benefit of its members, are the services for its members and the cost thereof clearly separable from its services to non-members and the costs thereof? If yes, then there is no profit but merely a surplus or saving: if no, then there is a taxable profit or gain. There is in principle no difference between a club which provides a marker for tennis on payment by the individual club members and a Chamber of Commerce which supplies a measurer of merchandise on payment by its members. Both are employees of the Association provided at the cost of and for the benefit of its members, and if there is a surplus or saving on the year's working, it is not taxable profit or gain. It may be handed back; it may be kept for

some future contingency; the test is whether it is the members' money.

In *Thomas v. Evans & Co., Ltd.* (7) there was a reserve fund of £200,000. Turning to the facts of this case, there can be no doubt that the Karachi Chamber of Commerce and its members are one and the same. It is true that under s. 26, Companies Act, the Chamber is an incorporated body, a legal entity, but it is made up of its members. Under Art. 1 of the Articles of Association the 'Chamber' means the Karachi Chamber of Commerce incorporated under s. 26, Companies Act, and 'Member' means a member of the Chamber. Its purpose as set out in its Memorandum of Association is to encourage the trade, commerce and manufactures of India and the interests of persons engaged therein and in particular of Sind. The Association, however, is not a Philanthropic Association but an Association of businessmen; its primary purpose is clearly to advance and protect the business interest of its own members and to provide buildings, organizations and services for that purpose. No bonus or dividend is to be paid and on the dissolution of the Association the property is not then to come back to the members, but it is to go to other institutions with like objects. There is nothing in all this incompatible with the assessee's case that here is a Chamber or Association, or even it may be called a club of businessmen associated together, for the purpose of furthering and protecting their own interest. Hence, presumably, the Commissioner's exemption of subscriptions amounting to over Rs. 13,000 from taxation, but these the Commissioner finds are from members only.

The bulk of the income of the Chamber, however, a sum of Rs. 40,573, comes from Measurement Fees which the Commissioner finds as to 29 per cent. and which fact is admitted by the assessee, comes from outsiders and therefore is, in his opinion, as to the whole liable to taxation. It is perhaps unfortunate that the Chamber have given their office of measurer the title of Public Measurer. Under bye-law No. 13 a Public Measurer is to be appointed under the authority of the Chamber to measure all merchandise, freight on which is ordinarily payable on measurement. Such measurement shall be taken

"II. No measurements shall be good except such as are taken by a Chamber Measurer, and with instruments bearing the stamp of the Chamber of Commerce.

* * * * *

VIII. Certificates of measurement shall be issued

to shipper and-or to ship agents in such form and in such manner as the Committee for the time being shall, from time to time, approve.

IX. A fee, the amount of which shall in no case exceed one anna per bale, case or package, but which may be regulated by the Chamber from time to time, shall be levied on all merchandise measured by the Public Measurer.

X. No merchandise shall be measured without the production of the Custom House Pass or a requisition in writing by the Exporter which must detail name of shippers, name of vessel, number and marks of bales, case or packages, and destination and bearing the endorsement of the Measurement Fee Clerk to the effect that the fee has been paid. Members of the Chamber shall be permitted to run a monthly account provided they give an undertaking in writing to pay such monthly accounts on presentation."

XIV. The Measurer shall give a certificate of measurement and furnish the Shipper with a copy thereof. The certificate shall state: Name of shipper, name of vessel, number and marks of bales, cases or packages, destination, dimensions, date, time and place of measurement.

XVI. In cases of import cargo for which measurement is required, it shall be incumbent upon the party requiring such measurement to advise the Public Measurer when the cargo is ready for measurement, to send a representative, with transport for the Measurer and the callipers, to the Public Measurer's office, and actually to conduct the Measurer to the place where the cargo awaiting measurement lies."

XVIII. The salaries of the Measurers and all other expenses connected with this scheme of measurement shall be paid by the Chamber from the Fee Fund raised under these rules.

XIX. All matters pertaining to measurements, as defined above including the appointment of the Measurer, the fixing of fees, the payment of the same, and the doing of all things necessary for a proper and economical working of the scheme, shall be placed in the charge of the Committee of the Chamber."

Under bye-law No. 14—Rules for the weighment of bag cargo and drawing samples:

"1. The Chamber Measurer, if required, shall weigh bag cargo and other goods and issue certificates of such weights, all labour and other expenses in connection with such weighment to be borne by the applicant. The charge for weighing 2 per cent. of bags to be Rs. 30 for each thousand tons or part thereof and such samples shall be sealed with the Chamber seal."

Now, the learned Commissioner relies by analogy on the case of a railway whose profits are nonetheless profits and taxable as such because they come in part from share-holders, and, indeed, if it were clear that the members of the Chamber had recourse to the Public Measurer on precisely the same footing as members of the public, I should find that the Chamber were giving to their members services similar to those supplied by a railway company to its ticket-holders who are also share-holders, for it appears to me that before there can be mutuality between an association and

its members, the services must be supplied by the Association to its members as such services for which the members themselves pay, from which payments any surplus is saving and not profits or gains. But looking to the realities of the case before us, it appears to me impossible to hold that members of the Chamber do not have recourse to the Public Measurer, despite his name, as members of the Association, having recourse to an officer of the Association for whom they themselves pay. If members, instead of paying for each act of measurement paid an extra subscription, of say, Rs. 100 each, irrespective of the services rendered to each particular member, it appears to me it would be difficult to say that their subscriptions were not exempt from taxation. It matters little, I think, that such payments are not made in a lump sum in advance and are proportionate to the services rendered. If the Chamber had kept two measurers, one for its members supported by the members' subscriptions, and one for the public, it would not have been difficult to show that the members' subscriptions which paid for the Members' Measurer as distinct from the Public Measurer, were exempt from taxation; it makes in practice, I think, no difference if the payments for the service of the measurers rendered to members and to non-members can be separated in the accounts. Though in r. 1 of bye-law No. 13 the somewhat grandiloquent title of "Public Measurer" is used, in r. 2 the more homely and private title of Chamber Measurer is used. Primarily, I think the Measurer is a Chamber Measurer but for the Chamber and its members there would be no Measurer. The great bulk of the work done is done for the members, and I can see in essence no difference between this case and the case in *Carlisle and Silloth Golf Club v. Evans Co., Ltd.* (6). I think, therefore, the answer to the question referred to us should be in the negative. The assessee is entitled to his costs including the fee of Rs. 100.

Tyabji, J.—I concur.

D. Answer in negative.

MADRAS HIGH COURT

Appeal No. 289 of 1934

March 22, 1938

VARADACHARIAR AND PANDRANG ROW, JJ.

A. SUBRAMANIA IYER—APPELLANT

versus

K. S. VENKATARAMA IYER AND OTHERS—

RESPONDENTS

Madras Estates Land Act (I of 1908), ss. 170, 171

172, 174, 178, 30, 38, 40—Board of Revenue—Powers of revision—S. 172, scope of—Whether gives power to Board to set right proceedings before Revenue Officer, before procedure under s. 170 has been gone through—Whether gives powers of revision *suo motu*—Steps contemplated by ss. 30, 38 and 40, if can be taken in course of settlement proceedings.

Section 172 of the Madras Estates Land Act, cannot be interpreted as giving powers of revision to the Board only after the re-publication under s. 170, cl. 3, had been made. All that s. 172 does is to fix the outer limit of time within which the powers of revision may be exercised. This does not necessarily imply that the Board has no power of interference before the re-publication. Its powers as an appellate authority under s. 171 can certainly be invoked and exercised independently of the question of confirmation by the Collector or re-publication under s. 170, cl. 3; under the provisions of s. 174 the orders passed under s. 171 are directed to be incorporated in the settlement record already published under s. 170 (3). Section 172 gives the Board powers of revision both *suo motu* and on the application of parties. Where the Board is satisfied that the proceedings before the Revenue Officer require to be set right, it need not wait till after the procedure under s. 170 has been gone through and can interfere at an earlier stage and give necessary directions. There is no warrant for saying that the Board has no jurisdiction to exercise its revisional powers till after the settlement record has been re-published after confirmation by the Collector. Section 172 only contemplates the Board directing a revision by the subordinate authority and not the fixing of rent by the Revenue Board itself. If, on the facts of any particular case, what the Board does in addition to what is contemplated by s. 172 amounts to little more than a mere arithmetical calculation or something of that kind, there is nothing in the nature of excess of jurisdiction in the exercise of such powers. Where, on the other hand, the Board proceeds to do something which is really more than a ministerial or arithmetical step and which if it had been directed to be done by the Revenue Officer would have involved a consideration of a number of matters which are not and cannot be before the Board at the time of passing the order, so much of the Board's order as goes beyond what is contemplated by s. 172 is done without jurisdiction. [p. 329, col. 2.]

By the order the Board of Revenue fixed the landlord's share at eighty-seven *kalams* per *veli* instead of sixty-five *kalams* fixed by the Collector and directed conversion into cash at certain average price per *kalam* subject to a deduction of fifteen per cent. on account of the distance of the village from the nearest town market. The Sub-Collector was asked to work out money rents on the above basis:

Held, that what the Board did in the matter of fixing cash rent was not within the powers conferred upon it by s. 172. If it had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a re-settlement on that basis and not merely given him a direction to carry out a simple process of conversion of paddy rent into money rent at a price fixed by the Board itself. 164 Ind. Cas. 398 (1), *Sappani Asari v. Collector of Coimbatore* (2) and 98 Ind. Cas. 334 (3), referred to.

There is nothing in the scheme of Chap. XI, Madras Estates Land Act to restrict the authorities settling the rent to the system of payment theretofore in vogue. The provision in s. 178 against the

commencement or continuation of proceedings under ss. 30, 38 and 40 of the Act during the pendency of settlement proceedings clearly implies the possibility that what could be done under these three sections might be done as part of the settlement proceedings. 178 Ind. Cas. 416 (4), relied on. [p. 329, col. 1.]

A. against the decree of the Sub-Judge Kumbakonam, in O. S. No. 1 of 1933.

Messrs. K. S. Krishnaswami Ayyangar and S. Ramachandra Ayyar, for the Appellant.

Mr. T. R. Venkatarama Sastri for Mr. M. S. Venkatarama Ayyar, for the Respondents.

Varadachariar, J.—This appeal arises out of a suit instituted by the tenants of an *inam* village in the Tanjore District, for a declaration that the entry in the Record of Rights, published in the village on June 22, 1932, with reference to the rent payable by the *ryots* in respect of their holdings cannot be enforced. This publication was made in pursuance of a notice issued by the Sub-Collector of Kumbakonam on June 10, 1932 (Ex. F) and that notice was given in pursuance of an order of the Board of Revenue (Ex. D), dated May 6, 1932. It is this order of the Board of Revenue that is really challenged in the plaint. The order was passed by the Board in the course of proceedings taken under Chap. XI, Madras Estates Land Act, on an application made by the *ryots* for the preparation of a Record of Rights and for the settlement of rents in the village. The action is not one under s. 173 of the Act and it is not based on any of the grounds specified in cl. 3 of that section. As pointed out in *Zamindar of Khalikote v. Beero Pollai* (1) at p. 848 the suit is one under the general law and is based on the ground that in passing the order, Ex. D, the Revenue Board acted without jurisdiction and that in settling the rents and proclaiming the same in pursuance of that order, the Sub-Collector was not acting as the Revenue Officer exercising his powers under the Act, but merely as the mouth-piece of the Revenue Board: cf. *Sappani Asari v. Collector of Coimbatore* (2) and *Mahabunnessa Bibi v. Secretary of State* (3).

The learned Subordinate Judge made a declaration to the effect that the order of the Sub-Collector, dated June 10, 1932,

(1) 59 M 825 at p. 848; 164 Ind. Cas. 398; A I R 1938 Mad. 531; 71 M L J 118; 44 L W 37; (1936) M W N 705; 9 R M 113 (F B).

(2) 26 M 742; 12 M L J 417.

(3) 53 Q 561; 98 Ind. Cas. 334; A I R 1926 Cal. 1064.

directing the publication of the Record of Rights incorporating the settlement of rent made by the Board of Revenue in its order, dated May 6, 1932, is *ultra vires* and made without jurisdiction. It is against this decree that one of the landholders has preferred this appeal making the *ryots* and the other landholders respondents. Objection has been taken to the form of the decree as not corresponding to the prayer in the plaint; but it is much more satisfactory to deal with the real points in controversy between the parties and the objection to the form of the decree is not of much significance. To bring out the grounds on which the validity of the Revenue Board's order has been attacked, it is necessary very briefly to narrate the history of the settlement proceedings. The Sub-Collector of Kumbakonam (who acted as the "Revenue Officer" in this case) passed an order on June 28, 1930, in the following terms:

"Fifty *kalam*s of paddy for one *veli* of wet land seem to be fair and equitable rent for the village... I therefore declare that a rent of fifty *kalam*s for one *veli* of wet land may be fixed."

According to the pre-existing rights of the parties, based on the *pattas* then in force, the landholders claimed that they were entitled to rent at a much higher rate. They accordingly preferred objections to this order of the Revenue Officer under s. 169; and when dealing with the objections, the then Sub-Collector fixed sixty-five *kalam*s per *veli* of wet land as a fair and equitable rent. This rent was fixed as payable not merely when a single crop was grown but also for both crops together when two crops were grown. The matter went up before the Collector of Tanjore as the "confirming authority." He agreed with the Revenue Officer so far as the fixing of sixty-five *kalam*s per *veli* was concerned, but he added that the *ryot* will be liable to pay additional rent for *thaladi* or second crop cultivation. In para. 11 of his order, he directed the Sub-Collector to complete the rent roll and revise it in accordance with the Sub-Collector's conclusions and the observations contained in the order of the Collector and to submit it for final confirmation. This order of the Collector was passed on August 17, 1931.

It appears from the pleadings that some appeals had been preferred to the Board of Revenue against the Revenue Officer's order but in all probability the appeals were preferred too late. However, there were

also three revision petitions to the Board, two by the landholders in October, 1931, and one by some of the *ryots* in November 1931. When these revision petitions came on before the Board on February 19, 1932, a suggestion was thrown out that the rents might be settled in cash and both parties were asked to show cause at the adjourned hearing why cash rents should not be fixed. The petitions came on finally before Mr. (now Sir Charles) Souter on May 6, 1932. By the order then passed, the Board fixed the landlord's share at eighty-seven *kalam*s per *veli* instead of sixty-five *kalam*s fixed by the Collector, the main reason being that the proportion of sixty and forty in which according to the custom of the village the crop was divisible between the landholder and the *ryot* should be worked with reference to the gross yield and not after allowing a deduction for expenses of cultivation. The order next proceeded to deal with the question whether the rent should not be fixed in cash; and holding that that was the proper thing to do, it directed conversion into cash at the average price of Rs. 2-15-0 per *kalam* (as reported by the Collector) subject to a deduction of fifteen per cent. on account of the distance of the village from the nearest town market. The Sub-Collector was asked to work out money rents on the above basis.

The validity of this order has been challenged in the plaint on several grounds. Three grounds in particular have been pressed before us: (i) that the order is not one passed under s. 172, Estates Land Act, and that if it was intended to be one under s. 172, the Board had no power to interfere in revision at that stage; (ii) that in proceedings under Chap. XI the Board had no power to fix a money rent in respect of a village where only rent in kind had hitherto been in vogue, and (iii) that the Board of Revenue could even under s. 172 only direct a revision and not itself fix the rent. It is unnecessary to refer in detail to the judgment of the lower Court and the views expressed in that judgment on the above points. There has undoubtedly been some uncertainty and conflict of judicial opinion on the interpretation of some of the relevant sections of the Act and the learned Subordinate Judge when he pronounced judgment had not before him the later decision of this Court in *Zemindar of Khalikote v. Beero Pollai* (1).

Out of the three objections above referred to, we may state that we do not see

much force in the first or in the second. It is true that at the time the order of the Board was passed, the Revenue Officer had not completed the settlement in accordance with the directions of the confirming authority nor had the re-publication under cl. 3 of s. 170 been made. But we are not prepared to interpret s. 172 of the Act as giving powers of revision to the Board only after the re-publication under s. 170, cl. 3 had been made. All that s. 172 does is to fix the outer limit of time within which the powers of revision may be exercised, namely "at any time within two years from the date...of re-publication under sub-s. (3) of s. 170".

This does not necessarily imply that the Board has no power of interference before the re-publication. Its powers as an appellate authority under s. 171 can certainly be invoked and exercised independently of the question of confirmation by the Collector or republication under s. 170, cl. 3; under the provisions of s. 174 the orders passed under s. 171 are directed to be incorporated in the settlement record already published under s. 170 (3). Section 172 gives the Board powers of revision both *suo motu* and on the application of parties. We see nothing either in the language of the section or in the reason of the thing to justify the view that even where the Board is satisfied that the proceedings before the Revenue Officer require to be set right, it must wait till after the procedure under s. 170 has been gone through and cannot interfere at an earlier stage and give necessary directions. It may often be convenient and help to save time to give the directions at the proper stage instead of waiting for the formal completion of the settlement records. Whether, in any particular case, the Board will find it more convenient to adopt the one course or the other is a different matter: but it seems to us that there is no warrant for saying that the Board has no jurisdiction to exercise its revisional powers till after the settlement record has been re-published after confirmation by the Collector.

Similarly, it seems to us that there is nothing in the scheme of Chap. XI to restrict the authorities settling the rent to the system of payment theretofore in vogue. Circumstances are conceivable in which the settlement of a fair and equitable rent can be better accomplished by fixing a rent in money. The provision in s. 178 against the commencement or continuation

of proceedings under ss. 30, 38 and 40 of the Act during the pendency of settlement proceedings clearly implies the possibility that what could be done under these three sections might be done as part of the settlement proceedings. Here again it is one thing to say that the Settlement Officer is not bound to carry out the duties imposed upon the Collector under ss. 30, 38 and 40 in independent proceedings, but a different thing to say that the Settlement Officer has no power to do such things even when he thinks it necessary to adopt that course in order to effect a satisfactory settlement of rent. The decision in *Ryots of Garabandha, etc. villages v. Zemindar of Parlakimedi* (4) and r. 22 of the rules framed by the Local Govt. under the Act clearly assume that in the course of the settlement proceedings steps like those contemplated by ss. 30, 38 and 40 of the Act might be taken.

It remains to deal with the third ground of objection, namely that s. 172 only contemplates the Board directing a revision by the subordinate authority and not the fixing of rent by the Revenue Board itself. That this is the appropriate construction of s. 172 was laid down in *Zemindar of Khalikote v. Beero Pollai* (1), following *Zamindarini of Mandasa v. Ryots of Mandasa Zamindari* (5) but it was also laid down in those cases that in certain circumstances a procedure which goes further than merely direct a revision by a subordinate authority might not amount to anything more than an "irregularity". Whether what has happened in any particular case must be regarded as only an irregularity or as something done without jurisdiction or in excess of jurisdiction will depend upon the circumstances of each case. If on the fact of any particular case, what the Board did in addition to what is contemplated by s. 172 amounted to little more than a mere arithmetical calculation or something of that kind, it might well be held that though it was unnecessary there was nothing in the nature of excess of jurisdiction in the exercise of such powers. Where, on the other hand, the Board has proceeded to do something which is really more than a ministerial or arithmetical step and which if it had been directed to be done by the

(4) I L R (1933) Mad. 858; 178 Ind. Cas. 416; A I R 1933 Mad. 381; (1938) 1 M L J 68; 47 L W 181; (1938) M W N 496; 11 R M 451.

(5) 56 M 579; 148 Ind. Cas. 698; A I R 1934 Mad. 231; 65 M L J 423; (1933) M W N 792; 38 L W 353; 6 R M 513.

Revenue Officer would have involved a consideration of a number of matters which were not and could not have been before the Board at the time that it passed such order, it will only be reasonable to hold that so much of the Board's order as goes beyond what is contemplated by s. 172 is done without jurisdiction. Dealing with the order of the Board in the present case in the light of this test, we are of opinion that the Board acted without jurisdiction in so far as it fixed money rents on the basis of a conversion rate of Rs. 2-15-0 per *kalam* subject to a deduction of 15 per cent. for cartage, etc., charges.

It is a matter of some significance in this case that at an early stage in the proceedings when the matter was before the Revenue Divisional Officer, the landlord opposed the proposal to fix the rent in cash : see Ex. G. para. 2 (b). From that stage till the matter came up before the Board of Revenue, no reference whatever was made to this question of cash rent and the whole procedure adopted by the Revenue Officer and by the confirming authority proceeded on the basis that the rent was to be fixed in kind. The data with reference to which settlement of rent in cash could be made were therefore never investigated and collected. It is true that when the matter was before the Board the parties were given an opportunity to show cause why cash rents should not be fixed ; we are informed that at that stage the *ryots* objected to the fixing of cash rents. The matter seems to have been argued only as a point of law and the Board of Revenue, so far as one can judge from the terms of Ex. D, seems to have been of the opinion that a settlement of rent under Chap. XI can be only on a cash basis. We are not sure that Chap. XI can be so restricted ; but we should not have thought fit to interfere with the Board's order merely on the ground of this error if, after deciding that the settlement should be on a cash basis, the Board had sent the case back to the Revenue Officer to settle rents on a cash basis after making the necessary investigation. As we have already observed, this is the procedure contemplated by s. 172. The Board seems to have assumed that a mere conversion of the paddy rate fixed by it into money on the basis of the average price of the last ten years would amount to a settlement of rent on a cash basis. With all respect, we do not think that that is what was contemplated by the Legislature as the settlement of rent in cash. If it had at all been pre-

sent to the mind of the Revenue Officer that the rent payable by the *ryots* should be fixed in cash, he would have investigated a number of matters relevant to that question. Even in proceedings under s. 40, the average of the last ten years excluding famine years is only one of the factors to be taken into account ; and in proceedings for settlement of rent it must *a fortiori* be true that the average price of the preceding ten years is not the only factor to be considered. In these circumstances, we are unable to hold that what the Board did in the present case in the matter of fixing cash rent is within the powers conferred upon it by s. 172. If it had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a resettlement on that basis and not merely given him a direction to carry out a simple process of conversion of paddy rent into money rent at a price fixed by the Board itself. We, however, see no objection to the rest of the Board's order on any ground of jurisdiction.

The result is that this appeal must be allowed in part. In modification of the lower Court's decree the order of the Board and the consequent settlement of rent by the Sub-Collector will be declared *ultra vires* only in so far as they related to the conversion of the paddy rent fixed by the Board into money rent. In the circumstances we direct the parties to bear their respective costs in the appeal.

N.-S.

Appeal partly allowed.

OUDH CHIEF COURT

Application No. 3 of 1937

November 7, 1939

RADHA KRISHNA, J.

THAKUR PRASAD SAKSENA AND

ANOTHER—DEFENDANT—APPLICANTS

versus

FIRM SADIQ HUSAIN-MEHDI HUSAIN—

PLAINTIFFS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. I, r. 8—Suit against unregistered body through one of its members only—Procedure under O. I, r. 8, not followed and decrees passed against that body—Trial held void and illegal.

Where a suit is brought on behalf of or against an association or an unregistered body, then no one member thereof can alone sue or be sued. The suit must be brought by or against all the members thereof. In order that a decree passed in a suit against an unregistered body should be binding, the procedure laid down by O. I, r. 8 of the Civil P. C., must be followed. Order I, r. 8 (1) and (2) lays down the conditions upon

which a representative suit can be entertained and proceeded with and if the procedure laid down by that rule is not followed, then the result of the suit has no binding effect on those who are not on the record. *Baiju Lal Rarbatia v. Bulak Lal Pathak* (1), *Srinivasa Chariar v. Raghava Chariar* (2) and 65 Ind. Cas 259 (3), relied on. [p. 332, col. 1.]

The objection that the procedure under O. I, r. 8, Civil P. O., was not followed, in a suit brought against an association through one of its members only, is not an objection as to non-joinder or misjoinder of parties. The prejudice is obvious in such a case where all the members of an association have been made bound by the decree although they were never either parties to the suit or properly represented by some one else. 136 Ind. Cas. 241 (4) and 125 Ind. Cas. 299 (5), distinguished. [p. 332, col. 2; p. 333, col. 1.]

A suit was brought against All India National Congress which is not a registered body, describing the defendant as All India Congress through one B, Secretary of the exhibition, and a decree was passed against the All India National Congress without carrying into effect the procedure laid down by O. I, r. 8 of the Civil P. O., to secure the representation of all the members thereof :

Held, that the procedure under O. I, r. 8, not having been followed, the defect in such a case was not mere irregularity but went to the root of the case and the trial was wholly void and illegal and the decree passed against the All India National Congress could not be sustained;

Held, also that as B was not impleaded in his personal capacity and no relief against him personally was claimed, it was not open to the Chief Court to convert the decree passed by the Court below against the All India National Congress into a decree against B personally. [p. 334, col. 1.]

App. for revision of the order of the Judge, Small Cause Court, Lucknow, dated October 10, 1936.

Mr. S. N. Roy, for the Applicants.

Messrs. Ghulam Hasan and S. N. Rafi, for the Opposite Party.

Judgment.— This is the defendants' application under s. 25 of the Provincial Small Cause Courts Act against the decree passed against them by Saiyid Shaukat Husain, Judge, Court of Small Causes, Lucknow.

The plaintiff opposite-party is described in the plaint as "Firm Sadiq Husain and Mehdi Husain, through Sadiq Husain, son of Husain Ali, proprietor of the firm, 50, Old Nakkhas, City Lucknow." It has been found by the Court below that the firm is not a proper firm but is only described as such and that Sadiq Husain is the sole proprietor of the business. This finding is no longer in dispute.

The facts are that the plaintiff sued the defendants Nos. 1 and 2 for recovery of a sum of Rs. 982-8-0 as hire for the use of 50 tents and 138 *kanas* alleged to have been taken on hire by them from the plaintiff for the use during the last Congress Session held at Lucknow. The defendant

No. 1 was described in the suit as below :

"All India Congress, through Babu Thakur Prasad Sakseena, Secretary, Swadeshi Exhibition, son of not known, Kaisth, Tirminiganj, City Lucknow."

The Court below decreed the suit against both the defendants holding that it was quite satisfactorily proved that the plaintiff supplied the tents and *kanas* to the defendants as alleged by him. In the decree also the defendant No. 1 is described as in the plaint.

Thakur Prasad who is described as the Secretary of the Swadeshi Exhibition in the plaint, and Ajudhia Prasad, defendant No. 2, have come up in revision to this Court against the said decree.

On behalf of the applicants their learned Counsel has contended that the suit against the "All India Congress" was not properly framed and could not be decreed against that body as represented by the applicants. Further, it was argued that the finding of the Court below upon the merits of the case was based upon a misreading and misunderstanding of the evidence produced by the defendants and was thus liable to be set aside as perverse.

On behalf of the opposite-party it has been contended that the first point was not raised in the trial Court and no prejudice having resulted to the defendants, the argument should not be entertained in this Court and that the non-observance of the provision of O. I, r. 8 of the Civil P. O., was a mere irregularity and the decree passed by the Court below cannot be set aside. It was further argued that the decree against the defendant No. 1 should at any rate be maintained.

I have heard the learned Counsel for the parties at great length.

There is no evidence in the case that the All India National Congress which was intended to be sued is a registered body. It consists of numerous members and is a fluctuating body of persons subscribing to the creed of the All India National Congress. Further, there can be no doubt that the intention of the plaintiff was to sue the All India National Congress as a body and not Thakur Prasad in his personal capacity. I have read the plaint carefully. In para. 1 it is stated that Thakur Prasad, Secretary, All India Congress Swadeshi Exhibition, was authorised to act on behalf of the Congress. In para. 4 it is alleged that the plaintiff supplied the goods on April 8, 1936, in pursuance of the order of the Secretary. In para. 8 relief is claimed by the plaintiff against the defendants who are

described in the beginning of the plaint. The position seems to have been maintained at the trial in the lower Court and there is no doubt that the lower Court understood the suit to be not against Thakur Prasad personally. In the proceedings the presence of defendant No. 1 is noted as "through Thakur Prasad". In the judgment also Thakur Prasad, who was examined as D. W. No. 1, is described as the "defendant No. 1's representative." There is no doubt, therefore, that the suit as framed was against the All India National Congress, although full description thereof was not given in the plaint, and that Thakur Prasad was not sued in his personal capacity. It is well-settled that where a suit is brought on behalf of or against an association or an unregistered body, then no one member thereof can alone sue or be sued. The suit must be brought by or against all the members thereof. The contention of the learned Counsel for the appellant is that in the present case all the members of the Indian National Congress not being parties, the suit could not proceed against it unless a representative suit was brought and unless permission of the Court was given to one or more members of the All India National Congress to defend the suit. A decree as passed by the Court below would not be binding on any member of the Indian National Congress and in order that it should be binding, the procedure laid down by O. I. r. 8. of the Civil P. O., should have been followed. In India legislation in respect of representative suits was first enacted by s. 30 of the Civil P. O. of 1877, which is now found in O. I. r. 8, of the Civil P. O. (1908). The effect of the enactment is that all persons interested in a suit, if the provisions of the statute relating to the representative suits are followed, are deemed to be the parties to the suit and bound by the result thereof. The statutory provision in question, in my opinion, was enacted not only in the interests of the numerous persons belonging to the same body and having the same interest in the suit but also to avoid the inconvenience of impleading all the persons as parties to the suit. When permission is given to one or more persons belonging to an Association to bring or defend the suit, the Court is required to issue a notice of such suit to all members thereof either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement. The order also provides that any person on whose behalf or for whose benefit a suit is

instituted or defended under sub-r. (1) of r. 8 may apply to the Court to be made a party to such suit. Order I, r. 8 (1) and (2) lays down in my opinion the conditions upon which a representative suit can be entertained and proceeded with and if the procedure laid down by that rule is not followed then the result of the suit has no binding effect on those who are not on the record. This view of mine is fully supported by the decisions in *Baiju Lal Parbatia v. Bulak Lal Pathuk* (I. L. R. 24 Cal. 385) (1), *Srinivasa Chariar v. Raghava Chariar* (I. L. R. 23 Mad 28) (2), *Shiam Lal v. Musammat Lalli and others* (I. L. R. 44 Allahabad 231, Full Bench) (3).

In *Shiam Lal v. Musammat Lalli*, I. L. R. 44 Allahabad 231 (Full Bench) (3) it has been held that :

"Order I, r. 8, of the Civil P. O. (1908) requires that when a plaintiff brings a suit in a representative capacity, he must first obtain the leave of the Court to bring such a suit, and when the leave is granted, the Court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are peremptory and the Court is bound to issue notice as required by the rule."

The same considerations apply to a suit where defendants are sued in a representative capacity. In my opinion it was imperative for the Court below to consider whether permission could be granted to Thakur Prasad to represent all the members of the All India National Congress and then to publish a notice of the institution of such a suit by public advertisement. The procedure of the Court below in the trial of the case was not in accordance with law and the decree as passed by it cannot be allowed to stand.

There is no force in the contention of the opposite party that no prejudice has resulted to the defendants and the decree should not be set aside on account of any irregularity not affecting the merits of the case for the simple reason that they were neither actually parties to the suit nor represented in it according to law.

It has further been contended that no objection as to non-joinder or misjoinder should be raised at this late stage. In my opinion the objection in the present case is not an objection as to non-joinder or misjoinder of parties. In my opinion prejudice is obvious in a case like the present where all the members of an Association have been made bound by the

(1) 24 O 385.

(2) 23 M 28; 7 M L J 281.

(3) 44 A 231; 65 Ind. Cas. 259; 20 A L J 73; A I R 1922 All. 16 (F B).

decree although they were never either parties to the suit or properly represented by some one else. It is an elementary principle of law that no one can be made liable by a decree or order unless he was a party to that suit or proceeding in which the decree or order was passed. My attention has been drawn to s. 99 and O. I, r. 3, Civil P. O. Those provisions do not lend any support to the contention that persons not parties to the suit must be held bound by the decree. Strong reliance has been placed upon two decisions, one of this Court reported in *Dilawar Husain v. Subhan Khan* (8 O. W. N., 722) (4) and the other of the Calcutta High Court reported in *Hriday Nath Roy v. Akhil Chandra Roy* (A. I. R. 1929 Calcutta 445) (5). None of these cases seems to have any application to the facts of the present case. The objection as to procedure under O. I, r. 8 of the Civil P. O. not having been followed was raised not on behalf of the persons sought to be represented or by the Association but by the defendants who were sued in their individual capacity.

In *Dilawar Husain's case* (8 O. W. N., 722) (4) one Subhan Khan, alleging himself to be the *mutwalli* of a certain piece of *waqf* property consisting of a Muhammadan grave-yard and a mosque in *Mohalla Narahi* in the city of Lucknow, sued the defendants for recovery of possession of that portion of the said grave-yard on which the defendant had a shop on the allegation that that defendant had executed a deed of gift of the site of the shop in favour of his son and this he had no right to do. The finding that the land in question was *waqf* was not contested in the Chief Court which found with regard to the title set up by the appellant, that the appellant had never asserted a hostile title in him as against the plaintiff or the rest of the Muhammadan community and had failed to establish adverse possession. The defendant-appellant had further raised the plea that the suit was not maintainable because the plaintiff was not the *mutwalli* of the *waqf* and had not obtained permission of the Court under O. I, r. 8 of the Civil P. O. to represent and prosecute the suit for the other members of the Muhammadan community. It was held that Subhan Khan was validly appointed *mutwalli* of the *waqf* property and this finding was upheld by the

Chief Court. On this finding the question whether Subhan Khan was precluded from instituting the suit because he had not obtained the permission of the Court became immaterial. The learned Judges, however, observed that the objection was not fatal to the plaintiff's case in view of the clear terms of s. 99 of the Civil P. O. and that no decree could be reversed or modified on account of any error, defect, or irregularity not affecting the merits of the case or the jurisdiction of the Court. The important point to be noticed about this decision is that the objection was raised by the defendants, who were all properly parties to the case and the objection raised the question that members other than Subhan Khan of the Muhammadan community were not properly represented in the suit. It is clear that so far as the defendants-appellants were concerned they were not prejudiced in their defence and the failure to follow the provisions of O. I, r. 8 of the Civil P. O. reduced itself to a mere irregularity so far as the defendants-appellants were concerned. Subhan Khan was already the plaintiff in the suit, and so far as the defence of the defendants-appellants was concerned what prejudice could result to them by not following the produced laid down by O. I, r. 8 of the Civil P. O. is difficult to say.

In the present case the decree has been passed against the All India National Congress without carrying into effect the procedure laid down by O. I, r. 8 of the Civil P. O. to secure the representation of all the members thereof. The provisions of O. I, r. 8 not having been followed, no member other than Thakur Prasad of the All India National Congress can be deemed to be parties of the case. However, the decree passed in the Court below is a decree against all the members of the All India National Congress which means that there is a decree against persons who were never actual parties to the suit and who could not be held to be represented in the suit otherwise. In my opinion the defect in such a case is not a mere irregularity but goes to the root of the case. No decree can be passed against a person who is not a party to the case and the objection in this case is, therefore, to the effect that he was not a party to the suit, and if that objection is correct, then the trial is wholly void and illegal.

The case reported in *Hriday Nath Roy v. Akhil Chandra Roy and others* (A. I. R. 1929 Calcutta, 445) (5) is a case which falls in a line with *Dilawar Husain v. Subhan Khan*

(4) 8 O W N 722; 136 Ind. Cas. 241; A I R 1931 Oudh 375; Ind. Rul. (1933) Oudh 97.

(5) A I R 1929 Cal. 445; 125 Ind. Cas. 299; 49 O L J 357; Ind. Rul. (1930) Cal. 523.

(8 O. W. N., 722) (4) and needs no further comment. I, therefore, hold that the procedure followed by the Court below was entirely illegal and the decree passed in the suit against the All India National Congress cannot be sustained in law.

The learned Counsel for the applicants further argued that the finding of the Court below was vitiated in law inasmuch as it was based upon a misreading and misunderstanding of the evidence produced in defence. In view of my decision on the previous point, it would be undesirable on my part to express any opinion on this contention.

The learned Counsel for the opposite-party argued that the decree passed by the Court below should be maintained against Thakur Prasad personally. I have shown above that Thakur Prasad was not impleaded in his personal capacity and no relief against him personally was claimed and in that case it is not open to me to convert the decree passed by the Court below against the All India National Congress into a decree against Thakur Prasad personally. I cannot accede to this argument on behalf of the plaintiff opposite-party.

In view of my finding on the first question, the decree passed by the Court below against both the applicants is set aside. The case is sent back to the trial Court with a direction to enter it at its original number in the register of suits and to dispose of it in accordance with law. As regards costs in view of the fact that the plea which has succeeded in this Court was not raised in the trial Court, I order that parties will bear their own costs of this application. The costs of the trial Court already incurred and those to be incurred hereafter will be within the discretion of the trial Court.

s.

Order accordingly.

ALLAHABAD HIGH COURT

Second Appeal No. 710 of 1936

January 13, 1939

BENNET AND VERMA, JJ.

KANHAI SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

BASDEO SAHAI AND OTHERS—DEFENDANTS

AND OTHERS—*Pro forma* PLAINTIFFS—

RESPONDENTS

Religious endowment—Creation of—Existence of image or idol, if necessary—Essentials to be shown—Offerings to Brahmin residing there, effect of—

Dedication to demon, effect of—Place, attachment of, in execution—Easements Act (V of 1882), s. 18—Villagers accustomed to making offerings for long time at particular "Isthan" situated in a house to rid their cattle of diseases—If a customary easement.

There need not be some image or idol or some dedication in order that the particular "Than" should be considered to be a religious place where the public had a right of worship. No particular act is necessary to signify a dedication. It is enough if the public have been going there and making offerings. The mere fact that these offerings were made to a Brahmin family does not show that it was a case of Brahmin family "carving out a livelihood from these offerings". Such offerings are always handed over to Brahmin Pujaris and the fact that the Pujaris take the offerings does not in any way detract from the right of the persons who make the offerings to continue to do so. Similarly the fact that the place is not connected with a deity but with a demon does not make any difference. The portion of the house in which the "Isthan" is situated is not, therefore, liable to sale in execution of decree. [p. 335, col. 2.]

Where residents of village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at a particular Isthan in a particular room, it amounts to a customary easement within the meaning of s. 18, Easements Act giving the villagers right to continue to make the offering. 180 Ind. Cas. 233 (1), relied on.

S. A. from the decision of the Additional Sub-Judge, Aligarh, dated February 19, 1936.

Mr. B. Malik, for the Appellants.

Mr. K. N. Malaviya, for the Respondents.

Bennet, J.—This is a second appeal by six plaintiffs against a decree of the lower Appellate Court dismissing their suit and the prayer is that the decree of the trial Court by which their suit was partly allowed should be restored. The plaintiffs consist of five Ahirs and one Gaderia, that is, they are all persons whose livelihood is gained by keeping cattle. The plaintiffs asked for a declaration that a certain house and enclosure in the village were not saleable in execution of decree No. 9 of 1933 and that the sale was null and void. The ground for the declaration was that the house and enclosure were appurtenant to the "Than" or "Isthan" of a village deity named Mahikhasur where the plaintiffs and other villagers go to worship. The particular worship alleged was that of making offerings to the Brahmin family who conducted the worship at the platform or "Than" when the cattle of the cattle-owners were afflicted with disease. The defence was that there was no such "Isthan" in the house and that the house was ordinary private property of the Brahmins.

The Brahmin family is as follows :

JAWAHAR—*Mst.* PARBATI

Mst. Gango

Nandan Singh

The mortgage in question is dated May 27, 1925, executed by *Mst.* Gango and her son Nandan Singh in favour of Dip Chand who is the father of Basdeo, defendant No. 1, and Basdeo's three sons are defendants Nos. 2 to 4. A decree was obtained on this mortgage and the declaration asked is in regard to this decree. The trial Court found that it was not proved that the house was appurtenant to the "Than" but that the "Than" did exist and it granted a decree in the following terms :

"That it be declared that there is a Than of the village god Mahikhasur in a room of the house in suit and the plaintiff and the other members of the public have a right to go and worship it. The sale of the room containing the Than or of the Than is null and void and cannot affect the right of the plaintiff or the other members of the public to worship at the Than. The sale of the rest of the house in suit and the Gher in suit is valid. The suit in respect of the rest of the house and the Gher is dismissed. The parties will bear their own costs of the suit."

It is this order in decree that we are asked to restore in this appeal. Now the findings of fact of the Court below are as follows : That there was a judgment of February 12, 1904, in a suit filed by one Govind Ram against *Mst.* Parbati claiming a rateable share in the offerings of the temple and that suit was decreed by the trial Court but dismissed in appeal on the finding that Govind Ram had rival temple and was claiming a share from the temple of *Mst.* Parbati out of malice. The Court held that this established that *Mst.* Parbati had a temple in the year 1894. The Court proceeds to find :

"The parties admitted that there is no image of any deity except a raised platform on which people come and put their offerings to crave the good will of the supposed deity in the interest of their suffering cattle in order to cure them. The room containing this platform is, according to the plaintiffs' own evidence, still utilized by the owners for their personal requirements as of sitting and sleeping. So I doubt very much whether this show of the plaintiffs would give them any right in this house except that they as members of the public might have come to give some offerings to *Mst.* Gango or her son Nandan in interest of their cattle..... I think the plaintiffs failed to prove the dedication of this particular piece of land and the room to anything religious and spiritual..... I have grave hesitation to give to this platform the same sanctity as is due to a temple as a mosque. I rather take it to be a haunt of a speculative man in the spirit of carving out a livelihood in the shape of offerings from certain believers which I think should not and perhaps does not extend to it the sanctity due

to a temple or to a mosque. In short, I take this to be the personal property of Jawahar and his descendants...."

The Court also referred to a sale of the house to Indarman in 1935 to pay off the decree of Basdeo. Now the learned Counsel for the respondents cannot show anything on the record to support this finding of an alleged sale which is not mentioned by the trial Court. It would appear, therefore, that in part of the decree of the Court below is based on evidence which is not on the record. The quotations which we have made from the judgment of the Court below indicate that the Court considered that there must be some image or idol or some dedication in order that the particular "Than" should be considered to be a religious place where the public had a right of worship. The fact that the public had been going there and making offerings was found by the lower Appellate Court as a fact but the Court considered that some further findings were necessary in order that the public could have any right to continue to make their offerings. Now the Court itself admits that no particular act is necessary to signify a dedication and that is a point which is also admitted by the learned Counsel for the respondents. The Court below seems to think that because these offerings were made to a Brahmin family therefore it was a case of Brahmin family "carving out a livelihood from these offerings" and this would in some way detract from the right of the persons who made the offerings. Such offerings are always handed over to Brahmin-Pujaris and the fact that the Pujaris take the offerings does not in any way detract from the right of the persons who make the offerings to continue to do so.

A further argument was made by learned Counsel for the respondents, Dr. Malaviya, that this platform was not connected with a deity but with a demon. There is nothing to support this argument in the findings of the Court below as that Court speaks of Mahikhasur as a deity and not as a demon. But even if the point were correct, the case would be very similar to the burning of fire at the *Holi*. A case recently came before this Bench in which it was held that there was a customary easement of certain residents of the *mahalla* in a town in Aligarh District to burn the *Holi* on a piece of ground appurtenant to the house of a party to the suit : *Lakshmi Chand v. Moti Lal* (1). Such customary easement comes under s. 18, (1) (1938) A L J 1243; 180 Ind. Cas. 233; A I R 1939 All 165; 11 R A 432.

Easements Act. It is true that in the present case there was no specific pleading of s. 18, Easements Act, but the facts proved would come under that section. That is, finding that the plaintiffs as owners of cattle resident in that village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at that particular 'Isthan' in that room does constitute a right of the plaintiffs to continue to make those offerings. For these reasons, we consider that the decree of the trial Court is correct and that the decree of the lower Appellate Court should be set aside. We therefore set aside the decree of the lower Appellate Court and restore the decree of the trial Court with costs to the plaintiffs throughout.

D.

Order accordingly.

PATNA HIGH COURT

Appeal No. 681 of 1937

September 28, 1938

WORT, AG. C. J. AND MANOHAR LALL, J.

RAM RANBIJAY PRASAD SINGH—

DEFENDANT—APPELLANT

versus

Musammât BACHIA KUARI—PLAINTIFF

—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Art 145—Applicability to suit for return of deposit with employer as security for good conduct—Succession Act (XXXIX of 1925), s. 214—Debtor—Employer with whom money is deposited as security for good conduct, if debtor to estate of deceased employee.

Article 145, Lim. Act, does not apply to a suit by a legal representative of a deceased employee for the return of a sum of money deposited by the deceased with the employer as security for good conduct because in such a case no cause of action arises at the date of deposit and the Limitation Act provides for time running only after the cause of action has arisen.

Where an amount is deposited with the employer by the employee as security for good conduct, the employer is obliged to return that amount when the employee leaves the service or dies and the employer is, therefore, a debtor either to the employee or to his estate within the meaning of s. 214, Succession Act.

A. from the decision of the Additional District Judge, Shahabad, dated June 19, 1937.

Messrs. S. M. Mullick and B. P. Sinha, for the Appellant.

Mr. Phulan Prasad Varma, for the Respondent.

Wort, Ag. C. J.—This is an appeal by the defendant arising out of an action in which the legal representative of one Ganga

(deceased) sued for the return of a sum of money deposited by Ganga with the defendant, his employer, as security for good conduct. Ganga died in the year 1923. It is clear, therefore, that unless Art. 145, Lim. Act, applied the action was barred by limitation. It may very well be that Art. 145 when speaks of the depositor and pawnee recovering movable property deposited or pawned that may include money or coin. Their Lordships of the Privy Council in *Asghar Ali Khan v. Kurshed Ali Khan* (1) have held that the words "movable property" in Art. 89 was sufficiently wide to cover money. But even assuming that that construction can be placed upon Art. 145, the point is one which seems to be fatal to the plaintiff's case. The period from which limitation runs under Art. 145 is the date of the depositor or pawn. That means to say that, although no cause of action arose in this particular case at the date of the deposit, yet time was running against the plaintiff or his legal representative. That makes the application of Art. 145 impossible as a general principle. Now the Lim. Act provides for time running only after the cause of action has arisen, and I think it may be taken as quite certain that if any other construction than that is to be placed upon a particular Article, it will be clear the Legislature never intended that that Article should apply to the facts of such a case as this.

There is yet another thing which is fatal to the plaintiff's case. Section 214, Succession Act, provides that "no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof except on the production of the succession certificate." I have repeated merely the relevant words of that section. It is contended on behalf of the plaintiff-respondent that the defendant was not the debtor of Ganga. That is an impossible contention. When Ganga left his employment or died (as in this case) the defendant was obliged to return the sum of money deposited with him; in other words, he became the debtor either to Ganga or to his estate. The appeal succeeds and is allowed and the plaintiff's action dismissed with costs throughout.

Manohar Lall, J.—I agree.

S.

Appeal allowed.

(1) 28 I A 227; 24 A 27; 8 Sar. 142; 3 Bom. L. R 576 (P O).

OUDH CHIEF COURT

Appeal No. 21 of 1937

November 20, 1939

THOMAS, C. J. AND ZIA-UL HASAN, J.

Musammât BACHAI—DEFENDANT—

APPELLANT

versus

HAYAT MOHAMMAD—PLAINTIFF

—RESPONDENT

Contract Act (IX of 1872), s. 65—Minor granted relief—Awarding of compensation to other party is in discretion of Court—Compensation held could not be awarded.

While it cannot be held that in every case in which relief is granted to a minor, he should be made to return the benefit derived by him from his contract, it cannot also be ruled that in no case can any person who seeks to avoid a contract entered into by him in his minority be made to pay compensation to the other party.

The fact that the purchaser was cognizant of the purchaser's minority at the time of the sale totally disentitles him to claim any compensation. *Mohori Bibee v. Dhurmodas Ghose* (1), referred to.

A against the decree of Mr. Justice W. Y. Madeley, dated August 30, 1937.

Mr. K. P. Misra, for the Appellant and Applicant.

Mr. H. H. Zaidi, for the Respondent.

Judgment.—This is a defendant's appeal under s. 12(2) of the Oudh Courts Act against a judgment and decree of a learned Judge of this Court sitting singly.

The plaintiff-respondent brought a suit for possession of two adjacent houses Nos. 612 and 613 in the Court of the Munsif, Sultanpur, against the present appellant on the allegation that the houses originally belonged to his father Chhedi who died leaving him (plaintiff) and a wife and two daughters as his legal heirs but that the defendant took possession of the northern portion in October 1922 and of the southern portion in July 1925, in collusion with the plaintiff's mother Musammât Jamni, defendant No. 2 without any right. He, therefore, sued for possession of a 7/16ths share of the houses.

It was found by the trial Court that No. 612 was sold by the plaintiff's mother to the present appellant with the permission of the District Judge who had appointed a guardian for the plaintiff and that No. 613 was sold on August 13, 1925, by the plaintiff, his mother and his two sisters by sale deed Ex. A-16. The plaintiff's minority was to cease according to the certificate of guardianship issued by the District Judge in 1928. The sale of the houses so far as it affected the plaintiff's 7/16ths share was, therefore, held to be void on account of the plaintiff's minority

at the time of the sale. Accordingly a decree was given to the plaintiff for possession of a 7/16ths share "in the southern half portion of the house in suit" and for Rs. 86-10-0 as damages instead of Rs. 180 claimed by the plaintiff. Both parties appealed against the trial Court's decree but the appeals were dismissed and the trial Court's decree affirmed. The defendant then appealed to this Court and the main point argued was that compensation should have been awarded to the appellant by the Courts below under s. 65 of the Indian Contract Act and s. 41 of the Specific Relief Act. The learned Judge of this Court who heard the appeal was, however, of opinion, that this was not a fit case in which compensation should be awarded to the vendee in respect of a contract which was void *ab initio*. The learned Judge, however, granted permission to the defendant to appeal under s. 12(2) of the Oudh Courts Act. Hence the present appeal.

We have heard the learned Counsel for the appellant but see no reason to differ from the opinion of the learned Judge of this Court. It has been found by the Courts below that there was no fraud or misrepresentation on the part of the minor at the time of the sale and it was admitted that the defendant-appellant knew that Hayat Mohammad had a certificated guardian. It was argued that the sale was made to raise money for paying earlier mortgages which had been made by the plaintiff's mother for the plaintiff's marriage and that, therefore, the plaintiff who benefited by the sale should be put to terms and made to pay compensation to the appellant before obtaining possession of the property. A large number of cases have been cited on behalf of the parties but as they lay down no more than that, compensation can be awarded against a minor, seeking to avoid a contract in the discretion of the Court if the circumstances so require, they are not of much help to us in deciding the present case. No hard and fast rule can be laid down on the point and while it cannot be held that in every case in which relief is granted to a minor, he should be made to return the benefit derived by him from his contract, it cannot also be ruled that in no case can any person who seeks to avoid a contract entered into by him in his minority be made to pay compensation to the other party. We think, however, that in the present case the fact that the appellant was cognizant of the plaintiff's minority at the time of the

sale totally disentitles her to claim any compensation. In *Mohori Bibee v. Dhurmodas Ghose*, L. R. 30 I A. 114 (1), their Lordships at p. 125, referring to ss. 38 and 41 of the Specific Relief Act remarked as follows:

"These sections, no doubt, do give a discretion to the Court, but the Court of first instance, and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interference with the discretion so exercised."

We may also remark that the plea now raised was not raised by the appellant in the trial Court and no issue was framed on the point.

The appeal has, in our opinion, no force and is dismissed with costs.

S. *Appeal dismissed.*

(1) 30 I A 114 at p. 125; 20 O 539; 5 Bom. L. R 421; 7 O W N 441; 8 Sar. 374 (P O).

ALLAHABAD HIGH COURT

Second Appeal No. 1767 of 1936

August 11, 1939

BENNET AND VERMA, JJ.

RAM KUMAR LAL AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

RAM CHARITTAR LAL AND ANOTHER—

PLAINTIFFS AND OTHERS—DEFENDANTS—

RESPONDENTS

U. P. Land Revenue Act (III of 1901), ss. 233 (m), (1), 175—Sale for arrears of revenue—Setting aside of, on ground of fraud—Suit in Civil Court, if barred.

Sub-s. (m) of s. 233, U. P. Land Revenue Act, does not deal with a suit to set aside a sale for arrears of revenue. It deals with claims from collection of revenue, but clearly is not intended to embrace the special case in sub-s. (1). Hence a suit in the Civil Court to set aside a sale for arrears of land revenue on the ground of fraud is not barred.

S. A. from the decision of the Additional Sub-Judge, Azamgarh, dated July 25, 1936.

Messrs. N. P. Asthana, A. P. Pandey and S. C. Asthana, for the Appellants.

Mr. Chaturbhuj Sahai, for the Respondents.

Bennet, J.—This is a second appeal by the defendants against a decree of the lower Appellate Court in favour of the plaintiffs granting the plaintiffs an injunction. The facts are simple. There was a house in the District of Azamgarh which the Collector of Azamgarh sold for arrears of land revenue due from Ram Govind Lal and the

house was sold as the house of Ram Govind Lal. The plaintiffs claim that they are separate from Ram Govind Lal and that the house is their property and that they have an enemy, defendant No. 3, Ram Naresh Lal, Mukhtar, and that he by his fraud got this house sold for the arrears of land revenue and that he supplied the money to the purchaser to buy the house and got the house eventually transferred to his brother Ram Kumar Lal. The trial Court dismissed the suit. The plaintiffs appealed and the lower Appellate Court held that the plaintiffs had proved that the entire proceedings from attachment to sale were fraudulent and that the house belonged to the plaintiffs and that there was no bar in law to the suit. In second appeal it is claimed that there was a bar in law arising from the Land Revenue Act (Act III of 1901), s. 233 (1) and (m). These sections provide:

"No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters: (1) claims to set aside a sale for arrears of revenue, except on the ground of fraud, under s. 175; (m) claims connected with, or arising out of the collection of revenue (other than claims under s. 183), or any process enforced on account of an arrear of revenue, or on account of any sum which is by this or any other Act realizable as revenue."

It is clear that the provisions of the exception in sub-s. (1) apply to the present case; as this was a claim to set aside a sale for arrears of revenue on the ground of fraud and it has been held that fraud has been proved, sub-s. (m) does not apply to the present case as it does not deal with a suit to set aside a sale for arrears of revenue. It does deal with claims from collection of revenue, but clearly sub-s. (m) is not intended to embrace the special case in sub-s. (1). Turning to s. 175, it provides as follows:

"If no application under s. 173 is made within the time allowed therefor, all claims on the ground of irregularity or mistake in publishing or conducting the sale shall be barred. Nothing herein contained shall bar the institution of a suit in the Civil Court for the purpose of setting aside a sale on the ground of fraud."

There is, therefore, in s. 175 a clear provision that a suit like the present is not barred. No ruling has been shown in which it was held that the Land Revenue Act would bar a suit in the Civil Court to set aside a sale for arrears of land revenue which was found to be fraudulent. For these reasons, we dismiss this second appeal with costs.

S.

Appeal dismissed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 194
of 1938.

September 19, 1939

ROWLAND AND CHATTERJI, JJ.
NRIPENDRA NATH CHATTERJI
AND OTHERS—DEFENDANTS—APPELLANTS
versus

ARUN CHANDRA CHATTERJI—
PLAINTIFF AND JITENDRA NATH
CHATTERJI—DEFENDANT—RESPONDENTS
*Limitation Act (IX of 1908), Sch. I, Art. 60—
Deposit with banker—Waiver of necessity for demand—
Repudiation of customer's right, if waiver—Demand
previous to suit, whether necessary—Case falling under
Art. 60—Article, if applies to interest also—Contract
Act (IX of 1872), s. 40, illus. (a) on death of banker
liability of his sons to pay sums to customers, whether
changed—Banker and customer.*

In the case of a deposit made with the banker, the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by the banker of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum. Hence in a suit by the customer to recover money deposited with the banker, the banker cannot simultaneously repudiate liability to pay this sum and insist that a demand previous to suit was essential to its maintainability. *Joachimson v. Swiss Bank Corporation* (1), relied on. [p. 340, col. 2.]

Where an amount has been deposited with a banker, the death of the banker does not alter the nature of the liability of his sons to pay that amount. The case falls within illus. (a) to s. 40 of the Contract Act and the liability in respect of this money remains entirely unchanged by the banker's death. [*ibid.*]

The ordinary rule is that the cause of action for recovery of principal and of interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, two periods of limitation are not applicable. Thus in a case falling under Art. 60, Limitation Act, that Article applies to the principal as well as to the interest. 58 Ind. Cas. 639 (6), referred to. *Makundi Koer v. Balkishen Das* (5), distinguished. [p. 341, col. 1.]

A. from a decision of the Subordinate Judge at Bhagalpur, dated January 21, 1938, modifying a decision of the Munsif at Bhagalpur, dated July 27, 1937.

Mr. R. S. Chatterji, for the Appellants.

Mr. Girindra Nath Mukherji, for the Respondents.

Rowland, J.—This is an appeal by the contesting defendants and arises out of a suit to recover money deposited by the plaintiff with the father of the defendant. The deposit it seems was made with the defendants' father as a banker by entries in a pass-book. It was opened in 1906 and entries in it both of credit and withdrawal were made, the last being dated November 3, 1907. The plaintiff was a nephew of Babu Kirti Chandra Chatterji with whom the money was deposited and it would seem

that the sums are of the nature of gifts by Kirti Chandra to the plaintiff. The entries have been found by both Courts to be genuine and the Courts have held that the claim is for money deposited within the meaning of Art. 60 of the Lim. Act. Under this Article the period prescribed is three years from the date of the demand. It is said in the plaint that demands were made from January 1, 1936 onwards and the suit was instituted on July 6, 1936. Babu Kirti Chandra Chatterji died in 1914; and the plaintiff claims the amount of the deposit from his sons on the ground that they are in possession of his assets. Interest is claimed at six per cent. per annum simple, this amount having been entered in the pass-book in connection with the first item of deposit.

One of the objections taken by the defendants was that except with regard to the first item of deposit, there was no agreement to pay interest. Both the Courts have held that the agreement to pay interest was intended to apply to all the items of deposit. This seems a reasonable construction and I find no substance in this particular objection.

The next point taken is that the suit should have been held to be barred by limitation. The nature of the claim was not a deposit but money lent and the Courts should have applied Art. 59 and not Art. 60 of the Schedule. In this connection reference is made to the finding of the Courts below that the plaintiff had not proved any demand for the money on January 1, 1936, or at any date prior to the institution of the suit. Nevertheless it has been held that the suit is maintainable and a decree has been passed. It is said that one criterion to determine whether a sum of money is merely money lent or is a deposit repayable on demand, is to see whether it is money for the recovery of which the plaintiff has a cause of action independently of any demand for repayment. For the English cases on the subject, we were referred to *Joachimson v. Swiss Bank Corporation* (1) where the subject is examined in some detail. In the head-note it is stated to have been decided that:

"Where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the

(1) (1921) 3 K B 110; 90 L J K B 973; 125 L T 338; 26 Com. Cas. 196; 65 S J 134; 37 T L R 534.

customer is a necessary ingredient in the cause of action against the banker for money lent". The suit was held to be not maintainable on the ground that no cause of action had accrued to the plaintiffs because no demand was made for payment. In a case from India in *Mohammad Akbar Khan v. Atter Singh* (2) the distinction between a deposit and a loan was examined by Lord Atkin who said :

"Was this then a loan or was it a deposit payable on demand? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the deposittee to seek out the depositor and re-pay him. He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the deposittee to re-pay".

"Therefore it is contended that the plaintiff is entitled to no decree for if this money was in the hands of the defendants as a deposit referred to in Art. 60, no cause of action had accrued and if it is any other kind of debt or loan the period of limitation for institution of the suit was long barred. The objection, it seems to me, is not fatal.

We have been shown two cases one of this Court and one of the Madras High Court in which such an objection has not succeeded. In this Court in *Bainath v. Firm Bihari Ram Shah Lal* (3) the Madras decision in *Guntur Narasimham v. Narayana Rao Garu* (4) was followed. The relevant passage which in this Court was cited from the judgment of the Madras case is by way of *obiter dictum* and the observation is that :

"The making of the demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made, in which case no question of limitation arises".

The language used may require some qualification in view of the decisions previously cited, to the effect that there

(2) 17 L 557; 163 Ind. Cas. 454; 1936 O L R 301; 8 R P O 274; A I R 1936 P O 171; 2 B R 588; 44 L W 23; 40 O W N 997; (1936) M W N 660; 17 P L T 513; 38 Bom. L R 739; 63 O L J 541; (1936) A L J 986; 71 M L J 712; 63 I A 279; 38 P L R 1006; 1936 A L R 479 (P O).

(3) A I R 1933 Pat. 701; 147 Ind. Cas. 1094; 6 R P 399.

(4) A I R 1926 Mad. 66; 92 Ind. Cas. 405; 22 L W 592.

must ordinarily be a demand or something that can be deemed equivalent to a demand or take the place of a demand as part of the cause of action. But the present case seems to fall within the concluding words of Lord Atkin in the case of *Joachimson v. Swiss Bank Corporation* (1) above cited. His Lordship observed :

"Finally it is perhaps unnecessary to say that the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum."

From this point of view, I am of opinion that the defendants cannot simultaneously repudiate liability to pay this sum and insist that a demand previous to suit was essential to its maintainability.

As to the nature of the deposit or loan this has been found by both the Courts to be a deposit falling within the terms of Art. 60 which includes money of a customer in the hands of his banker so payable and I do not think we can go behind that finding. It is, however, contended that although the money was perhaps a deposit in the hands of Kirti Babu, after his death the same money in the hands of his sons had changed its character, there being between them and the plaintiff a liability of a different nature from that which had existed between their father and the plaintiff. It has not been shown to us in what manner the death of Babu Kirti Chandra could or should be deemed to alter the nature of the liability to pay this sum of money. The case appears to fall within illustration (A) to s. 40 of the Contract Act and the liability in respect of this money to be entirely unchanged by Kirti Babu's death.

Then it is suggested that though it may be held that in respect of the principal money limitation is saved, Art. 60 being applicable, interest is governed by Art. 63 so that the plaintiff is entitled to recover along with the principal only interest for three years last before the institution of the suit. For this reliance is placed on a decision in *Makundi Kuer v. Balkishen Das* (5). But that was a special case where the depositor had realised out of Court the whole of his principal as well as interest at a certain rate; but with this he was not satisfied. He claimed interest at a higher rate and he brought a suit to recover the difference between the interest which he claimed and the interest which he had been paid. The present case is not

(5) 3 A 328.

by any means on all fours with the facts of that decision.

This is more comparable with *Narayan Chetty v. Suppiah Chetty* (6), in which it was held that where money had been deposited on the understanding that interest was not to be paid out as it accrued but to be added to the principal, Art. 60 would apply to the interest as well as to the principal and that both would be deemed to be deposits payable on demand. The ordinary rule is that the cause of action for recovery of principal and of interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, I do not think that two periods of limitation will be applicable. In my view then no part of the claim in respect of interest is time-barred.

In the result, I find no substance in the contentions raised in the appeal. There is a cross-objection to which I must now refer. The Munsif had decreed the claim in full including costs; but the lower Appellate Court was of opinion that as the plaintiff had failed to establish a demand antecedent to the institution of the suit, he should not recover from the defendants his costs of the suit. The result was that the Subordinate Judge modified the first Court's decision by giving a decree for the claim but without costs and directed that the parties should bear their own costs of the appeal. This was a matter within the discretion of the lower Appellate Court with which we do not think we ought to interfere. It was for the plaintiff to give the defendants proper notice of his demand before rushing to Court although for the reasons I have stated this did not have to prove fatal his success in the suit. I would therefore not interfere with the discretion of the lower Appellate Court in withholding the plaintiff's costs from them.

I would dismiss both, the appeal and the cross-appeal, with costs.

Chatterji, J.—I agree.

s.

Appeals dismissed.

(6) 43 M 629; 58 Ind. Cas. 639; 11 L W 418; (1920) M W N 248; 38 M L J 437; A I R 1920 Mad. 983.

CALCUTTA HIGH COURT

Application decided on

April 18, 1939

SEN, J.

In the goods of Mst. GOLAB DAYE

Succession Act (XXXIX of 1925), s. 263—Defendant dying pending suit—Executors not taking step to get themselves substituted—Letters of administration granted to administrator ad litem—Revocation of—Supplementary grant of probate.

Where during the pendency of a suit on a mortgage the mortgagor dies and no steps are taken by his executors to get themselves substituted although repeatedly asked to do so, they cannot subsequently apply for revocation of the grant of letters of administration made to the administrator *ad litem* though they can be given a supplementary grant of probate keeping the grant to the administrator *ad litem* intact. *In the goods of Brown* (1), relied on.

Mr. N. N. Bose, for Devendra N. Chatterjee and another Mortgagee.

Mr. P. N. Mullick, for the Administrator *ad litem*.

Mr. S. K. Bose, for the Executors and Executrix.

Order.—This is an application for the revocation of a grant of letters of administration limited for the purpose of representing the deceased in a suit and for grant of probate to the executors named in the will of one *Mst. Golab Daye*, deceased. The petitioners are the executors named in the will. The application is opposed by the administrator *ad litem* and the plaintiffs in the suit in which the administrator was appointed. *Mst. Golab Daye* was the defendant in a mortgage suit instituted by certain persons; she died pending that suit. The plaintiffs in that suit tried to get the heirs and legal representatives of *Mst. Golab Daye* substituted and a long correspondence ensued between the plaintiffs and the attorney for one of the executors named *Bajinath Khettri*. Although the executors were asked repeatedly to get themselves substituted in the suit they took no steps. Thereafter an application was made in that suit for the appointment of an administrator *ad litem* and citations were issued on all the executors. They did not appear and an administrator *ad litem* was appointed. The executors now apply for a revocation of this grant of letters of administration and also for a grant of probate to them.

The plaintiffs in the mortgage suit object to the revocation of letters of administration and they contend that if the letters are now revoked, it would lead to unnecessary delay; they suggest that this applica-

tion has been brought for the purposes of delay. In my opinion no case has been made out for revocation of the grant of letters of administration. The executors had ample opportunity of getting themselves represented in the suit. They deliberately refrained from taking any steps in the matter and they cannot now complain because an administrator *ad litem* has been appointed. The Court may revoke a grant of letters of administration on the ground mentioned in s. 263, Succession Act. In my opinion, no just cause has been shown to exist within the meaning of that section. It seems to me that this application, so far as it relates to the revocation of the grant, has been made for the purpose of harassing the plaintiffs in the mortgage suit and for delay. That part of the application is, therefore, dismissed.

As regards the question whether the petitioners can get probate, it seems to me that there is no reason why they should not be given a supplementary grant of probate keeping the grant to the administrator *ad litem* intact. I have not been shown any provision in the Succession Act or any Indian authority regarding this matter. Learned Counsel on behalf of the petitioners has referred me to the case in *In the goods of Brown* (1). There it was held that a supplementary grant may be made in circumstances similar to the present one. I consider that the English practice should be followed in this case. I therefore direct that a *caeterorum* grant of probate will issue to the applicants. The grant to the administrator *ad litem* shall remain. The respondents other than the administrator *ad litem* will get their costs as between attorney and client. So far as the administrator *ad litem* is concerned, he will get party and party costs. The executors will get their costs of obtaining probate out of the estate.

D. Order accordingly.

(1) (1877) L R 2 P D 455.

OUDH CHIEF COURT

Criminal Miscellaneous Application No. 109 of 1939

November 21, 1939

THOMAS, C. J. AND RADHA KRISHNA, J.
THE DISTRICT MAGISTRATE, KHERI
COMPLAINANT—APPLICANT

versus

M. HAMID ALI GARDISH—ACCUSED
—OPPOSITE PARTY

Contempt of Court—Writing and publishing

article likely to prejudice pending case amounts to contempt of Court—Accused held guilty of contempt but was discharged under s. 3, proviso 1, Contempt of Courts Act (XII of 1926).

The special privilege of the press is a time-worn fallacy, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. Writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court.

Held, that the article grossly offended against the law of contempt of Court. [The accused was, however, discharged on his tendering unqualified apology, under first proviso to s. 3, Contempt of Courts Act.]

Or. Misc. App. for taking action under Contempt of Court's Act.

The Government Advocate and Assistant Government Advocate, for the Crown.

Mr. Akhtar Husain, for the Opposite Party.

Judgment.—One Brij Lal thekedar on January 28, 1939, filed a complaint under s. 426, I. P. C. for mischief against nine persons in the Court of the Sub-Divisional Officer, Nighasan. It was transferred to the Court of the Tahsildar Magistrate of Nighasan. The learned Magistrate convicted all the nine accused on May 27, 1939.

On April 23, 1939, Hamid Ali Gardish, who is the proprietor, printer and publisher of the newspaper *Dost* printed the following article in his newspaper:

"Ruin of Tenants.

Our correspondent from Nighasan informs us that Brij Lal, resident of *Mausa Nakaiha*, a hamlet of Jatpurwa, was a thekedar of Raqam Sewai from the Khairigarh estate. He wanted to realise new kind of items from the tenants of Lakhania village. When they refused to pay them, then false cases have been started against the tenants. Hence the tenants are involved in four separate cases. Mr. Khushwaqt Rai has already written about all this to the District Magistrate.

False reports made at the Police Station,

Dhauraura

The above mentioned Brij Lal on account of enmity makes false reports against the tenants of Lakhania and he also gets his servants to make false reports. It is hoped that the Police Officer of Dhauraura Police Station will be careful of this man."

The accused on May 9, 1939, filed a copy of the article quoted above in their defence. The learned Tahsildar brought this fact to the notice of the District Magistrate who reported the matter to this Court for necessary action.

A notice was issued from this Court against Hamid Ali Gardish to show cause why he should not be convicted for contempt of Court. He has appeared before us with a Counsel and filed the following applica-

LAHORE HIGH COURT

Second Appeal No. 292 of 1939

July 5, 1939

TEK CHAND AND ABDUL RASHID, JJ.

Mst. BASANT KAUR—PLAINTIFF

—APPELLANT

VERSUS

RAM SINGH—DEFENDANT—RESPONDENT

*Limitation Act (IX of 1908), Sch. I, Arts. 91, 144—
Suit for possession of property on allegation that
its sale was sham—Question of limitation, decision
of—Allegation found correct—Article applicable.*

Where the allegations in the plaint, that the sale was a sham transaction or a mere paper transaction, are correct, a suit for possession of the property based on those allegations must be governed by Art. 144 and not by Art. 91. Therefore the decision of the question of limitation would depend on the decision of the question whether the sale in dispute was a sham transaction. The passing of consideration and the relationship between the parties would be very important matters in arriving at the conclusion as to whether the sale was or was not a sham transaction. 109 Ind. Cas. 54; (1), 30 Ind. Cas. 909 (2), 52 Ind. Cas. 533 (3) and *Petherperumal Chetty v. Muniandy Servai* (4), relied on. [p. 345, col. 1.]

S. A. from a decree of the District Judge, Ambala, dated January 20, 1939.

Mr. Shamair Chand, for the Appellant.

Messrs. Mehr Chand Mahajan and Tek Chand, for the Respondent.

Abdul Rashid, J.—This appeal has arisen out of a suit instituted by Mst. Basant Kaur, widow of Nand Singh, against Sardar Ram Singh, Pleader, for possession of a house and land measuring 1 *bigha* and 9 *biswas* situated in the town of Rupar. The allegations of the plaintiff were that her husband Nand Singh had died without any issue in December 1931, and that the house and the land in dispute and the other property belonging to Nand Singh came into her possession. She was a young widow while the defendant was a Pleader practising at Rupar. He contracted an illicit intimacy with her, and represented to her that it would be of great advantage to him professionally, if it were known that he was the owner of the house and the land in dispute. The plaintiff was taken in and entered into a sham transaction, and executed a registered deed on March 25, 1933, transferring the house and the land in dispute to the defendant so that he may pass as the ostensible owner of the house. It was never the intention of the parties that the title in the property should pass to the defendant and the sale-deed was executed by the plaintiff on the assurances given to her that the house would remain her property and would be restored to her whenever she wanted. Later the defendant

tion :

"The accused in the aforementioned case begs to tender an unqualified apology for the Article under action and throws himself at the mercy of this Hon'ble Court. I undertake never to commit such an act again and pray to the Hon'ble Court to be pleased to forgive me".

We are of opinion that the Article grossly offends against the law of contempt of Court. It was clearly an attempt to prejudice the mind of the learned Magistrate in regard to the trial of the case pending in his Court under s. 426, I. P. C. The newspaper men do not often realise at the time of writing that they are doing something improper or blameworthy. A journalist has no right to write in the tone the accused has used in the article on matters happening in law Courts. The special privilege of the press is a time-worn fallacy, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person, writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court.

The question for consideration is whether we should act under the first proviso to s. 3 of the Contempt of Courts Act which provides that "the accused may be discharged or the punishment awarded may be remitted on apology being made by it to the satisfaction of the Court" or whether we should compel Hamid Ali Gardish to purge his contempt by payment of a fine or the undergoing of a sentence of imprisonment.

We put a large number of questions to the accused, and he struck us to be a simple man. We are of opinion that he was foolish in writing the said article. He stated before us that he did not realise the seriousness of the offence. The circulation of the newspaper is very small and we are told that the income is about 30 a month.

We accordingly, while convicting Hamid Ali Gardish of contempt of Court with respect to the Court of the Tahsildar Magistrate at Nighasan, discharge him on his apology.

B.

Order accordingly.

became the plaintiff's *mukhtar-i-am* and got possession of the entire property belonging to her. About nine months before the institution of the present suit, the plaintiff suspected the defendant's intention and asked him to restore the house to her. On his refusal to do so, she cancelled her *mukhtar-nama* in the defendant's favour. She was, therefore, entitled to possession of the house as the transaction of transfer was a mere paper transaction and was void *ab initio*.

The defendant pleaded, *inter alia*, that the transaction of sale in his favour was genuine and for valid consideration. He further pleaded that the suit, having been brought more than three years after the execution of the sale-deed, was time-barred and that the plaintiff was estopped from suing because she had been seeing the defendant making improvements and had not objected thereto, and also because, she had admitted in the course of a civil suit, *Puran Singh v. Mst. Basant Kaur*, that she had sold the house to the defendant for consideration. On these pleadings the trial Court framed the following issues:

- "(1). In the suit barred by time?
- "2. Was the sale in dispute a sham transaction and was effected without consideration and under undue influence?
- "3. (a). Was the plaintiff a *pardanashin* woman at the time when the sale-deed was executed?
- "3. Is the plaintiff estopped by her conduct from bringing the present suit?
- "4. What improvements has the defendant effected and is he entitled to be compensated on their account?
- "5. Relief."

The trial Court held that the sale dated March 25, 1933, was a sham transaction and that it was a nullity from the very beginning. It further held that as the sale was a sham transaction, it was unnecessary for the plaintiff to have the sale deed set aside within three years under Art. 91, Lim. Act, and that she could institute a suit for possession of the property in dispute under Art. 144 within a period of 12 years from the date when she was dispossessed. It was also held that the plaintiff was not estopped by her conduct from bringing the present suit in spite of the fact that she was not a *pardanashin* lady. It was found that Rs. 855 had been spent by the defendant in effecting improvements but that he was not entitled to any compensation. The plaintiff was accordingly given a decree for possession of the house in dispute. The defendant preferred an appeal in the Court of the learned District

Judge, Ambala. The judgment of the learned District Judge contains the following observations:

"The lower Court has held *inter alia* that the sale in favour of the defendant was without consideration. As defendant's appeal is entitled to succeed on points of law it is not necessary for me to go into the question of actual payment of consideration. In my opinion, the plaintiff's suit is liable to dismissal for the following three reasons: (1) It is barred by time. (2) Title passed under s. 54, T. P. Act, even if no consideration passed, (3) Plaintiff is estopped from suing on account of her conduct."

On the three points which, according to the learned District Judge were points of law, the decision was that the suit was barred by time, that title passed to the defendant on March 25, 1933, and that the plaintiff was estopped from suing on account of her conduct. On these findings the defendant's appeal was accepted and the plaintiff's suit dismissed with costs in both Courts. Against this decision the plaintiff has preferred a second appeal to this Court. It was strenuously contended by Mr. Shamair Chand on behalf of the appellant that the lower Appellate Court had erred in deciding the question of limitation without giving any finding as to whether the alleged alienation of the property in dispute was a sham transaction or whether it was merely voidable. The learned Counsel argued that it was essential for the lower Appellate Court to consider the entire evidence and to give a finding whether the defendant had an illicit intimacy with the plaintiff and as to whether the plaintiff had entered into a sham transaction merely to benefit the defendant professionally. The passing of consideration was one of the matters which would be of great importance in determining as to whether it was intended by the parties that title in the house should pass to the defendant on March 25, 1933. In my opinion the above contention has great force and must be given effect to. The question of limitation, in the circumstances of the present case, cannot be decided without giving a finding as to whether the transaction of March 25, 1933, was a sham and void transaction or whether it was merely voidable. It was incumbent on the learned District Judge therefore to go into the entire evidence to determine the various factors which would show that the alleged sale was merely a paper transaction.

It was held in *Mohammad Nazir v. Zulaikha* (1) that where a deed is *ab initio* null and void, there is no necessity for a

(1) 50 A 510; 109 Ind. Cas. 54; A I R 1938 All. 267; 26 A L J 269.

person who considers himself aggrieved thereby to come to Court promptly and have the deed actually cancelled or set aside but where a deed is good but is voidable at the option of the party aggrieved, he must come to Court within three years to have it set aside. A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed and does not fall within the purview of Art. 91, Sch. I, Lim. Act, 1908. In the case reported in *Manchha Ram Pranjivandas v. Panu Bhai Lallu Bhai* (2) the facts were that a Hindu widow having alienated a property of her husband, the reversioners sued more than three years after the date of alienation to recover possession of the property. It was found as a fact that the alienation was merely a sham transaction. It was held that in these circumstances Art. 91, Lim. Act, had no application as the alienation was unreal and ineffectual. In *Sangawa v. Huchangowda* (3) it was held that where the sale-deed was a mere paper transaction and inoperative, a suit for possession of the property was not barred, if brought more than three years after the execution of the sale-deed, as the suit for possession would be governed by Art. 144 and not by Art. 91, Lim. Act. In *Petherperumal Chetty v. Muniandy Servai* (4) it was held by their Lordships of the Privy Council that if a sale-deed is inoperative, it is unnecessary for the plaintiff to have it set aside as a preliminary to his obtaining possession of the property in dispute. In such cases, the suit was governed not by Art. 91 but by Art. 144, Lim. Act.

In view of the authorities summarized above, it is perfectly clear that if the allegations in the plaint, that the sale was a sham transaction or a mere paper transaction, are correct, the present suit for possession of the property in dispute must be governed by Art. 144 and not by Art. 91. The trial Court was therefore correct in holding that the decision of the question of limitation would depend on the decision of the question whether the sale in dispute was a sham transaction. The passing of consideration and the relationship between the parties would be very important matters

(2) 40 B 51; 30 Ind. Cas. 909; A I R 1915 Bom. 242; 17 Bom. L R 698.

(3) 48 B 166; 82 Ind. Cas. 533; A I R 1924 Bom. 174; 25 Bom. L R 1207.

(4) 35 O 551; 35 I A 98; 4 L B R 286; 7 O L J 528; 12 O W N 562 (P O).

in arriving at the conclusion as to whether the sale was or was not a sham transaction.

The principal argument addressed by Mr. Mahajan on behalf of the respondent was that if the plaint be taken into account as a whole, it merely amounts to this, that the plaintiff was induced to execute the sale-deed by means of fraud and undue influence. The learned Counsel therefore contended that in these circumstances the transaction of sale was not void *ab initio* but merely voidable and that Art. 91 was applicable to the facts of the present case. I do not find myself in agreement with the contentions raised by the learned Counsel for the respondent. The words in the plaint are perfectly clear. They are to the effect that the transaction is a sham transaction. It is also stated in the plaint that the sale-deed was a mere paper transaction (*mehas kaghi bainama*). The plaint also recites that the defendant told the plaintiff to give over the house to him merely for the purpose of making a show (*barai nam*). The allegations in the plaint could hardly be more explicit. The learned Counsel for the respondent could not support the judgment of the learned District Judge on the question of estoppel. He conceded that there was no estoppel but that the *jawab dawa* of *Mst. Basant Kaur* in the suit, *Puran Singh v. Mst. Basant Kaur*, contained an important admission which must be taken into account in finding out the intention of the parties regarding the passing of title.

For the reasons given above, I would accept this appeal, set aside the judgment and decree of the learned District Judge and remand the case to him for re-hearing and re-decision. The learned District Judge will consider the entire evidence produced by the parties and give a finding on all the issues framed by the trial Court in the light of the observations made above. Court-fee levied on the memorandum of appeal in this Court shall be refunded, and the other costs shall be costs in the cause.

Tek Chand, J.—I agree.

D.

Case remanded.

PATNA HIGH COURT

Criminal Revision No. 466 of 1939

November 3, 1939

ROWLAND, J.

Syed ZAFAR AHSAN

AND OTHERS—PETITIONERS

versus

Babu JUGESHWAR BUX ROY

AND ANOTHER—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 145—One party claiming exclusive possession and other joint possession with them—Proceedings under s. 145, if appropriate—Possession—State delivery of possession by Civil Court, whether conclusive proof of present possession—Criminal trial—Revision—Practice.

Proceeding under s. 145, Criminal P. O., can be started in a case in which one party claims exclusive possession while another party claims to be in joint possession along with them as the question in such a case is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. 140 Ind. Cas. 903 (1), relied on.

The law is that the Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a state delivery of possession cannot be conclusive as to present possession. 113 Ind. Cas. 181 (2), relied on.

As a general practice the High Court will not entertain in the absence of most exceptional circumstances an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned. 119 Ind. Cas. 401 (3), relied on.

Or. R. against an order of the Magistrate, First Class, Daltonganj, dated March 30, 1939; a motion against which order was rejected by the Judicial Commissioner of Chotanagpur on June 30, 1939.

Messrs. B. N. Mitter, Ajit Kumar Mitter and G. Muhammad, for the Petitioners.

Sir S. Sultan Ahmad and Messrs. B. C. De, K. K. Banerji and S. S. Sinha, for the Opposite Party.

Order.—This is an application in revision by the second party in a proceeding under s. 145 against an order of the Magistrate declaring possession in favour of the first party. The proceeding related to lands of the Deogaon Estate of which Babu Gopal Bux Roy, first party No. 2, is proprietor. The petitioners Nos. 2 to 7 are persons in whose favour the proprietor had made a grant of a *mukarrari* lease of eight annas in the estate at a time when neither of the parties were in possession. The proprietor Gopal Bux Roy sued to recover possession on a declaration that

the principal defendant of that suit was an imposter. In order to finance this litigation, the *mukarrari* lease was granted to the members of the second party. The suit failed in the first Court, but on appeal was decreed by this High Court on August 19, 1936, the final order being that Gopal Bux Roy and the present petitioners Nos. 2 to 7 should recover joint possession of the entire Deogaon estate, their shares being one-half and one-half. The lower Court in execution issued on March 12, 1937, a writ of delivery of possession which is said to have been duly executed. The writ was in favour of both parties. The petitioners appointed Managers one Mr. Rashid and then a Mr. Qayum who apparently did not succeed in collecting any rents or exercising any sort of effective possession in the estate. They then on May 15, 1938, appointed a new Manager Mr. Syed Zafar Ahsan who is petitioner No. 1 and who, it is said, began to make collection, the earliest rent receipt purporting to be issued by him being on a date May 27, 1938. The present proceedings started with a report by the Sub-Inspector of Police of P. S. Chatrapur, dated October 7, 1938, as to disputes regarding collection of rents and grazing fees in his *elaka* and a similar report dated October 24, 1938, from the Sub-Inspector of Police of P. S. Harihargunj. The Magistrate called for written statements from both parties on November 9, 1938. There was some formal amendment to the proceedings on November 21, 1938, and they were transferred for disposal on January 27, 1939, to Mr. P. C. Mazumdar, the Magistrate, who eventually disposed of the proceeding and passed the order now under revision.

The Magistrate has written a long and careful judgment and has dealt with the evidence of possession on both sides. The points taken in revision are that as between parties entitled to joint possession of property, s. 145 is not the appropriate procedure and the Magistrate erred in law in proceeding under that section. Secondly, it is said that when possession was delivered by the Civil Court, it was the duty of the Magistrate to uphold that possession. Other grounds arise out of the Magistrate's appreciation of the evidence in the case which, it is said, has been vitiated by certain errors.

As to the first point, the argument is not well-founded, although certain of the earlier decisions may seem to favour it,

it has been negatived by a Division Bench of this Court in *Nandkeshwar Prasad Sahi v. Sita Saran Sahi* (1). It was there held to be wrong to graft limitations upon the enactments which the Legislature has not placed there, that a case in which one party claims exclusive possession while another party claims to be in joint possession along with them is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area.

As to the next point, the argument does not seem to be sustainable in face of the decision of the Full Bench of the Calcutta High Court in *Agni Kumar Das v. Mantazaddin* (2) which has been followed in a series of decisions in this Court. The Magistrate has correctly appreciated the law which is that the Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a stale delivery of possession cannot be conclusive as to present possession. In this case it is found by the Magistrate that from March 12, 1937 onwards, it was the first party who exercised all the acts of possession in respect of the disputed property and indeed up till May 27, 1938, no overt act of possession appears to have been attempted to be done on behalf of the second party. It was in the circumstances open to the Magistrate to hold, as he has held, that there had been an ouster of the second party. I should add that in the decree which was passed in 1936 Babu Gopal Bux Roy was not the petitioners' judgment-debtor but was a co-plaintiff.

As regards the suggested errors in the reasoning by which the Magistrate has dealt with details of the evidence, it is objected that the Magistrate has referred to the fact that Gopal Bux Roy has got his name entered in Collectorate Register as 16-annas proprietor and has relied on this fact in support of the first party's possession. As the second party claimed possession not in the capacity of a pro-

prietor but of *Samukarraridar*, the entry in Register D had to be in the name of Gopal Bux Roy in any event and is consistent with the case of either party. The entry was not, therefore, a piece of evidence definitely supporting the case of the first party. Apart from this the criticisms advanced against the Magistrate's reasoning do not seem on examination to be well-founded. This is not an appeal on matters of fact and if it were it is by no means clear that the Magistrate's finding ought to be disturbed.

It is pointed out on behalf of the opposite party that whereas the order of the Magistrate was passed on March 30, 1939, this Court was not moved until August 28, 1939. It has been held in *Kelu Patra v. Iswar Parida* (3) that as a general practice the High Court will not entertain in the absence of most exceptional circumstances an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned.

For these reasons, the application fails and is dismissed. The Rule is discharged.

s. *Application dismissed.*

(3) 8 Pat. 468; 119 Ind. Cas. 401; A I R 1929 Pat. 404; 30 Cr. L J 1053; Ind. Rul. (1929) Pat. 577; 11 P LT 18.

OUDH CHIEF COURT

Special Bench

Civil Reference No. 3 of 1939

November 23, 1939

THOMBS, C. J., ZIA-UL HASAN AND

HAMILTON, JJ.

Pandit HAR NARAIN LAL—APPLICANT

versus

UDAN SINGH—OPPOSITE PARTY

Stamp Act (II of 1899), s. 2 (5) (b)—Scribe of pro-note signing it with words "money was paid in my presence"—Whether attests it—If makes document bond—Transfer of Property (Act IV of 1882), s. 3.

The mere fact that a person says that the money was paid in his presence does not mean that he becomes an attesting witness, and this cannot *per se* amount to "attestation."

Where therefore a scribe of a promissory note signs the pro-note by adding the words that "money was paid in my presence," it does not amount to attestation and the document does not thereby become a bond.

O. Ref. made by the Junior Secretary, Board of Revenue, Allahabad.

The Assistant Government Advocate, for the Crown.

(1) 13 P L T 609; 140 Ind. Cas. 909; A I R 1932 Pat. 366; (1932) Cr. Cas. 899; Ind. Rul. (1932) Pat. 35 (2); 34 Cr. L J 115; 12 Pat. 87.
(2) 56 C 290; 113 Ind. Cas. 181; 48 C L J 193; 32 C W N 1173; A I R 1928 Cal. 610; 30 Cr. L J 69 (F B).

Order.—This is a reference by the Board of Revenue under s. 57 of the Stamp Act.

Pandit Harnarain Lal brought a suit on the basis of a promissory note dated August 8, 1934, against *Udan Singh* and others. The document bears a revenue adhesive stamp of one anna. In the opinion of the Inspector of Stamps the document was a bond within the meaning of s. (2) (5) (b) of the Stamp Act chargeable with a duty of Re. 1 under Art. 15, Sch. I of the Stamp Act. The learned Civil Judge differed from the Inspector and held that the document was only a promissory note, and not a bond.

The scribe of the document is *Peare*, and he has signed the document in the following words:

"Baqalam Peare wald. Makhdoom Sheikh, Ratanpur Rupiya hamare robroo diya gaya, that is, by the pen of Peare, son of Makhdoom Sheikh of Ratanpur. The money was paid in my presence."

The contention of the learned Assistant Government Advocate is that the scribe plays the part of an attesting witness in regard to the fact of payment by adding the words that "the money was paid in my presence" and that witnessing to the fact of payment by the scribe amounts to attestation of the document.

The word "attestation" is not defined in the Stamp Act, but the word "attested" as inserted in s. 3 of the T. P. Act by the Amending Act (XVII of 1926), in relation to an instrument, means attested by two or more witnesses, each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

There can be no doubt that a scribe can become an attesting witness, but what is said to be an attestation in the present case is merely a statement in writing by the scribe that the money was paid in his presence. The mere fact that a person says that the money was paid in his presence does not mean that he becomes an attesting witness, and this cannot *per se*

amount to "attestation". We are therefore of opinion that the document in question cannot be treated as a bond.

We accordingly reject the reference. Let the papers be returned.

s.

Reference rejected.

NAGPUR HIGH COURT

Criminal Revision Application No. 166
of 1939

June 17, 1939

NIYOGI, J.

LAXMAN—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT

O. P. Protection of Debtors Act (IV of 1937), ss. 3, 4—"Molestation"—Creditor demanding payment of debt—Debtor becoming angry and bidding him go to Civil Court—Creditor losing temper beating debtor with shoe and leaving the place—Creditor, if can be punished under s. 4.

The terms of the definition of "molestation" given s. 3, O. P. Protection of Debtors Act, indicate that the obstruction or using violence or intimidation to constitute molestation should be accompanied by the intent to cause the debtor to abstain from doing what he has a right to do or to compel him to do what he has a right to abstain from doing. It is evident that the particular intent is a question of fact in every case. If the Court holds that the creditor's intention in obstructing, or using violence to, or intimidating, the debtor is to compel him to pay a debt which he has a right in certain circumstances to abstain from doing, the creditor's act would amount to molestation.

The creditor demanded payment of his debt, from his debtor whereupon the latter became angry and bade him go to Civil Court. The creditor lost his temper and beat the debtor with a shoe and left the place. The creditor was prosecuted for an offence punishable under s. 4 of the C. P. Protection of Debtors Act, 1937, for molesting the debtor for the recovery of a debt owed by him:

Held, that the circumstances in which the creditor used violence did not warrant any assumption that the creditor's intention was to compel him to pay the debt. But on the contrary its effect would presumably be to confirm the debtor's resolve not to pay. Here the creditor did not resort to violence as an instrument to compel the debtor to pay when he was not disposed to pay. It was only a manifestation of the pitch of his passion that was aroused by the debtor's remark that the creditor should look to Civil Court. But the creditor was indeed liable to be punished for assault under the I. P. O. Cr. Rev No. 358 of 1938 explained and distinguished.

Cr. R. App. of the order of the Court of the Additional Sessions Judge, Nagpur, dated January 24, 1939.

Mr. T. J. Kedar, for the Applicant.

Order.—This is an application to revise the order of the Additional Sessions Judge, Nagpur, in Criminal Revision No. 58 of

1938, decided on January 24, 1939. The case involves the question of construction of s. 3 of the O. P. Protection of Debtors Act, 1937.

The facts are that one Upashya was indebted to the accused Laxman. On January 13, 1938, the accused demanded payment of his debt, whereon Upashya became angry and bade him go to Civil Court. The accused lost his temper and beat Upashya with a shoe and left the place. The accused was prosecuted for an offence punishable under s. 4 of the O. P. Protection of Debtors Act, 1937, for molesting the debtor for the recovery of a debt owed by him. In a summary trial he was convicted of the offence and sentenced to pay a fine of Rs. 100.

The accused applied to the Additional Sessions Judge, Nagpur, for revising the order of conviction and sentence on the ground that his assault on the debtor did not constitute an offence punishable under s. 4 of the O. P. Protection of Debtors Act, 1937. The learned Additional Sessions Judge followed *Crown v. Mohamad Khan*, Criminal Revision No. 308 dated November 7, 1938, and held

"that the object of the intimidation was to make the complainant to pay a debt without forcing the accused to take proceedings against him in a Civil Court, that a threat which would prevent him from taking up a position which the law allows him falls within the mischief of molestation as defined in s. 3 of the O. P. Protection of Debtors Act; and that the Act does not permit a money-lender by threatening his client to deter the debtor from forcing his creditor to take action against him in a Court of law."

On this view he held that the assault on the debtor amounted to an offence of molestation as defined in s. 3 of that Act.

The situation in the case which came up before this Court in Criminal Revision No. 358 of 1938 was somewhat different. In that case the creditor threatened the debtor while he was going to his office on duty as an Assistant Foreman at the Power House. The threat was made in the vicinity of the place where he worked. The creditor was fined Rs. 100. The Additional Sessions Judge, Nagpur, referred the case under s. 438, Criminal P. O. for the opinion of the High Court as, in his opinion, no debtor could claim a right of not paying his creditor and that therefore the threat to induce the debtor to pay up his debt did not constitute molestation as defined in s. 3 of that Act. The reference was not accepted by this Court and the reason given was that the object of the intimidation was to make the debtor pay a debt without

forcing the accused to take proceedings against him in a Civil Court. It was conceded that a debtor could not claim a right that he would not pay his creditor but it was explained that the object of the threat was to prevent a case being brought in the Civil Court which would prevent the debtor from urging pleas in mitigation such as an exorbitant rate of interest and any other pleas which the law would allow him. The rule was propounded that a threat which would prevent a debtor from taking up a position which the law allows him falls within the mischief of molestation as defined in s. 3 of the O. P. Protection of Debtors Act. To understand the precise meaning of the foregoing expression I have made an analysis which shows that the learned Judge had envisaged the position as follows. The creditor wants to avoid going to Civil Court and the debtor wants to force him to go to it for recovering his debt. The law allows the debtor to force the creditor to go to Civil Court although the debtor has no right to abstain from paying off his debt if he is able to do so. When the creditor threatens the debtor with evil consequences to compel him to pay a debt without recourse to Civil Court, he thereby intends to cause the debtor to do an act which he has a right to abstain from doing.

The material words in s. 3 of the O. P. Protection of Debtors Act, 1937, are as follows :

"For the purposes of this Act, a person who, with intent to cause another person to abstain from doing or to do any act which he has a right to do or to abstain from doing,

(a) obstructs, or uses violence to, or intimidates, such other person shall be deemed to molest such other person."

The terms of the definition indicate that the obstruction or using violence or intimidation to constitute molestation should be accompanied by the intent to cause the debtor to abstain from doing what he has a right to do or to compel him to do what he has a right to abstain from doing. It is evident that the particular intent is a question of fact in every case. If the Court holds that the creditor's intention in obstructing, or using violence to, or intimidating, the debtor is to compel him to pay a debt which he has a right in certain circumstances to abstain from doing, the creditor's act would amount to molestation. In the present case, the circumstances in which the creditor used violence do not warrant any assumption that the creditor's intention was to compel

him to pay the debt. But on the contrary its effect would presumably be to confirm the debtor's resolve not to pay. The trial Magistrate says in para. 5 of his order :

"It has thus been proved that the accused did go to Upashya's house to dun him for recovery of debts, that as the complainant asked him with impunity to have a recourse to the Civil Court, the accused got annoyed and abusing the complainant hit him. It is thus clear that the accused molested the complainant as contemplated under s. 3, O. P. Protection of Debtors Act."

The finding of fact is that the creditor hit the debtor as a result of the annoyance caused to him by the debtor having asked him to go to Civil Court for recovering his debt. The violence done to the debtor was never regarded by the creditor as a means to compel him to pay his debt. I can well imagine a case where, in circumstances such as those proved in the present case, a creditor might use violence to his debtor and ask him to pay up his debt to avoid further violence. That would indeed be a case of clear molestation. But here the creditor did not resort to violence as an instrument to compel the debtor to pay when he was not disposed to pay. It was only a manifestation of the pitch of his passion that was aroused by the debtor's remark that the creditor should look to Civil Court. The violence was not intended to operate on the debtor's mind so as to induce him to pay but it was intended to be a punishment for his impertinence in asking the creditor to go to Civil Court.

The creditor was indeed liable to be punished for assault under the I. P. O. but I cannot persuade myself to concur in the view that his act amounted to an offence under s. 3 of the O. P. Protection of Debtors Act, 1937, in the particular circumstances of the present case. For the foregoing reasons, I set aside the conviction and sentence and direct that the applicant be acquitted. The fine, if recovered, will be refunded to the applicant.

It would be open to the complainant to prosecute the applicant for assault or causing hurt or insult, which are offences punishable under the I. P. O. if he so wishes to do.

D.

Revision allowed.

PATNA HIGH COURT

Appeal No. 630 of 1938

September 11, 1939

ROWLAND AND CHATTERJI JJ.
RAM RAN BIJAYA PRASAD SINGH—
DEFENDANT—APPELLANT

versus

ABDUL GHANI KHAN AND OTHERS—
PLAINTIFFS—RESPONDENTS

Custom—Right of burial—Custom to bury dead, when should be decided as existing.

A Court should not decide that a certain local custom exists unless it is satisfied of its reasonableness and its certainty as to extent and application. Where the trial Court finds that the customary right of burial exists over a portion of the disputed plot but is unable to ascertain the limits of that portion, the custom is not established as the extent of land over which the supposed customary right exists is uncertain. *Mohidin v. Shivlingappa* (1), explained.

A. from the appellate decree of the Sub-Judge, Arrah, dated July 6, 1938.

Messrs. S. M. Mullick and B. P. Sinha,
for the Appellant.

Messrs. Md. Hasan Jan and Syed Hasan,
for the Respondents.

Judgment.—This is an appeal by the defendant in a representative suit brought under O. I, r. 8, Civil P. O., by the plaintiffs on behalf of all the Muhammadans of Bhojpur Jadeed. The defendant-appellant is the proprietor of the village and the disputed plot bearing survey No. 1303 in *khata* No. 322 with an area of 7.56 acres stands in the Record of Rights entered as *parti kadim gair mazrua malik* with trees on it similarly entered. The claim of the plaintiffs was that the plot belonged to them as a Muhammadan graveyard and they prayed to recover exclusive possession of the entire plot by dispossessing the defendant. Alternatively the plaintiffs asked for a declaration of their right by custom or easement to bury their dead in this plot. The Munsif held that the survey entry was correct and the plaintiffs had no right either to the trees or the land; that a market or bazar had been held on the suit land from time immemorial; that there were a few graves, but that the plaintiffs had not adduced instances sufficient to establish any customary right of burying the dead. On these findings he dismissed the whole suit with costs. The Subordinate Judge who heard the appeal has stated the point for decision before him in these terms:

"Whether the plaintiffs have acquired any right by custom to bury the dead in the disputed plot No. 1303 or any portion thereof."

He does not directly state as a point for decision the claim of the plaintiffs to possess the entire plot as a graveyard to the exclusion of the proprietor's right to use it for other purposes; but in his judgment he does not accept the contention which was argued before him that the Record of Rights was incorrect and that the plot was *kabristan*. He agreed with the finding of the Munsif that the defendant was still using and from time immemorial had used a part of the suit land for holding a market. He accepted the evidence that there were *pucca* graves at three or four places in the disputed plot and that in the immediate vicinity of each of those *pucca* graves, burials had been made for many years past till now. He found that

"the user of a portion of the disputed plot by the Musalmans as a graveyard was ancient, exclusive and continuous and that with the owner's knowledge,"

and concluded that "the plaintiffs have acquired a customary right to bury the dead in a portion of the disputed plot," namely, the area "in and about the graves already existing and as near them as possible." As a result he has given them a declaration of that right. Against this decision the defendant has appealed and the plaintiffs have preferred a cross-objection.

The main points taken in the appeal of the defendant are that no such customary right can in law be acquired in land owned by another; that the facts found do not warrant in law a finding of the existence of such a custom, and that the judgment and decree are vague and incapable of execution for want of a finding as to the situation and dimensions of the portion of the disputed land over which the plaintiffs had established their rights. The lower Court's view that a customary right to bury the dead may exist appears to be supported by *Mohidin v. Shivlingappa* (1) but the correctness of that decision seems to be doubted by Mookerjee, J. in *Gopal Krishna v. Abdu Samad* (2). But it is not necessary here to decide whether as an abstract proposition of law such a customary right can be acquired in another's land; for assuming the law to be as stated in the Bombay decision we are of opinion that the appeal must succeed on the second of the grounds above stated. The learned Judges of the Bombay High

Court accepted it as a correct statement of the law that

"a Court should not decide that a local custom, such as that set up in this case, exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application."

Now in the present case on the Subordinate Judge's own finding the supposed custom seems lacking in certainty as to extent. All that he finds is that the customary right of burial exists over a portion of the disputed plot. He is unable to ascertain the limits of that portion. He arbitrarily defines the limits as being "in and about the graves already existing." But he loses sight of the fact that within a big plot of 7.56 acres these graves lie in scattered places and not in one continuous block. He proceeded to fix the limits relying on the case in *Mohidin v. Shivlingappa* (1). There, however, the finding of the Court below was that the right of burial existed "round about the *darga* in the land in dispute." It was on the basis of that finding that the High Court limited the right to "burying near the *darga*". This decision does not justify the course adopted by the learned Subordinate Judge in the present case. On the facts as found by him, the extent of land over which the supposed customary right exists is uncertain. That being so, the custom is not established.

It has also been argued before us that the alleged custom is unreasonable as the plaintiffs' own evidence shows that there are four or five other graveyards in the village and the plot claimed is of no less than $7\frac{1}{2}$ acres. Apparently this contention has some force, but it involves several questions of fact which were not raised in the Courts below. Firstly, we do not know the extent of the village. Secondly, we have no idea of the Muhammadan population of the village. Thirdly, the other graveyards may have been intended for the use of the people of adjoining villages also. In the absence of any finding on such question of fact, we cannot pronounce any opinion on the supposed unreasonableness of the custom.

However, the appeal succeeds on the other ground already dealt with. It may be observed that as regards the graves and *chabutras* actually existing, Mr. Mullick for the appellants conceded that his client is not entitled to interfere with these; but there was no case made out of his having attempted to do so and for any relief regarding them alone, the plaintiffs have

(1) 23 B 866; 1 Bom. L R 170.

(2) A I R 1921 Cal. 569; 66 Ind. Cas. 640; 34 O L J 319.

no cause of action. The decision of the Subordinate Judge is set aside and that of the Munsif restored. The cross-objection fails and is dismissed. In the circumstances parties will bear their own costs throughout.

S.

Appeal allowed.

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 81 of 1938.

May 3, 1939

ROBERTS, C. J. AND MACKENBY, J.

E. M. JOSEPH—APPELLANT

versus

OFFICIAL ASSIGNEE—RESPONDENT

Insolvency—One of beneficiaries of trust becoming insolvent—Trustee paying such money to him as would have been payable to him in ordinary course, instead of to Official Assignee—He should be directed to refund money to Official Assignee.

Where upon one of the beneficiaries of a fund becoming insolvent, the trustee instead of paying to the Official Assignee from time to time such moneys as would have been payable to the insolvent and other beneficiaries in the ordinary course in the case of the insolvent, to the Official Assignee, forms his own notions as to what the proper allowance might be and makes at the expense of the beneficiaries (including, himself) a series of payments of moneys which were in fact due and payable to the Official Assignee in insolvency, to the insolvent, the trustee should be directed to refund to the Official Assignee the money so paid. *In re Tyler, Ex parte the Official Receiver* (1), distinguished.

C. Misc. A. against the order of the High Court, dated August 18, 1935.

Mr. N. M. Cowasjee, for the Appellant.

Mr. E. C. V. Foucar, for the Respondent.

Roberts, C. J.—This is an appeal from an order of Shaw, J., whereby the trustee of a fund, one E. M. Joseph, the beneficiaries of which were the several sons of J. I. Joseph (deceased), including one A. P. Joseph who has since become insolvent, was directed to pay to the Official Assignee the sum of Rs. 3,097-6-9 or so much of it as might be payable by reason of the order of an Appellate Court which was presently considering an appeal from an order by the learned Insolvency Judge, and whose judgment is contained in the Civil Miscellaneous Application No. 13 of 1938. It appears that the trustee of this fund, instead of handing over from time to time such moneys as would have been payable to the insolvent and other beneficiaries in the ordinary course in the case of the insolvent to the Official Assignee, in forming his own notions as to what the proper allowance might be and in making, at the expense of the benefi-

ciaries (including, of course, himself) a series of payments of moneys which were in fact due and payable to the Official Assignee in insolvency, followed an entirely erroneous idea. The question whether the insolvent should have been permitted to receive the money for maintenance was before the High Court in two cases in July 1935 and in November of the same year, and both applications appear to have been rejected. Nevertheless, the trustee continued to make the payments (very small in amount, only Rs. 18 a week) for the maintenance of the insolvent, his wife and eight children, but nonetheless in clear contravention of the law. And having done so, the position now is that the Official Assignee has applied for this money to be refunded by the appellant and the learned Judge on the original side directed that that should be done but that the order to be drawn up should abide by the decision of the Appellate Court on the insolvency matter. So far as that decision is concerned, it is only necessary to say that the Bench dismissed the application for allowance and directed an allowance under s 75, sub-cl. (2), Rangoon Insolvency Act, of Rs. 50 a month subject to various conditions. It appears from the effect of the judgment that the insolvent was allowed not only Rs. 18 a week but the use of premises which resulted in a loss of Rs. 50 a month, which would otherwise have to be paid as rent to the trust estate. The insolvent's share of this loss would be Rs. 12-8-0. This we are told, has been calculated in the claim together with the Rs. 18 which has been formerly paid by the trustee to the insolvent instead of to the Official Assignee.

We have been referred by Mr. Cowasjee to the case in *In re Tyler Ex parte the Official Receiver* (1), from which it is clear that an officer of the Court who stands by whilst or who has constructive notice that payments are being made which need not be made by way of premiums in insurance during the pendency of a bankruptcy, cannot afterwards turn round, despite the fact that there will be no answer in law or equity to his claim, and refuse the repayment of those sums by him. The learned Judges in that case all stressed the fact that the Court could not allow one of its officers to make a claim which was founded upon the fact that they were taking undue advantage of one who had acted in ignorance of his right and permitted him to go

(1) (1907) 1-K B 865; 76 L J K B 541; 97 L T 30; 11 Manson 73, 51 S J 291; 23 T L R 323.

on doing so and afterwards turning round by means of what Vaughan Williams, L. J. described as a "shabby trick" to try to get some benefit to the creditors thereby.

This case is quite unlike that case. It is a case in which a trustee saw fit, out of motives of high-mindedness, benevolence and great charity, to indulge in the whim of practising those virtues not at his own expense but at the expense of others. That being so, the Official Assignee is clearly right in saying: "If you would be high-minded, benevolent and charitable, you must do so out of your own pocket and not out of the trust estate moneys." That being so, there is no doubt that the order made by the learned Judge on the original side was right and it must be confirmed with costs, Advocate's fee six gold mohurs.

Mackney, J.—I agree.

D. Order confirmed.

PATNA HIGH COURT

Full Bench

In the matter of Federal Court Appeals

Nos. 10, 14 and 17 of 1939

September 26, 1939

HARRIES, O. J., FAZL ALI AND

AGARWALA, J.J.

Babu LACHMESHWAR PRASAD

SHUKUL AND OTHERS—APPELLANTS

versus

Babu GIRDHARI LAL CHAUDHURI

AND OTHERS—RESPONDENTS

Federal Court Rules, O. IX, r. 1—High Court, if can, in Federal Court appeals, extend time fixed by O. XLV, r. 7, Civil Procedure Code, for depositing printing costs—Amendment of O. XLV, r. 7 in 1920—R. 9 of Privy Council Rules, if gives power to High Court to extend time fixed by O. XLV, r. 7, in Privy Council appeals—"Date of decree," meaning of—Limitation Act (IX of 1908), s. 4—Applicability to deposit of costs—General Clauses Act (X of 1897), s. 10—"Office," if includes office of Court—Deposit made on re-opening of Court after vacation, if within time.

Per Harries, O. J. and Fazl Ali, J., Agarwala, J., dissenting.—What O. IX, r. 1 of the Federal Court Rules means is that O. XLV, Civil P. O., as amended or modified by any Order in Council and in particular is modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, shall govern the procedure in Federal Court appeals. As O. XLV, r. 7, Civil P. O., has been modified by Order in Council of February 9, 1920, so as to give the Court power to extend time to make a deposit in Privy Council appeals, such power is also given to the Court in relation to Federal Court appeals by reason of O. IX, r. 1 of the Federal Court Rules. Rule 9 of Order in Council of February 9, 1920, only empowers the Court to extend time when the justice of the case requires it, and such power should be exercised with great caution and only where there are cogent reasons for doing so. In short, it is only where the justice of the case demands that the Court should extend time that such

extension should be given. The fact that the appellant who was a *karta* of the joint family had contracted small-pox which made him unable to deposit the money within period allowed by law is a cogent reason for extending the time. The High Court is not closed during the vacation, and the money can be deposited and, if tendered, will be accepted during vacation. Time, however, may be extended if failure to deposit printing costs is due to the honest impression on the part of the appellant that if the money is deposited on the opening day of the Court, it would be accepted as being within time as this is not an ordinary case of ignorance of the law, but to a large extent mistake committed due to the failure of the Court in making the position clear. [p. 357, col. 2; p. 354, col. 1; p. 359, col. 2.]

Per Agarwala, J.—Neither para. 9 nor any of the other paragraphs of the Order-in-Council of 1920, applies to appeals to the Federal Court and, consequently, the High Court has no power to extend the time prescribed by O. XLV of the Civil P. O., in the case of appeals to the Federal Court. [p. 362, col. 2.]

The phrase "date of the decree" in O. XLV, r. 7 (1), Civil P. O., means the date which the decree bears or the date upon which judgment was pronounced. The starting point of time therefore in O. XLV, r. 7, is the date which the decree bears and not the date when the decree was actually signed.

Obiter.—The meaning of O. XLV, r. 7 (1), Civil P. O., as it now stands, is plain. An extension of time may be granted for deposit of printing charges after the expiry of 90 days upon cause being shown, but such extension of time cannot exceed 60 days, and if this further period of 60 days has elapsed, the Court has no power under the rule as it stands to grant further time. The words are, mandatory and limit the discretion of the Court. If the period of 90 days from the date of the decree has expired, the Court can at most grant a further extension of 60 days. Once that period has elapsed, the Court has no power as the rule stands, to grant any further time. Rule 9 of the Privy Council Rules, however, allows the Court either to cancel the certificate or make such other order as the justice of the case demands. The words used in r. 9 are sufficiently wide to give the Court power to extend time for making deposits of printing costs in proper cases in appeals to His Majesty in Council beyond the limits fixed by O. XLV, r. 7, Civil P. O. 101 Ind. Cas. 555 (8), 177 Ind. Cas. 188 (9) and 181 Ind. Cas. 378 (10), relied on. [p. 356, cols. 1 & 2.]

[Case-law referred to.]

Per Agarwala, J.—An "application," in s. 4, Lim. Act means an application to the Court to take some step which the Court is empowered to take only on being requested to do so, such as execute a decree, set aside an execution sale, etc. When making a deposit of costs the appellant does not move the Court to do anything. Section 4, therefore, does not apply to deposit of costs. p. 362, col. 2.]

An act directed or allowed to be done or taken in an office is used in s. 10, General Clauses Act in contradistinction to an act directed or allowed to be done or taken in a Court, and "office" does not here include the office of a Court, for, the office of the Court is merely the hand with which the Court performs some of its functions. Hence, the fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which s. 10, General Clauses Act, applies. The High Court is closed for ordinary business during the

annual vacation. Printing costs deposited on the day the Court re-opens will, therefore, be within time under s. 10. 71 Ind. Cas. 426 (13), relied on, [p. 363, col. 1.]

Mr. T. N. Sahai (in No. 10), Mr. Nitai Chandra Ghosh (in No. 14) and Messrs. S. K. Mitra and P. Jha (in No. 17), for the Appellants.

Messrs. Hasan Jan and P. N. Gour (in No. 10), Mr. T. N. Sahai (in No. 14) and Messrs. B. C. De and A. K. Mitra (in No. 17), for the Respondents.

Harries, C. J.—These are three applications filed by the appellants in the three appeals praying that the amounts of printing costs in connection with these three appeals to the Federal Court be accepted and, if necessary, time for depositing the same be extended. The facts of the three cases differ materially and will be considered later. There was, however, considerable delay in all three cases in making the necessary deposits, and the first point which has to be determined is whether this Court can extend the time fixed by law for depositing these printing costs. If the Court has no such power, then it matters little what the facts of any particular case may be if the deposit has not been made within the period stipulated. The three applications first came before a Bench of this Court, and having regard to the general importance of the question that Bench referred the matter to a larger Bench. These applications accordingly have been heard by this Full Bench. A right of appeal to the Federal Court is given by s. 205, Government of India Act, 1935. That section is in these terms:

"(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

"(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, within the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

In all these cases certificates were given by this Court that the cases involved a substantial question of law as to the interpretation of the Government of India Act, and such is the sole ground of appeal in

each case. The Federal Court have drafted rules governing the procedure to be followed in appeals to that Court. Order IX of these rules makes O. XLV, Civil P. O., applicable to appeals to the Federal Court with certain modifications. Order IX is in these terms:

"1. Where a certificate has been given under s. 205 (1) of the Act, the provisions of O. XLV of the Code, as modified and adapted by the Govt. of India (Adaptation of Indian Laws) Order, 1937, shall apply in relation to appeals to the Federal Court

"2. Subject to the provisions of ss. 4 and 12, Lim. Act, 1908, applications under r. 2 of the said O. XLV, shall be presented within ninety days from the date of the signing of the decree or order appealed from."

The Govt. of India (Adaptation of Indian Laws) Order, 1937, adds a rule No. 17 to O. XLV, Civil P. O., and makes some other slight amendments to that order. This Rule No. 17 which is added to O. XLV, Civil P. O., is in these terms:

"Where a certificate has been given under s. 205 (1), Govt. of India Act, 1935, the provisions of this Order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this Order to His Majesty in Council and to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court:

Provided that

(a) R. 3 of this Order shall have effect as if at the end of sub-r. (1) thereof there were inserted the words 'apart from any question of law as to the interpretation of the Govt. of India Act, 1935, or any Order in Council made thereunder'; (b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Govt. of India Act, 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in r. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent."

The Govt. of India (Adaptation of Indian Laws) Order, 1937, makes only formal amendments to the wording of O. XLV, r. 7, Civil P. O. which deals with time for making deposits of printing costs. The material portion of that rule reads as follows:

"(1) Where the certificate is granted, the applicant shall, within ninety days or such further period not exceeding sixty days, as the Court may, upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date.... (b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit...."

The words "His Majesty in Council" must be read as Federal Court. In cases where the only ground of appeal taken is

that a question of law on the interpretation of the Govt. of India Act has been wrongly decided, the word "certificate" in relation to Federal Court appeals must mean the certificate granted under s. 205 (1), Govt. of India Act. In such cases no certificate such as that contemplated by O. XLV, r. 3, is necessary by reason of proviso (b) of r. 17 which has been added to O. XLV, Civil P. C. by the Govt. of India (Adaptation of Indian Laws) Order, 1937. It will be seen from the terms of O. XLV, r. 7 that printing costs in Privy Council appeals had to be deposited within 90 days of the date of the decree or within a further period of 60 days if so allowed by the Court or within six weeks from the date of the certificate whichever was the later date. In all three cases now before the Court, the money was tendered after the expiration of 150 days from the date of the decree and long after the expiration of six weeks from the date of certificate. It has been held repeatedly that "the date of the decree" in this rule means the date when judgment was actually pronounced, because that latter date is the date which the decree bears: see *Harendra Lal Roy v. Hari Dasi Debi* (1) following a decision of their Lordships of the Privy Council in *Owners of the Ship "Brenhilda" v. British India Steam Navigation Co.* (2).

It was contended by the applicants, however, that a different meaning should be given to the phrase "date of the decree" in this rule as applicable to Federal Court appeals. Order IX, r. 2 of the Federal Court Rules deals with applications to this Court in Federal Court matters under O. XLV, r. 2, that is applications similar to applications for leave to appeal to His Majesty in Council. In this Rule of the Federal Court Rules it is stated that such applications are to be made within 90 days from the date of the signing of the decree or order appealed from. It was therefore contended that the starting point from which time ran in such applications was the date when the decree was actually signed and not the date upon which the judgment was pronounced. There is a clear difference in the wording of O. XLV, r. 7 (1), Civil P. C. and O. IX, r. 2 of the Federal Court Rules. The words in O. XLV, r. 7, Civil P. C., are, however, clear and it is not open to this Court to place any other construction upon them than

that which has been placed by all the Courts in India in the past. The phrase "date of the decree" in O. XLV, r. 7 (1), Civil P. C. means the date which the decree bears or the date upon which judgment was pronounced. Whether the words "date of signing of the decree" appearing in O. IX, r. 2 of the Federal Court Rules mean something different from the date of the decree is a difficult question; but the point does not arise in this case, and it is therefore unnecessary for me to offer any opinion upon the question. It is sufficient to say that the starting point of time in O. XLV, r. 7, Civil P. C., is undoubtedly the date which the decree bears and not the date when the decree was actually signed. As I have previously stated, in all these cases no money was tendered for printing costs within 90 days of the date of the decree, and no application was made in any of the cases to extend the time after the expiration of the 90 days. In fact, more than 60 days had elapsed after the expiration of the period of 90 days from the date of the judgments before any of these applications were made. In these circumstances, has the Court any power further to extend the time for the deposit of such printing costs?

It was contended on behalf of the applicants that the words "within 90 days or such further period not exceeding 60 days as the Court may upon cause shown allow from the date of the decree complained of" are directory and not mandatory. It is said that normally the deposit should be made within such period but the discretion of the Court is not limited, and the period could be extended in proper cases. Order XLV, r. 7 (1), Civil P. C., was amended by Act XXVI of 1920. Previous to the amendment the deposit for printing costs had to be made within six months from the date of the decree or within six weeks from the date of the grant of certificate whichever was the later date. By the amending Act of 1920 the words "within 90 days or such further period not exceeding 60 days as the Court may upon cause shown allow" were substituted for the words "within six months." Their Lordships of the Privy Council in *Burjore v. Bhagana* (3) held that the words "within six months" were directory and not mandatory, and the Court could allow further time to deposit printing costs in exceptional cases where there were cogent reasons for so doing. It is

(1) 14 O W N 420; 5 Ind. Cas. 844.

(2) 7 O 547; 8 I A 159; 4 Sar. 236 (P O).

(3) 10 O 557; 11 I A 7; 4 Sar. 498; 8 Ind. Jur. 216 (P O).

argued that the amendment merely amounts to substituting words which are directory only for words which had been previously held to be only directory. In my view the meaning of O. XLV, r. 7 (1), Civil P. O., as it now stands, is plain. An extension of time may be granted for deposit of printing charges after the expiry of 90 days upon cause being shown, but such extension of time cannot exceed 60 days, and if this further period of 60 days has elapsed, the Court has no power under the rule as it stands to grant further time. The words are, in my view, mandatory and limit the discretion of the Court. If the period of 90 days from the date of the decree has expired, the Court can at most grant a further extension of 60 days. Once that period has elapsed, the Court has no power as the rule stands to grant any further time.

The matter, however, does not rest there as far as appeals to His Majesty in Council are concerned. On February 9, 1920, the date upon which the amendment of O. XLV, r. 7 (1), to which I have referred, took effect, His Majesty in Council issued an order rescinding previous rules, orders and regulations relating to appeals to His Majesty in Council and substituting for them other rules regulating the mode, form and time of such appeals. By the terms of this order in Council of February 9, 1920, all Courts in India are bound to observe the rules therein contained. Rule 9 of this order in Council of February 9, 1920, reads as follows :

"Where an appellant, having obtained a certificate for the admission of appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires."

In appeals to His Majesty in Council this rule empowers Courts in India to cancel certificates already given in certain cases. It is to be observed that no such power was given to the Courts under O. XLV, Civil P. O. This rule does not compel Courts to cancel certificates in case of failure to make deposits of printing costs. The words used are "may cancel" and not "shall cancel." In such cases if the Court does not cancel the certificate, it may make such other order, as, in the opinion of the

Court, the justice of the case requires. It was strongly urged on behalf of the applicants that this rule gives the Court in Privy Council matters a power in proper cases to extend time before making a deposit of printing costs beyond the limit fixed by O. XLV, r. 7 (1) and in my view this contention is well-founded. Rule 9 of the Privy Council Rules allows the Court either to cancel the certificate or make such other order as the justice of the case demands. It appears to me that the framers of this rule contemplated that the justice of the case might require a further extension of time, and that being so, the Court was expressly granted the power to grant such extension in spite of the mandatory words contained in O. XLV, r. 7, Civil P. O. The words used in r. 9 are sufficiently wide to give the Court power to extend time for making deposits of printing costs in proper cases beyond the limits fixed by O. XLV, r. 7, Civil P. O. It must be remembered that s. 112, Civil P. O., contemplates a possible conflict between the rules contained in the Code and the rules framed by His Majesty in Council. That section expressly enacts that

"nothing contained in the Code shall be deemed to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee."

In other words, if there is a conflict between the rules contained in the Code and the rules issued by His Majesty in Council, the latter will prevail. In my view therefore the Court has power in proper cases in appeals to His Majesty in Council to extend time for making deposits of printing costs beyond the limits fixed by the Code. There has been considerable conflict of judicial opinion upon this point. Benches of this Court in *Ramani Ranjan Bilas Upadhyaya v. Durga Dutt* (4) and *Kamala Kanta Singh v. Bindhumukhi Dassi* (5) have held that the Court has no power to extend time for the deposit of printing costs beyond the limits fixed by O. XLV, r. 7, Civil P. O. It would appear, however, that the Benches did not consider the effect of r. 9 of the Order-in-Council dated February 9, 1920, and dealt with the matter as if it was entirely governed by the provision of O. XLV, r. 7, Civil P. O. In *Govind Narain Singh v. Shamlal Singh* (6) Rankin, C. J.

(4) 9 P L T 305; 105 Ind. Cas. 585; A I R 1927 Pat. 330

(5) A I R 1929 Pat. 431; 123 Ind. Cas. 769; Ind. Rul. (1930) Pat. 369.

(6) 39 Q W N 651.

and Ghose, J. of the Calcutta High Court held that O. XLV, r. 7, Civil P. O., and r. 9 of the Privy Council Rules, 1920, did not give the Court power to extend time beyond the limits defined in O. XLV, r. 7, Civil P. O., and a similar view was expressed by the Lahore High Court in *Munna Lal v. Gajraj Singh* (7). On the other hand, the High Courts of Bombay, Madras and Allahabad have taken a different view. In *Nilkanth Balwant v. Sachidanand Vidya Narshimha* (8) a Full Bench held that the effect of r. 9 of the Order-in-Council, 1920, was to give power to the Court in proper cases to extend the time beyond the limits fixed by the Code. A similar view was expressed by a Madras Full Bench in *Mathukumalli Ramayya v. Vuppalapathi Lakshmayya* (9) and by a Full Bench of five Judges of the Allahabad High Court in *Bishnath Singh v. Court of Wards Estate of Sri Ram Chandra* (10). This latter case overruled the earlier Full Bench case in *Bahadur Lal v. Judges of the High Court, Allahabad* (11) in which it was held, Niamatullah, J., dissenting, that r. 9 of the Order-in-Council of 1920 gave the Court no discretion to extend time beyond the limits fixed by O. XLV, r. 7, Civil P. O. I respectfully agree with the views expressed by the learned Judges in the Bombay, Madras and Allahabad Full Bench cases, and I am of opinion that in Privy Council appeals this Court has power in proper cases to extend time for making deposit of printing costs beyond the limits fixed by O. XLV, r. 7, Civil P. O.

The next question to be determined is whether this power is given to the Courts in proceedings relating to appeals to the Federal Court. As I have stated previously, O. IX, r. 1 of the Federal Court Rules provides that

"the provisions of O. XLV of the Code, as modified and adapted by the Govt. of India (Adaptation of Indian Laws) Order, 1937, shall apply in relation to appeals to the Federal Court."

The word "Code" is defined in the Federal Court Rules in O. I, r. 2. The definition is as follows :

"In these rules, unless the context otherwise

(7) A I R 1935 Lah. 733; 159 Ind. Cas. 232; 8 R L 363.

(8) 51 B 430; 101 Ind. Cas. 555; A I R 1927 Bom. 217; 29 Bom. L R 352 (F B).

(9) I L R (1938) Mad. 1007; 177 Ind. Cas. 188; A I R 1938 Mad. 796; (1938) M W N 678; 48 L W 35; (1938) 2 M L J 128; 11 R M 276 (F B).

(10) A I R 1939 All. 299; 181 Ind. Cas. 378; I L R (1939) All. 549; (1939) A L J 278; 11 R A 580; 1939 O W N 366; 1939 O L R 291 (F B).

(11) 55 A 432; 143 Ind. Cas. 559; A I R 1933 All. 241; (1933) A L J 207; Ind. Rul. (1933) All. 290.

requires 'Code' means the Civil P. O., 1908, as amended or modified by any order in Council or by or under any Central Act."

Rule 9 of the Order-in-Council of February 9, 1920 does, in my view, modify O. XLV, r. 7, Civil P. O., because it empowers the Court in proper cases to grant further time to deposit printing costs, though such power is expressly confined within certain limits in O. XLV, r. 7. If O. XLV, r. 7, as modified by r. 9 of the Order-in-Council of February 9, 1920, is to apply to Federal Court appeals, then this Court has power in proper cases to extend the time for depositing printing costs in Federal Court appeals. It has been contended, however, that O. IX, r. 1 of the Federal Court Rules only contemplates one modification of O. XLV of the Code, that is the modification made by the Govt. of India (Adaptation of Indian Laws) Order, 1937, and that being so, it is urged that the context requires that the word "Code" appearing in O. IX, r. 1 of the Federal Court Rules should be read as the Civil P. O., 1908, and not as the Civil P. O., 1908 as amended or modified by any Order-in-Council. In short, it is urged that as one modification only is mentioned, all other modifications of the Code previously made by Orders-in-Council must be disregarded. If other modifications of the Code were contemplated by the framers of the Federal Court Rules, it is contended that it would have been sufficient to say in O. IX, r. 1 that "the provisions of O. XLV of the Code shall apply in relation to appeals to Federal Court" as by the definition of the word "Code" means the Civil P. O., 1908, as amended or modified by any Order-in-Council which would include the Govt. of India (Adaptation of Indian Laws) Order, 1937.

In my view the word "Code" in O. IX, r. 1 of the Federal Court Rules must be given the meaning given to that word in the definition contained in the Rules. There is nothing in the terms of O. IX, r. 1 of the Federal Court Rules which demands that the word "Code" should be given any meaning other than the meaning given in the definition. In my judgment what O. IX, r. 1 of the Federal Court Rules means is that O. XLV, Civil P. O. as amended or modified by any Order-in-Council and in particular as modified and adapted by the Govt. of India (Adaptation of Indian Laws) Order, 1937, shall govern the procedure in Federal Court appeals. As

O. XLV, r. 7, Civil P. O. has been modified by Order-in-Council of February 9, 1920, so as to give the Court power to extend time to make a deposit in Privy Council appeals, such power is also given to the Court in relation to Federal Court appeals by reason of O. IX, r. 1 of the Federal Court Rules. To hold otherwise would be to deprive an appellant to the Federal Court of a right which he undoubtedly has in connection with appeals to His Majesty in Council. It is to be observed that r. 9 of Order-in-Council of February 9, 1920, only empowers the Court to extend time when the justice of the case requires it, and it is clear that this power should only be exercised in exceptional cases. In *Burjore v. Bhagana* (3) a case on O. XLV, r. 7, Civil P. O., before the amendment of 1920, their Lordships of the Privy Council held that time should not be extended beyond six months unless there were cogent reasons for doing so, and this has been emphasized in the Full Bench cases of Bombay, Madras and Allahabad, to which I have referred. All the Courts which have held that a Court has power to extend the time to make a deposit in Privy Council appeals, have also held that such power should be exercised with great caution and only where there are cogent reasons for doing so. In short, it is only where the justice of the case demands that the Court should extend time that such extension should be given. It will be therefore necessary to consider the particular facts of each of these cases to see whether such cogent reasons exist which demand that the Court should exercise its discretion in favour of the appellants and extend time for making the deposit of printing costs.

Federal Court Appeal No. 10 of 1939.—The facts in the application in Federal Code Appeal No. 10 of 1939 can be shortly stated as follows:—This Court delivered judgment on December 19, 1938, and granted a certificate that the case involved a substantial question of law as to the interpretation of the Government of India Act. On March 13, 1939, the decree of the High Court was actually signed and on March 27, 1939, the appellants made an application to this Court under O. XLV, r. 2, Civil P. O. On April 12, 1939, notice was served upon the appellants by this Court of the amount of the deposit necessary for printing costs. The appellants did not deposit the money, and on July 31, 1939, the office placed the matter before a Bench for orders. On September 1, 1939, the

appellants filed an application in this Court intimating that he was then in a position to pay the money and that time for acceptance of the same should be extended, and this is the application now before the Court. The date of the decree and certificate is December 19, 1938, and the applicants should have deposited this sum within 90 days of December 19, 1938. The 90 days expired on March 28, and no application was made to the Court to extend the time. The further period of 60 days expired on May 27, and no application of any kind was made until September 1, and no explanation has been given for the delay beyond a vague statement that there was difficulty in obtaining the money. The amount involved was Rs. 253-3-0 and in my view, there are no cogent reasons in this case why the Court should exercise its discretion and extend the time. There has been great delay and in my view, the application to extend time for making the deposit should be rejected.

Federal Court Appeal No. 14 of 1939.—In this case judgment of the High Court was delivered on January 23, 1939, and a certificate given under s. 205 (1), Govt. of India Act, 1935. On March 13, 1939, the decree was signed and on April 21, 1939, the appellants filed a petition in this Court under O. XLV, r. 2, Civil P. O. On May 11, 1939, this appeal was consolidated with another appeal (Federal Court Appeal No. 13 of 1939) and an order was made apportioning the costs. On May 11, 1939, the office served an estimate of the printing costs upon the appellants and that estimate was for Rs. 93-3-0. On July 24, 1939, which was the opening day of the Court after the long vacation, this money was tendered but was refused by the Court as the tender was out of time. On July 25, 1939, the appellants filed this application praying for extension of time to deposit the money if such extension was necessary.

According to the appellants, appellant No. 1 contracted small-pox shortly after May 11, 1939, and was seriously ill for a considerable time. Appellant No. 2 who is the son of appellant No. 1 attained majority shortly before May 11, 1939, and it is said that he had to attend on his father and further that he was ignorant of matters connected with the limitation. Further it is said that after the attack of small-pox appellant No. 1 developed a scrotal tumour which incapacitated him for some time. For these reasons it is said that the appel-

lants were unable to come to Patna and instruct lawyers to make the deposit before July 24, 1939; more than 150 (one hundred and fifty) days elapsed from the date of the decree, but, in my view, there are cogent reasons in this case why time should be extended. The facts mentioned by the appellants have been verified by affidavit, and it is to be noted that these facts are not contradicted by the respondents. If appellant No. 1 who was the *karta* of the family was incapacitated by small-pox, then there was good reason why the money was not paid within the period allowed by law. There seems to be no reason to doubt that appellant No. 2 was too inexperienced to take any steps to make the deposit or to apply for an extension of time. For these reasons I would extend the time for making the deposit and direct that the money tendered on July 24, 1939, be accepted.

Federal Court Appeal No. 17 of 1939.—In this case the judgment of the High Court was delivered on January 17, 1939, and a certificate given under s. 205 (1), Govt. of India Act, 1935. The decree was signed on February 13, 1939, and on May 11, 1939, the appellants filed a petition under O. XLV, r. 2, Civil P. C. The High Court vacation was from May 12, 1939, to July 23, 1939. On May 29, 1939, notice of the amount of printing costs, namely Rs. 210, was served upon the appellants, and on July 24, 1939 (that is, on the opening day of the Court after the vacation) the money was tendered and accepted by the learned Registrar subject to any orders passed by a Bench of the Court. One hundred and fifty days expired on June 16, 1939, that is during the vacation, and it was urged on behalf of the appellants that as the Court was closed, they could not make a deposit until the opening day of the Court.

In my judgment this Court is not closed during the vacation, and the money can be deposited and, if tendered, will be accepted. It will be observed that the notice of the amount of printing costs was actually sent by the office on May 29, 1939, and that was during the vacation. It has been expressly decided in this Court in *Jai Kissen v. Baijnath Ram Marwari* (12) that a deposit for printing costs may be made when the Court is not sitting but when the office is open. I am satisfied, however, that there has been considerable misunderstanding as to what business the office of this

Court transacts during the vacation. In *Anand Ram v. Ramghulam Sahu* (13) the question arose as to whether appeals could be filed during the vacation, and certain correspondence is referred to in that report from which it is clear that the position with regard to this office during the vacation was far from clear. I am satisfied that there is considerable confusion even to-day, as no orders have been issued as to what the Court will or will not do during the vacation. The appellants in this case state that they were under the impression that if the money was deposited on the opening day of the Court, namely July 24, 1939, it would be accepted as being within time. Such has been the view of a large number of litigants, and they are not entirely to blame for such a view. The matter has not been made clear in the past, and that being so, I am quite prepared to believe that the appellants honestly believed that they could deposit this money on the opening day of the Court. This is not an ordinary case of ignorance of the law, and to a large extent, the mistake committed by the applicants was due to the failure of the Court in making the position clear. That being so, I am prepared to hold that there are cogent reasons in this case for extending the time for making a deposit, and accordingly I would direct the office to accept the deposit which was tendered on July 24, 1939.

For the reasons which I have given, I would therefore refuse to extend the time in *Federal Court Appeal No. 10 of 1939* and dismiss the application. I would, however, extend the time in *Federal Court Appeals Nos 14 and 17 of 1939* and direct the office to accept the money tendered. In all the circumstances, I would make no order as to costs of these applications.

Fazl Ali, J.—I agree.

Agarwala, J.—I agree to the order proposed. As, however, the reasons for my conclusion differ widely from those of my Lord the Chief Justice, I propose to state them in detail and to analyze the law bearing on the question at issue. The ordinary appellate jurisdiction of the Federal Court is described in s. 205, Govt. of India Act, 1935, and the Federal Legislature has been empowered to enlarge this jurisdiction by s. 206. Section 205 (1) gives a right of appeal to the Federal Court from

(12) 8 P L T 779; 103 Ind. Cas. 213; A I R 1927 Pat. 332.

(13) 2 Pat. 264; 71 Ind. Cas. 426; A I R 1923 Pat. 150; 3 P L T 820.

any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or any Order-in-Council made thereunder, and casts upon the High Court the duty to consider, in every case, whether or not such a question is involved, and of its own motion to give or withhold a certificate accordingly. Where a certificate is given, any party in the case may appeal to the Federal Court, (1) on the ground that any question as to the interpretation of the Govt. of India Act or of an Order-in-Council made thereunder has been wrongly decided; (2) on any ground on which that party could have appealed to His Majesty in Council if no such certificate has been given; and (3) with the leave of the Federal Court, on any other ground: [s. 205 (2).]

By the Govt. of India (Adaptation of Indian Laws) Order, 1937, s. 111-A has been added to the Code and by it ss. 109, 110 and 111 of the Code have been declared to apply to appeals to the Federal Court as they apply in relation to appeals to his Majesty in Council, provided that

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order-in-Council made thereunder, has been wrongly decided;

(b) in determining under cl. (c) of s. 109 whether the case is a fit one for appeal, and, under s. 110, whether the appeal involves a substantial question of law any question as to the interpretation of the said Act, or any Order-in-Council made thereunder shall be left out of account."

As to the procedure in appeals to the Federal Court, none of the provisions of the Civil P. O. apply to any proceedings in the Federal Court unless expressly incorporated in the Rules of the Federal Court (O. XI, r. 5). The procedure in the Federal Court in relation to appeals from that Court to His Majesty in Council is prescribed by O. XXXII of these Rules which applies the provisions of O. XLV of the Code, with certain modifications. So far as appeals from the High Courts to the Federal Court are concerned, O. IX, r. 1, provides:

"Where a certificate has been given under s. 205 (1) of the Act, the provisions of O. XLV of the Code, as modified and adopted by the Govt. of India (Adaptation of Indian Laws) Order, 1937, shall apply in relation to appeals to the Federal Court."

The only alteration in O. XLV of the Code effected by the Adaptation of Laws

Order, so far as appeals to the Federal Court are concerned, is the addition of r. 17 which is in these terms:

"17. Where a certificate has been given under s. 205 (1), Govt. of India Act, 1935, the provisions of this Order (i.e. O. XLV of the Code,) shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and reference in this Order to His Majesty in Council and to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court."

Provided that:

"(a) Rule 3 of this Order shall have effect as if at the end of sub-r. (1) thereof there were inserted the words apart from any question of law as to the interpretation of the Govt. of India Act, 1935, or any Order-in-Council made thereunder;

(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Govt. of India Act, 1935, or any Order-in-Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in r. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent."

Rule 2 of O. XLV of the Code provides:

"Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of."

Rule 3 (1) requires the petition to, (1) state the grounds of appeal, and (2) pray for a certificate either: (a) that as regards amount or value and nature, the case fulfils the requirements of s. 110, or (b) that it is otherwise a fit one for appeal to the Federal Court. Rule 3 (1) is to be read as if, at the end of it, there were inserted the words "apart from any question of law as to the interpretation of the Govt. of India Act, 1935, or any Order-in-Council made thereunder: "[Proviso (a) to r. 17].

And where such a question is the only one to be raised in the appeal, (i) it is not necessary to pray for the certificate referred to in r. 3 (1), and (ii) the appellant is not required to furnish security for the respondent's costs: [Proviso (b) to r. 17].

In cases in which the certificate mentioned in r. 3 (1) is required, and is refused, the petition for leave to appeal must be dismissed: [r. 6]. Where the certificate is granted, the applicant is required to (i) furnish security, and (ii) deposit the amount required for certain expenses: [r. 7 (1).]

The security must be furnished and the deposit made within: (a) 90 days (or such further period, not exceeding 60 days, as the Court may upon cause shown allow) from the date of the decree complained of, (b) or within 6 weeks from the date of the grant of the certificate, whichever is the later date: [r. 7 (1).]

A question has been raised whether "the date of the decree" referred to in r. 7 (1) is the date on which the decree is actually signed or the date which the decree bears. The decrees in these present cases being decrees of the High Court to which the Civil P. O. applies bear date the day on which the judgments were pronounced, as required by O. XX, r. 7 of the Code. It may be contended that if the Federal Court Rules had intended to provide that limitation should run from the date on which the decree was actually signed, they would have said so, as in O. IX, r. 2 which deals with limitation for an application under O. XLV, r. 2, and provides that the period shall run from the date of signing the decree or order appealed from. In the present cases this point is not of any importance because whether the period of limitation for making the deposits required by r. 7 (1) be reckoned from the date which the decrees bear or from the date on which they were signed, the deposits were beyond the period prescribed by that Rule. Nor are we concerned with the alternative period, *viz.* six weeks from the date of the certificate, as no certificate under r. 3 (1) was required or granted. Section 205 (1), Govt. of India Act, 1935, and O. XLV, r. 17, proviso (b) of the Code, introduced by the Adaptation of Laws Order, having made it quite clear that when the only ground of appeal is that a question of law as to the interpretation of the Act or any Order-in-Council made thereunder has been wrongly decided, the aggrieved party, in such a case, has an unrestricted right of appeal which is not dependent on the grant of a certificate under O. XLV, r. 3.

In all these three cases the only ground of appeal is that a question of law as to the interpretation of the Act has been wrongly decided, and in each case "the date of the decree" is March 13, 1938, which was the date on which judgment was delivered in each of the cases, although in the case of Appeal No. 10 the decree was actually signed on December 19, 1938, in the case of Appeal No. 14 on January 23, 1939, and in the case of Appeal No. 17 on January 17, 1939. In Appeal No. 10 the costs were not tendered until September 1, 1939; in No. 14 the deposit was tendered on July 24, 1939, but refused by the office; and in No. 17 the deposit was tendered on July 24, 1939, and accepted by the office subject to objection. In none of the cases, therefore, has the deposit been made within the 90 days prescribed by

r. 7 (1), or even before the expiry of the further 60 days which the Court might, upon cause shewn, have allowed. The Court's annual vacation was from 12th May to July 22, 1939, and the 23rd was Sunday. During the vacation a Bench of two Judges was sitting to deal with criminal work and other work of an urgent nature. Throughout the vacation the office was open.

Two questions arise for decision: (1) Is this Court empowered to extend the period of limitation beyond the 60 days mentioned in r. 7 (1) and (2)? In the circumstances of these cases should that power be exercised in favour of any of the present appellants? The view taken in this Court, so far as appeals to His Majesty in Council are concerned, is that this Court has no power to extend time beyond the period of 60 days prescribed by r. 7 (1). *Jai Kissen v. Baijnath Ram Marwari* (12), *Kamala Kanta Singh v. Bindhumukhi Dassi* (5). The same view was taken in *Ram Dhar v. Prag Narain* (14), *Munna Lal v. Gajraj Singh* (7), *Poornananthachi v. Gopalaswami Odayar* (15) and *J. N. Surty v. T. S. Chettyar Firm* (16). The contrary view was taken in *Nilkant Bulwant v. Sachidanand Vidya Narshimha* (8) and in later Full Bench decisions of the Allahabad and Madras High Courts, *Bishnath Singh v. Court of Wards Estate of Sri Ram Chandra* (10) and *Mathukumalli Ramayya v. Vuppalapathi Lakshmayya* (9). Prior to 1920 the period prescribed by O. XLV, r. 7, was six months. It was held by the High Courts that the Court had a discretion to extend this period. In 1920 the period was reduced to 90 days and the further period to which the Court might extend the time was expressly limited to 60 days. This Court and the Rangoon Court, and the Allahabad and Madras Courts in their earlier decisions, held in the cases referred to above, that it does not lie within the discretion of the Court to extend the time beyond 60 days. The Bombay High Court, and the High Courts of Allahabad and Madras in their later decisions, take the contrary view. This view is based on para. 9 of an Order-in-Council dated February 9, 1920, which is an Order "for regulating the mode, form and time of appeal to be made from

(14) 44 A 216; 65 Ind. Cas. 249; A I R 1922 All. 43; 20 A L J 13.

(15) 55 M 835; 138 Ind. Cas. 663; A I R 1932 Mad. 484; 62 M L J 685; (1932) M W N 557; 35 I W 679; Ind. Rul. (1932) Mad. 601.

(16) 4 R 265; 98 Ind. Cas. 417; A I R 1927 Rang. 20; 5 Bur. L J 187.

the decisions of any Court of Judicature in India" to His Majesty in Council. It has been held that para. 9 of this Order confers upon the High Courts a discretion to extend the time prescribed by O. XLV, r. 7 (1), Civil P. O. for the furnishing of security or deposit of costs in appeals to the Privy Council.

It is now contended that para. 9 also enables the High Courts to extend the time prescribed by O. XLV, for the furnishing of security or deposit of costs in appeals to the Federal Court. This contention is founded on O. IX, r. 1, of the Rules of the Federal Court and the definition of "Code" in O. I, r. 2 of those Rules. "Code" is there defined as "the Civil P. O., 1904, as amended or modified by any Order-in-Council or by or under any Central Act," unless the context otherwise requires. Order IX, r. 1 of the Rules of the Federal Court applies to civil appeals to that Court the provisions of "O. XLV of the Code as modified and adapted by the Govt. of India (Adaptation of Indian Laws) Order, 1937." It is argued that the word "Code" in this rule must be read in the sense assigned to it in O. I, r. 2 and that when so read it includes para. 9 of the Order-in-Council dated February 9, 1920. The answer to that argument is that the Adaptation of Laws Order of 1937 is also an Order-in-Council and if all Orders-in-Council were intended to be included in the word "Code" in O. IX, r. 1, the words "as modified and adapted by the Govt. of India (Adaptation of Indian Laws) Order, 1937" in that rule are redundant. I am supported in my conclusion that the word "Code" in O. IX, r. 1, is not used in the wider sense in which it is defined in O. I, r. 2, by the following consideration. If para. 9 of the Order-in-Council of 1920 applies to appeals to the Federal Court, then the whole of that Order applies. Now para. 1 of that Order-in-Council provides:

"Applications to the Court for leave to appeal to His Majesty in Council shall be made within 90 days of the decree or order to be appealed from, subject to ss. 4, 5 and 12, Lim. Act."

This must be compared with O. IX, r. 2 of the Rules of the Federal Court:

"Subject to the provisions of ss. 4 and 12, Lim. Act, 1908, applications under r. 2 of the said O. XLV, shall be presented within 90 days from the date of the signing of the decree or order appealed from."

If the Order-in-Council of 1920 applies to appeals to the Federal Court it was entirely unnecessary to state in O. IX, r. 2, that ss. 4 and 12, Lim. Act, apply to applications to prefer such appeals, for these

sections would apply by reason of para. 1 of the Order-in-Council. Furthermore, while the Order-in-Council expressly applies s. 5, Lim. Act, to appeals to His Majesty in Council, O. IX, r. 2 of the Rules of the Federal Court deliberately omits any reference to that section and also prescribes that the period of limitation shall be "90 days from the date of the signing of the decree or order appealed from" and not, as provided in the Order-in-Council, "90 days of the decree or order to be appealed from" which, by reason of O. XX, r. 7 of the Code, means 90 days from the date on which the judgment was pronounced. I would therefore hold that neither para. 9, nor any of the other paragraphs of the Order-in-Council of 1920 applies to appeals to the Federal Court and, consequently, that this Court has no power to extend the time prescribed by O. XLV of the Code in the case of appeals to the Federal Court.

It remains to consider the question whether, apart altogether from judicial discretion, a litigant has a right to an extension of the prescribed time. In this connection s. 4, Lim. Act, 1908, and s. 10, General Clauses Act, 1897, require consideration. Section 4, Lim. Act, 1908, provides:

"4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

The furnishing of security or the depositing of costs is not, in my view, an "application", which means, as I understand the word in this section an application to the Court to take some step which the Court is empowered to take only on being requested to do so, such as execute a decree, set aside an execution sale, etc. When making a deposit of costs the appellant does not move the Court to do anything. Furthermore, it is noticeable that although the Rules of the Federal Court provide that s. 4, Lim. Act, shall apply to the period of 90 days prescribed for an application under O. XLV, r. 2 [see Rules of the Federal Court, O. IX, r. 2] they make no such provision with respect to the action to be taken under r. 7 (1). Section 148 of the Code does not apply because the periods of 90 and 60 days in O. XLVII, r. 7, are fixed by the Code and not by the Court. The relevant portions of s. 10, General Clauses Act, 1897, are as follows:

"10 (1). Where by any Central Act...made after the commencement of this Act, any act...is directed or allowed to be done or taken in any Court or office...within a prescribed period then, if the Court or office is closed...on...the last day of the

prescribed period, the act shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

Provided that nothing in this section shall apply to any act...to which the Lim. Act, 1877 (now the Act of 1908), applies.

(2) This section applies to all Central Acts..... made on or after January 14, 1887."

As s. 4, Lim. Act, does not, in my view, apply to a deposit of costs, there is nothing in the Lim. Act which applies to the making of such a deposit, and the matter is governed by s. 10, General Clauses Act.

The next question is whether the appellants are entitled to an extension of time under this section. First, with regard to the expression "Court or office." Here, I think, an act directed or allowed to be done or taken in an office is used in this section in contradistinction to an act directed or allowed to be done or taken in a Court, and that "office" does not here include the office of a Court, for, when a litigant is required to do a particular act to further his suit or appeal, it is really in Court that he is required to do it although for the sake of conveyance and to save the time of Judges, it is in fact done in the office of the Court. The office of the Court is merely the hand with which the Court performs some of its functions. If this be so, the fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which s. 10, General Clauses Act, applies.

It has been pointed out that in Appeals Nos. 14 and 17 the office of the Court served estimates of costs on the appellants during the vacation and it was suggested that this indicates that the Court was not closed within the meaning of s. 10. As I have stated above, two Judges sit during the vacation to deal with criminal work and other urgent work. They do not necessarily sit every day of the vacation. Usually there is so much criminal work for them to do that no other work is dealt with unless it is really of an urgent nature. In practice, the only civil work which is ordinarily entertained in the vacation consists of applications for stay of execution or sale, and it cannot be overlooked that it is not only those Judges who are not on vacation duty who avail themselves of the vacation but also the majority of Advocates, who are officers of the Court. In these circumstances it seems to me that the Court is closed for ordinary business during the annual vacation. This conclusion is in accordance with

the decision of the Taxing Judge of this Court in *Anand Ram v. Ramghulam Sahu* (13). The facts of that case were as follows: A memorandum of appeal properly stamped in accordance with the then current Court Fees Act was presented to the Assistant Registrar on August 18, 1922, during the vacation. On that date the Registrar, who is the officer whom this Court has appointed to receive memoranda of appeal was not in Patna. An amendment of the Court Fees Act which enhanced the fees payable on memoranda of appeal came into operation on August 24. The Court re-opened, after the vacation, on October 23. The question for decision was whether the presentation to the Assistant Registrar before the amendment was a valid presentation or not. In the course of his judgment, the Taxing Judge observed:

"There are ample authorities to shew that a memorandum of appeal presented during the vacation to the proper officer appointed in that behalf will be a valid presentation although it is open to the appellant to present a memorandum of appeal on the first day of the opening of the Court under the law of limitation if the time fixed for the filing of the same expires during the vacation. This is for the benefit of the litigants. But there is nothing to prevent the presentation of a plaint or memorandum of appeal or during a vacation or even on a Sunday, provided it is presented to a proper officer."

This case decided (1) that although presentation to a proper officer on a *dies non* is a valid presentation, (2) a presentation on the re-opening day is a presentation within time even when the prescribed period of limitation has expired. This latter proposition proceeds on the view that the Court is "closed," within the meaning of s. 4, Lim. Act, during the vacation, although the vacation Judges attend Court for urgent judicial business. In another case, *Jai Kissen v. Baijnath Ram Marwari* (12), a Division Bench held that where the Court is not sitting but the office is open, the time for a deposit of the printing costs of a Privy Council appeal cannot be deemed to expire on the next day when the Court actually sits. The learned Judges refer neither to the decision in *Anand Ram v. Ramghulam Sahu* (13), nor to s. 10, General Clauses Act. Their decision is apparently based on a distinction between the Court and the office of the Court, a distinction, which I have already indicated above, should, in my view, be held not to exist.

In this view of the matter I would hold that in Appeal No. 14 the deposit was tendered in time and was wrongly refused by the office; and that in Appeal No. 17 the

deposit was made in time. In each of these appeals the deposit should be accepted. With regard to Appeal No. 10, I would hold that as no deposit was made within the prescribed period, it cannot be accepted as the Court has no power to extend the time beyond the 60 days, which have elapsed.

s. *Answer accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT

Civil Revision Application No. 7 of 1936

September 16, 1938

DAVIS, J. C. AND TYABJI, J.

RAMCHAND KIMATRAI AND OTHERS—

APPLICANTS

versus

UDHALMAL DWARKADAS AND OTHERS—

OPPONENTS

Court Fees Act (VII of 1870), s. 12 (ii)—Decree signed and sealed but Court ordering plaintiff to pay deficit court-fee—Plaintiff getting benefit under decree—Revision from such order—High Court can take action under s. 12 (ii) before passing final orders.

Where the plaintiff is ordered to pay the deficit court-fee after the judgment is signed and sealed, the Judge would be acting without jurisdiction, in that after giving judgment, his power to order the deficit court-fee to be paid is gone. But although the plaintiff may have a genuine grievance that he had not the opportunity of being heard and that the Court was *functus officio*, if he gets benefits from the decree, it is but reasonable that he should pay court-fee upon the benefits so received. Consequently the High Court, in revision from such an order, can before passing final orders, take action under s. 12 (ii), Court Fees Act, 137 Ind. Cas. 855 (1) and 53 Ind. Cas. 435 (3), explained. [p. 365, col. 1.]

O.R. App. from the order of the Joint Sub-Judge, Shikarpur, dated November 7, 1935.

Mr. Sughanlal Hassanand, for the Applicants.

Mr. K. H. Nagrani, for the Opponents.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, J. C.—This is a revision application against the order of the Joint Sub-Judge of Shikarpur, dated November 7, 1935, in which after a compromise decree had been signed and sealed by the Court on October 14, 1935, the Judge ordered deficit court-fee upon Rs. 11,000 to be paid. The applicant in this revision application who is the plaintiff, is aggrieved and says that the Subordinate Judge was *functus officio* when he passed this order as to the payment of court-fee and while his learned Advocate asks us in revision to set aside the order of the Subordinate Judge, he at the same time says

that we have no power under s. 12 (ii), Court Fees Act, to remedy the mistake to the detriment of the revenue in the payment of the court-fee which the record before us may show. Now so far as the order of November 7 is concerned, it does appear that this order was made without jurisdiction. The compromise decree was signed and sealed on October 14. Therefore, so far as the Court's power was concerned, that decree, except so far as it is provided by the Civil P. O. that a judgment can be altered or be reviewed, was final, so far as the Court which passed it is concerned. In *Kedar Nath v. Maharaja Chandra Mauleshwar Prasad Singh* (1), at p. 535, the Court held that where judgment is pronounced and signed and sealed the decree must follow and the Court cannot even direct the preparation of the decree to be stayed until the payment of the deficit court-fee. But that case is not entirely in point. In the case before us the Judge did not order the decree to be postponed till the payment of the deficit court-fee because the decree was signed and sealed before the order of payment was made. It is not therefore necessary for us to decide whether it is not even competent to a Court before a decree has been signed and sealed but after judgment has been pronounced and signed, to order the drawing up of the decree to be postponed, until a deficit court-fee has been paid. But once the decree has been signed and sealed, it appears to us that the Judge of that Court cannot order deficit court-fee to be paid. In the Patna case the learned Judge said :

"After the judgment has been pronounced and it has been signed and sealed, no power is left in the Court to alter it or add to it or subtract anything from it; and the judgment having been pronounced, a decree must be prepared in accordance with it. Section 28, Court Fees Act, in our opinion, does not empower the Court to call upon the parties to pay the deficit court-fee after judgment has been pronounced. It only provides for validating certain acts which would be invalid if a certain document was not properly stamped. We are fortified in the view we take by a Full Bench decision of our own Court in *Radhika Raman v. Janki Kuer* (2), where it was held that when the High Court dismisses an appeal for whatever cause, it ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of court-fees payable in the lower Court and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him. The same view was taken in the Calcutta High Court in *Jatra Mohan*

(1) 11 Pat 532 at p. 535; 137 Ind. Cas. 855; A I R 1933 Pat. 228; 13 P L T 504; Ind. Rul. (1933) Pat. 159.

(2) A I R 1919 Pat. 9; 51 Ind. Cas. 756; 4 Pat. L J 472 (F B).

Sen v. Secretary of State (3)."

The Calcutta case to which this judgment refers, *Jatra Mohan Sen v. Secretary of State* (3), was a case where the suit was dismissed and the plaintiff was ordered to pay the deficit court-fee after the judgment was delivered and the Court accepted. without much argument the contention that the Judge acted without jurisdiction, in that after giving judgment, his powers to order the deficit court-fee to be paid, had gone. But we do not think that either of the decisions prevent us before we have passed final orders in revision application either allowing or dismissing it, from taking action under s. 12 (ii), Court Fees Act. We are not concerned with sub-s. (i) to s. 12, Court Fees Act, because that relates to the Courts first accepting a plaint or a memorandum of appeal and has no reference to the alteration of a court-fee by another Court in appeal. Section 12 (i) is as follows :

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum as the case may be, is filed and such decision shall be final as between the parties to the suit."

Sub-section (ii) of s. 12 relates to cases such as this, where the order in a suit has come before a Court of reference or revision as the order in this suit is before us in revision and if then we consider, as we do, that the question as to court-fee has been wrongly decided to the detriment of the revenue, by the lower Court, we consider we have power to require the party by whom such fee has been paid to pay such additional fee as would be payable were the question rightly decided. Section 12 (ii) is as follows :

"But whenever any such suit comes before a Court of Appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of s. 10, para. 11, shall apply."

The learned Advocate for the applicant says that there has been in fact no decision by the trial Court so as to give this Court jurisdiction under s. 12 (ii), because no specific issue as to the court-fee to be paid was raised and decided in the lower Court. It is clear, however, that when a plaint is admitted, by necessary implication, there is a decision that the right court-fee has been paid and in fact in this case the applicant as plaintiff was ordered to pay an additional

tional court-fee on Rs. 2,000 based on his claim as a creditor against the partnership firm. The statement in the memorandum of appeal that the plaintiff only asked for declaration that he was a creditor is incorrect, and of course such a prayer could not stand alone and must be followed by a prayer for some consequential relief, that for instance, an order be passed that the sum found due to him should be paid to him.

A reference to the plaint would show this prayer in fact was not made. The plaintiff sued as legal representative of his father, one Seth Shivaldas, who was a partner with Seth Dwarkadas in a firm, for the settlement of partnership accounts. He also alleged that he was separate from his father and he advanced money by law of loan to the partnership business and he asked for a declaration that he was such a creditor and for a prayer that he should be paid from the partnership assets the money he had lent to the partnership firm. His claim was settled by compromise and it is in relation to this compromise that this question of court-fee has been raised because under the terms of the compromise he was to get 11 survey numbers. He was also to get the balance due under a decree in Suit No. 84 of 1927 and apparently on these two items the Judge has placed the value Rs. 7,000 and Rs. 4,000, respectively. He complains that these values were placed upon these items without his knowledge and without his being heard and after the Court was *functus officio*. It appears also that in the settlement of the partnership accounts, the applicant was awarded a sum of Rs. 542. On the ground that he had not the opportunity of being heard and on the ground that the Court was *functus officio*, the applicant may have a genuine grievance, but it appears to us not unreasonable that as the applicant has got the benefit of this compromise decree he should pay the court-fee upon the benefits so received. He has already paid court-fee on Rs. 2,000 as his share on settlement of partnership accounts. This share was settled at only Rs. 542. The balance of the court-fee so paid can therefore be taken into account in his favour when the court-fee payable by him on the other part of his claim as creditor of the partnership valued by the Judge at Rs. 11,000 is settled. He has also paid court-fee on the declaration which, however, he has obtained.

We do not think we should now pass any final order allowing or rejecting this

revision application, for if we did, our action might be open to the same objection as in this case is raised, that having allowed or dismissed the revision application we are *functus officio* and can make no order under sub-s. (ii) to s. 12. That such an argument under the circumstances would be a good argument, we think a matter of some doubt. But we think it better not to make any final order rejecting or allowing the revision application, that is to say, setting aside or refusing to set aside the order of the Judge passed without jurisdiction until proper court-fee has been paid in the suit out of which this revision application arises. The Judge in the trial Court should therefore give notice to the applicant and inquire into and decide as to what proper court-fee is payable and report to us. We shall then decide what proper court-fee is payable, and when this has been paid, we shall then pass final orders on this revision application. The Judge should report as to the court-fee payable within two months. Order accordingly.

D.

Order accordingly.

BOMBAY HIGH COURT

Second Appeals Nos. 685 and 686 of 1937

April 5, 1939

LOKUR, J.

SURAT BOROUGH MUNICIPALITY—

DEFENDANT—APPELLANT

versus

SARIFA KARUNNISSA AND OTHERS—

PLAINTIFFS—RESPONDENTS

Bombay Municipal Boroughs Act (XVIII of 1925), ss. 104, 105, 203—S. 105, if prescribes limitation—Powers of Municipality acting under ss. 104 and 105, whether governed by Limitation Act (IX of 1908)—Remedy of Municipality by suit under s. 203 time-barred—If can exercise powers under s. 105—Limitation Act (IX of 1908), s. 28—Act bars remedy only by way of suit—Right exists and can be enforced by other remedy—S. 28, if affects right to movable property.

Once a bill is presented with "the least practicable delay" as required by s. 104, sub-a. (1) of the Bombay Municipal Boroughs Act, the right to issue a notice of demand and then to recover the amount by a distress warrant under s. 105 accrues to the Municipality, and that right is not lost by lapse of time. Section 105 does not prescribe any period of limitation, nor does it say, like s. 104, that the distress warrant should be issued with the least practicable delay. The periods of limitation prescribed for filing a suit under the Lim. Act govern the procedure in a Court of law, and the powers of the municipality acting under the provisions of ss. 104 and 105 are not governed by the Lim. Act. The fact that the remedy of the municipality to recover the amount by filing a suit in a

Civil Court under s. 203 is time-barred cannot prevent it from exercising the special powers conferred upon it by the Bombay Municipal Boroughs Act. [p. 367, col. 2.]

The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription under s. 28, Lim. Act. It is only the remedy by way of a suit that is barred, but the right itself continues to exist; and if there is some other remedy by which that right can be enforced, the Lim. Act cannot come in the way. Thus, where the recovery of a debt is barred by lapse of time, the right to the debt is not extinguished, and if the debtor, without being aware of the bar of time pays up, he cannot sue the creditor to refund the money to him on the ground that his claim for recovery of the debt had become time-barred. 145 Ind. Cas 893 (1), relied on. [p. 368, col. 1.]

Section 28, Lim. Act extinguishes only the right to immovable property if the claim to it is not enforced within the period of limitation, but it does not affect the right to movable property.

S. As. from an order of the District Judge Surat, in Appeal No. 78 of 1936.

Mr. N. N. Majmudar, for the Appellant.

Judgment.—These two second appeals arise out of two companion suits, one filed by the wife and the other by the husband, for a refund of the amounts of Municipal taxes said to have been unlawfully recovered by the Surat Borough Municipality under warrants of distress, and paid by them under protest. In appeal No. 685 of 1937 the respondent was sent a bill for Rs. 105-5-8 on August 6, 1934, including Rs. 101-9-8, as arrears from the year 1923. In appeal No. 686 of 1937 the respondent was sent a bill for Rs. 160-14-0 on the same day, including Rs. 150-6-0, for arrears from the year 1924. Both the respondents made applications to the Municipality protesting against the bills, and as distress warrants were issued against them, they paid the amounts under protest, and filed these suits to recover the amounts which were in excess of the amounts due for six years prior to the bills, on the ground that arrears more than six years old were time-barred, and that the Municipality had no right to recover them by distress warrants. The trial Court held that in the case of the house-tax, which was a charge on the house, the period of limitation was twelve years, and in the case of other taxes the period of limitation was only six years. It further held that those amounts of the taxes, for the recovery of which the claim of the Municipality was time-barred, could not be recovered by distress warrants, and gave the plaintiffs in the two suits decrees on that basis. In the suit

in appeal No. 686 of 1937, the Municipality was ordered to refund a sum of Rs. 63-12-0 to the plaintiff, while in the suit in appeal No. 685 of 1937, the Municipality was ordered to refund a sum of Rs. 31-11-8 to the plaintiff. Both the decrees were confirmed in appeal by the learned District Judge, and the Municipality has presented these two appeals.

The only question to be decided in these appeals is, whether the Municipality had no power to recover the amounts of taxes, which were time-barred under the Lim. Act, by issuing distress warrants under s. 105, Bombay Municipal Boroughs Act, 1925. It is true that a part of the claim of the Municipality would have been time-barred if the Municipality wanted to file a suit to recover it in a Civil Court. But the Municipality is given special powers under s. 105 to recover its dues by issuing distress warrants. Section 104, sub-s. (1) of the Act provides that when any amount, which by or under any provisions of the Act, is declared to be recoverable under Chap. VIII, or is claimable as an amount or instalment on account of any other tax, becomes due, then the Chief Officer shall, with the least practicable delay, cause to be presented to any person liable for the payment thereof, a bill for the sum claimed as due. Sub-s. (2) of s. 104 prescribes the contents of the bill; and sub-s. (3) provides that if the sum for which any bill has been presented, as aforesaid is not paid at the municipal office, or to a person authorized by any rule in that behalf to receive such payments, within fifteen days from the presentation thereof, the Chief Officer may cause to be served upon the person to whom such a bill has been presented, a notice of demand. Section 105, sub-s. (1) of the Act empowers the Municipality to recover the amount by distress and sale of the movable property or the attachment and sale of the immovable property of the defaulter on whom a notice of demand has been served and who does not, within fifteen days from the receipt of such notice, either pay the amount demanded in the notice, or show cause to the satisfaction of the Chief Officer why he should not pay the same. Section 105 does not in any way limit the power of the Chief Officer to recover the amounts of the taxes in respect of which bills and notices of demand have been issued under s. 104, except that before issuing a warrant, he should consult the President.

Both the lower Courts seem to think that as s. 203 of the Act enables the Municipa-

lity to file a suit to recover such taxes, and as such suits are governed by the provisions of the Lim. Act, it must be presumed that even the remedy by way of distress warrants under s. 105 is similarly limited. There is no justification for such a view. Section 203 only provides an alternative procedure for the recovery of taxes, as is clear from the marginal note. The section itself says that in lieu of any process of recovery allowed by or under the Act, or in case of failure to realise by such process, the whole or any part of any amount recoverable by the Municipality, it shall be lawful for the Municipality to sue in any Court of competent jurisdiction the person liable to pay the same. The reason for providing this alternative remedy is obvious. No distress warrant can be issued under s. 105 of the Act unless a bill and a notice of demand are served under s. 104. Sub-s. (1) of s. 104 requires that the bill should be presented to the person concerned with the least practicable delay after the amount has become due. If for any reason such bill is not presented, the Chief Officer cannot present a bill after a long delay and pursue the remedies provided by ss. 104 and 105 of the Act. In such cases it will be necessary for the Municipality to have recourse to the alternative remedy of filing a suit in a Civil Court as provided by s. 203. Once a bill is presented with "the least practicable delay" as required by s. 104, sub-s. (1), of the Act, the right to issue a notice of demand and then to recover the amount by a distress warrant under s. 105 accrues to the Municipality, and that right is not lost by lapse of time. Section 105 does not prescribe any period of limitation, nor does it say, like s. 104, that the distress warrant should be issued with the least practicable delay. The periods of limitation prescribed for filing a suit under the Lim. Act govern the procedure in a Court of law, and the powers of the Municipality acting under the provisions of ss. 104 and 105 are not governed by the Lim. Act. The fact that the remedy of the Municipality to recover the amount by filing a suit in a Civil Court is time-barred cannot prevent it from exercising the special powers conferred upon it by the Bombay Municipal Boroughs Act, 1925.

The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription under s. 28, Lim. Act. It is only the remedy by

way of a suit that is barred, but the right itself continues to exist; and if there is some other remedy by which that right can be enforced, the Lim. Act cannot come in the way. Thus, where the recovery of a debt is barred by lapse of time, the right to the debt is not extinguished, and if the debtor, without being aware of the bar of time pays up, he cannot sue the creditor to refund the money to him on the ground that his claim for recovery of the debt had become time-barred: *Shiam Lal Diwan v. Official Liquidators, U. P. Oil Mills Co., Ltd.* (1), at p. 951. On the same principle, although a party has lost his right to file a suit to enforce a stale claim, still his right continues to exist; and if he happens to be a defendant, he can rely upon that right unless it is extinguished by s. 28, Lim. Act. This principle is fully discussed in *Gopal Bhaurao v. Shree Jagannath Pandit* (2). Section 28, Lim. Act, however, extinguishes only the right to immovable property if the claim to it is not enforced within the period of limitation, but it does not affect the right to movable property. It is therefore clear that, as the defendant Municipality issued the bills in time with the least practicable delay and the recovery was postponed by reason of the applications made by the plaintiffs themselves from time to time, the right of the Municipality to recover the amounts of the bills by distress warrants under s. 105, Bombay Municipal Boroughs Act, 1929, is not lost or time-barred. The amounts recovered were really due from the plaintiffs, and, as they have been recovered by the Municipality, the plaintiffs have no right to claim a refund of those amounts. For these reasons I allow the appeals and dismiss both the suits. The respondents in the two appeals shall pay the costs of the appellant throughout and bear their own.

s. Appeals allowed.

(1) 55 A 912 at p. 151; 145 Ind. Cas. 893; A I R 1933 All. 789; (1933) A L J 1203; 6 R A 124 (F B).
(2) 59 B 502; 159 Ind. Cas. 213; A I R 1935 Bom. 326; 37 Bom. L R 471; 8 R B 175.

CALCUTTA HIGH COURT

Appeal No. 19 of 1939

July 18, 1939

DEBAYSHIRB, O. J. AND NASIM ALI, J.
DIGAMBAR PONDÁ AND ANOTHER

—APPELLANTS

versus

SATISH CHANDRA DAS—

RESPONDENT

Bengal Tenancy Act (VIII of 1885), s. 26-G—
Order in proceedings under, appealability.

The Ben. Ten. Act, nowhere provides for an appeal against an order in a proceeding under s. 26-G though there are provisions in other sections of the Act where an appeal has been provided for against other orders. Such an order is not also appealable under s. 96, Civil P. O., because the decree contemplated by s. 96 of the Code is a decree made in a suit. A proceeding under s. 26-G is started by an application and not by a plaint, and consequently the order under s. 26-G cannot be said to be an order in a suit.

A. from appellate order of the District Judge, Midnapore, dated December 17, 1938.

Messrs. Gopendra Nath Das and Sambhu Nath Banerjee, for the Appellants.

Messrs. Rama Prosad Mukherji, Saroja Kumar Maity and Kali Pada Sinha, for the Respondent.

Nasim Ali, J.—This is an appeal against an order of the District Judge of Midnapore, dated December 17, 1938, confirming the order of the Subordinate Judge, Second Court of Midnapore, dated December 3, 1938, in a proceeding under s. 26-G, Ben. Ten. Act. The learned District Judge has dismissed the appeal on the ground that no appeal against the order of the Subordinate Judge lay to him. The question for determination in this appeal therefore is whether an appeal to the lower Appellate Court from the order of the Subordinate Judge was competent. Section 26-G (6) is in these terms:

"An application under sub-s. (5) shall be accompanied by a process-fee of the prescribed amount for service of notice on the mortgagee; and the Court or Revenue Officer to whom such an application is made, may, after service of such notice, award to the mortgagor such compensation as appears equitable in respect of the period during which the mortgagee retained possession after the date on which the mortgagor became entitled to be restored to possession and may pass an order restoring the possession of the land mortgaged to the mortgagor and such order shall have the effect of a decree of a Civil Court."

The contention of Mr. Das, on behalf of the appellants, is that the order of the Subordinate Judge is appealable, as sub-s. (6) of s. 26-G definitely states that the order shall have the effect of a decree of a Civil Court. The Ben. Ten. Act, however, nowhere provides for an appeal against an order in a proceeding under s. 26-G though we find provisions in other sections of the Act where an appeal has been provided for against other orders. Mr. Das contended that the order of the Subordinate Judge being a decree of a Civil Court was appealable under s. 96, Civil P. O. The decree contemplated by s. 96 of the Code, however, is a decree made in a suit. A proceeding under s. 26-G

is started by an application and not by a plaint, and consequently the order under s. 26-G cannot be said to be an order in a suit. The order complained against therefore was not appealable before the District Judge. The learned District Judge was therefore right in dismissing the appeal. The appeal is accordingly dismissed with costs, the hearing-fee being assessed at two gold mohurs.

Derbyshire, C. J.—I agree.

D. Appeal dismissed.

ODH CHIEF COURT

First Civil Appeal No. 94 of 1936

October 5, 1939

ZIA-UL HASAN AND RADHA KRISHNA, JJ.
DURGA DAS AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

Musammât HANIFA BEGAM AND OTHERS—
DEFENDANTS—RESPONDENTS

Muhammâdan Law—Dower—Claim for—Nature of—Simple money decree in dower suit—Subsequent bona fide transfer of property by heirs—If affected by decree—Such transfer during pendency of appeal—S. 52, Transfer of Property Act (IV of 1882), if applies.

A Muhammadan woman's claim for dower is a simple money claim. A decree for dower obtained by the widow of a Muhammadan against the other heirs even though it may be realisable from the assets of the deceased does not create a charge against those assets unless the decree specifically creates such a charge. [p. 310, col. 2.]

Where therefore subsequent to the passing of a simple money decree in a dower suit but pending appeal the heirs of the deceased Muhammadan mortgage the property of the deceased in their hands, bona fide for value, the mortgage is not affected by such a decree and the decree not having created a charge on the property s. 52, T. P. Act has no application 130 Ind. Cas. 113 (1) and 95 Ind. Cas. 367 (2), relied on, 28 Ind. Cas. 191 (4), distinguished, *Syud Basahat Hussain v. Dooli Unand* (3), referred to.

F. O. A. against the order of the Civil Judge of Lucknow, dated April 30, 1936.

Mr. Raj Kumar Srivastava, for the Appellants.

Messrs. Mohammad Wasim and Shah Mohammad Hussain Usmani, for the Respondent.

Judgment.—This is a plaintiffs' first appeal arising out of a suit brought by them in the Court of the Civil Judge, Lucknow, for a declaration that the property in suit is liable to be attached and sold in execution of their decree and that the defendants have no right or title to the property.

The property consists of a two-thirds

share in a *kothi* situated in China Bazar, Lucknow. This *kothi* and some other property was owned by one Hamid Ali Khan, a Shia Muhammadan, who died in September 1918 leaving as his heirs his widow, Kaniz Sughra Begam, his sister Musammât Salimunnissa and his brother Nawab Ali Khan. A dower debt of Rs. 25,000 was due to Kaniz Sughra Begam and as a childless Shia widow, she was entitled to a one-fourth share in the movables and in the materials of the houses left by her husband. She sold both her dower debt and her one-fourth share in the inheritance of her husband to the plaintiffs and some others. The transferees filed two suits against Nawab Ali Khan and Musammât Salimunnissa, one in respect of the dower debt purchased by them, and the other for partition of the one-fourth share of Kaniz Sughra Begam in the property of Hamid Ali Khan. The suit for dower was decreed on May 24, 1922, and though Nawab Ali Khan appealed against the decree, the appeal was dismissed by the Allahabad High Court on May 12, 1926 (Ex. 3). The suit for partition was dismissed by the trial Court but it was eventually decreed by the High Court and the final decree for partition was passed on January 29, 1931 (Ex. 4). On March 5, 1925, Nawab Ali Khan mortgaged a two-thirds share in the site of the *kothi* in question and a moiety share in the materials to one Nawab Saiyid Ali Khan for Rs. 8,000 (Ex. 9). Nawab Saiyid Ali Khan sued on his mortgage and obtained a preliminary decree on August 7, 1929. The decree was made absolute on March 8, 1930, and on August 6, 1930, Saiyid Ali Khan sold this decree to Chaudhri Mohammad Jamil, who is now represented by the defendants-respondents. Chaudhri Mohammad Jamil put the decree purchased by him in execution and purchased the property himself. Subsequently the plaintiffs-appellants attached the property in suit in execution of their dower decree. The defendants objected under O. XXI, r. 58, Civil P. O. and their objections were allowed. Thereupon the plaintiffs brought the suit which has given rise to this appeal mainly on the grounds that Saiyid Ali Khan and Chaudhri Mohammad Jamil took the transfers with full knowledge of the plaintiffs' claim and the decrees made in their favour and that the transfer made by Nawab Ali Khan in favour of Nawab Saiyid Ali Khan was with the intention of defrauding his creditors particularly the plaintiffs.

The suit was contested by the defendants, the heirs of Chaudhri Mohammad Jamil, and on the defence put up by them, the following issues were framed by the learned Civil Judge.

1. Are the transfers in favour of Nawab Saiyid Ali Khan and Chaudhri Mohammad Jamil invalid having been made during the pendency of the partition and dower suits?

2. Was the transfer made by Nawab Ali Khan made with intent to defraud the plaintiffs or their transferees' claim?

3. Are the defendants or their predecessors-in-interest transferees in good faith and for consideration?

4. Does the order dated May 18, 1935, operate as *res judicata* between the parties?

5. To what relief are the plaintiffs entitled?

Issue No. 1 was decided by the learned Civil Judge in the negative holding that the doctrine of *lis pendens* did not apply to the case. The objection on which Issue No. 2 was framed was not pressed before the trial Court so no finding was recorded on that issue. The learned Civil Judge did not also consider it necessary to decide Issue No. 3 as the plaintiffs had given up their plea of the transfer having been made with intent to defraud them. Issue No. 4 was framed on the defendants' plea that if the property in suit be held to have been subject to a charge in favour of the plaintiffs, the order of May 18, 1935, on the defendants' objections under O. XXI, r. 58, Civil P. O. operated as *res judicata* between the parties; but as the learned trial Judge held that there was no charge over the property, the question involved in the issue did not arise. As a result of the findings arrived at, the plaintiffs' suit was dismissed.

The point that was mostly stressed before us on behalf of the plaintiffs was that the mortgage made by Nawab Ali Khan during the pendency of the plaintiffs' suit was invalid under s. 52 of the T. P. Act. It was, however, conceded that so far as the plaintiffs' suit for partition was concerned, the transfer cannot be impeached by them as it does not affect the decree obtained by them in that suit by reason of property other than the one in dispute now being allotted to them by the decree in the partition suit. The learned Counsel, however, strenuously argued that there was a charge over the property so far as Kaniz Sughra Begam's dower was concerned. We have heard the learned Counsel at

length on this point but regret that we are unable to accept his contention. It is, we think, well established that a decree for dower obtained by the widow of a Muhammadan against the other heirs even though it may be realizable from the assets of the deceased does not create a charge against those assets. In *Abdul Rahman Khan v. Inayat Bibi* (7 O. W. N. 1181) (1) it was held by a Bench of this Court that a Muhammadan woman's claim for dower is a simple money claim and though the decree may be executed against the husband's property, it cannot be charged against any specific portion thereof. Similarly in *Mohammad Haibur Rahman v. Saiyid Qasim Husain* (95 Ind. Cas. 367) (2) a Bench of the Patna High Court also held that dower ranks as an ordinary unsecured debt and does not create any charge on the property of the husband and that the fact that a money decree has been obtained for it makes no difference.

Mulla in his Principles of Muhammadan Law (11th edition para. 223, p. 223 says:—

"The dower ranks as a debt, and the widow is entitled along with other creditors of her deceased husband, to have it satisfied on his death out of his estate...She is not entitled to any charge on her husband's property though such a charge may be created by agreement".

and further—

"There is no doubt that it is within the competence of a Court to create a charge by its decree for a dower debt so that if such a charge is created and the decree has not been appealed against and has become final, effect will be given to the charge. But though it is not beyond the power of a Court to pass a decree creating a charge, it will not ordinarily do so. The proper decree to make is a simple money decree and no charge is created merely because the decree directs execution by sale of properties mentioned."

In para. 32 (p. 28) the same author says:—

"If the share transferred by an heir is a share in immovable property forming part of the estate of the deceased and the transfer is made during the pendency of a suit by the widow of the deceased for her dower in which a decree is passed creating a charge on the estate for the dower debt, the transferee will take the share of the heir subject to the charge, but if the widow's decree is a simple money decree, the transferee will not be affected."

In the present case the decree obtained by the plaintiffs in the dower suit was a simple money decree creating no charge against any property left by Hamid Ali Khan. The mortgage in favour of Nawab Saiyid Ali Khan cannot therefore be affected by the decree obtained by the plaintiffs in the dower suit.

(1) 7 O W N 1181; 130 Ind. Cas. 113; A I R 1931 Oudh 63; Ind. Rul. (1931) Oudh 129.

(2) 95 Ind. Cas. 367; (1926) Pat. 178; A I R 1926 Pat. 404; 7 P L T 664.

It was contended on behalf of the appellants that the Court below was wrong in not giving a finding on Issue No. 3, namely, whether or not the defendants or their predecessor-in-interest were transferees in good faith and for consideration. We may say that the issue as it stood could very well have been decided in favour of the defendants on the materials on the record as there was nothing to show that the mortgage in question was not in good faith or was not for consideration; but the learned Counsel argued that the evidence on the record showed that at the time of taking the mortgage Nawab Saiyid Ali Khan was fully aware of the plaintiffs having obtained a decree in their suit for dower and that because of this notice, the mortgage must be held to be invalid. The learned Counsel has not, however, been able to satisfy us under what provision of the law it can be held that merely because Saiyid Ali Khan had knowledge of the decree passed in the plaintiffs' favour, the mortgage taken by him was invalid. We have already held that the decree in the dower suit created no charge against any property so that s. 52, T. P. Act has no application and as the plea based on s. 53, T. P. Act was not pressed, we are unable to find how the question of the transferees' knowledge comes in. The plaintiffs' own plaint in the suit for partition shows that the property left by Hamid Ali Khan, movable and immovable, was of the value of about Rs. 90,000 and if in the circumstances Saiyid Ali Khan took a mortgage of a very small portion of the property for Rs. 3,000 with knowledge of the decree in favour of the plaintiffs, the fact cannot go against the *bona fides* of the transaction. In para. 32 (1) of Mulla's Muhammadan Law it is said

"Any heir may, even before distribution of the estate, transfer his own share and pass a good title to a *bona fide* transferee for value notwithstanding any debts that might be due from the deceased."

We have already said that the mortgage made by Nawab Ali Khan was a *bona fide* transaction for value. It cannot therefore be affected by the dower debt due to Kaniz Sughra Begam remaining unpaid. In *Syud Bazahat Hassain v. Dooli Chand* (L. R. 5 I. A. 211) (3) relied on by the learned Counsel for the appellants himself, it was held by their Lordships of the Privy Council that a creditor of a deceased Muhammadan whether in respect of dower

or otherwise cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by his heir-at-law, whether by sale or mortgage. No doubt it was further held by their Lordships that such an alienee is bound by any decree charging the estate passed in a suit against the heir, pending at the date of alienation but in the present case the decree obtained by the plaintiff did not create any charge against any property.

The case of *Mirza Mohammad Sharafut Baha ur v. Shahzadi Wahida Sultan Begam* (19 O. W. N. 502) (4) was also relied on in support of the contention that where the widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she can seek to recover her dower by way of an administration suit; but the suit brought by the plaintiffs was a simple suit for recovery of the dower debt and not an administration suit.

Next it was argued that as the execution of the decree for dower was stayed by their Lordships of the Allahabad High Court pending decision of the partition suit, it must be deemed that both the suits were consolidated and those consolidated suits constituted, as it were, an administration suit. We are unable to accept this argument also. We quote the passage from the judgment of the High Court (Ex. 2) on which this argument is based.

"The last point is whether the plaintiffs are entitled to sue for the whole of the dower debt or whether one-fourth should not be deducted. It is admitted that the transferees, i. e. the plaintiffs are in no better position than the widow herself, but no authority has been shown for the proposition that a widow insuring for her dower debt must make a deduction proportionate to the share of her inheritance in her deceased husband's estate. The widow's dower debt ranks with any other debt and must be paid before the balance of the estate can be divided between the heirs. If *Mst. Kaniz Sughra* gets her whole dower debt in this suit, then she will, of course, obtain less in her capacity as an heir.

There is another appeal pending between the same parties, namely, first appeal No. 465 of 1922 in which Lala Durga Das and others as transferees of the rights of *Mst. Kaniz Sughra* are claiming her share in the property left by Hamid Ali Khan. Any sum decreed on account of the dower debt of *Mst. Kaniz Sughra* will have to be adjusted when fixing the amount of the share due to her in the other suit, but there seems to be no justification for reducing the amount of dower claimed for *Mst. Kaniz Sughra* in the present case."

The above quotation clearly shows that execution of the dower decree was stayed

(3) 5 I A 211; 4 O 402; 3 Sar. 853; 3 Ind. Jur. 121 (P O).

(4) 19 O W N 502; 28 Ind. Cas. 191; 21 O L J 319; A I R 1915 Cal. 655.

by the High Court as it was contended on behalf of the appellant in that case that *Mst. Kaniz Sughra* was also liable for a portion of the dower debt and as the High Court thought that this point could be taken into account by the trial Court while fixing the amount of her share in the partition suit, execution of the decree for dower was stayed. The High Court did not, in our opinion, mean either to consolidate the two suits or to hold that the suits taken together should be deemed to constitute an administration suit. Had this been the intention, they would not have upheld the trial Court's decree for recovery of Rs. 25,000 in the dower suit.

Lastly it was contended that as the property which was mortgaged by Nawab Ali Khan and which was purchased in auction by Chaudhri Muhammad Jamil consisted of a two-thirds share in the site of the *kothi* in question and a moiety share only in its materials, their suit should have been decreed in respect of the remaining one-sixth of the materials (plaintiffs having attached a two-thirds share both in the site and in the materials). It appears, however, that though in the first instance only a half share of the materials was sold in execution of the mortgage decree, yet the remaining one-sixth share was subsequently sold and purchased by Chaudhri Muhammad Jamil in satisfaction of his decree on account of the fact that by the partition decree Nawab Ali Khan got a two-thirds share in the materials also. The sale certificate in respect of this share was produced by the defendants in the trial Court but was taken back on account of a mistake on the part of the defendant's Pleader in the Court below. We have allowed it to be filed again in this Court. It thus appears that Chaudhri Muhammad Jamil purchased the entire two-thirds share of Nawab Ali Khan in the materials of the *kothi* also. Moreover, this point was never raised by the plaintiffs in the trial Court.

The result is that the appeal fails entirely and is dismissed with costs.

a.

Appeal dismissed.

NAGPUR HIGH COURT

Civil Revision No. 485 of 1938

September 5, 1939

GRUBE, J.

In re Mst. FATMABI—APPLICANT

Revision—Court-fees, decision on, adverse to applicant—Revision, if maintainable—Succession Act (XXXIX of 1925), ss. 379 (1) (3)—Application for succession certificate—Deposit of amount equal to fee payable under Court Fees Act—Application allowed on condition of furnishing security—Condition not fulfilled—Amount held should be refunded.

Orders about court-fees adverse to an applicant can be the subject of revision, and the same principle would apply where it is found that any clear provision of law has been disregarded.

The applicant applied for a succession certificate and under s. 379 (1) of the Succession Act, deposited Rs. 370 equal to the fee payable under the Court Fees Act. The application was allowed subject to the applicant's furnishing security. This she was unable to do, and papers were ordered to be filed. She then applied for refund of the deposit of Rs. 370 :

Held, that the first condition of s. 379 (3), that the sum should be received under sub-s. (1) was fulfilled and therefore the refund should be granted. *Sankara Ayyar v. Nainar Mooppanar* (1), not followed.

App. for revision of the order of the Court of the Subordinate Judge, First Class, Saugor, dated June 16, 1938, in Succession Certificate Case No. 2 of 1937.

Mr. W. B. Pendharkar, for the Applicant.

Order.—The applicant applied for a succession certificate, and under s. 379 (1) of the Indian Succession Act, deposited Rs. 370 equal to the fee payable under the Court Fees Act. The application was allowed subject to the applicant's furnishing security. This she was unable to do, and papers were ordered to be filed. She then applied for refund of the deposit of Rs. 370. The lower Court relying on *Sankara Ayyar v. Nainar Mooppanar* (1) has found that she is not entitled to refund.

It has been held in this Court that orders about court-fees adverse to an applicant can be the subject of revision, and I think the same principle would apply here if it is found that any clear provision of law has been disregarded. Section 379 (3) seems to me to be perfectly clear in laying down two conditions on the fulfilment of which such a deposit shall be refunded. These are that the sum should be received under sub-s. (1), and secondly, that it should not be expended under sub-s. (2). The first condition is clearly fulfilled, and sub-s. (2) itself says that the expending shall be in the purchase of stamp. There has been no such expending in this case. *Sankara Ayyar v. Nainar Mooppanar* (1)

which dealt with the corresponding section of the old Act is a very short judgment. It simply says that if the order for the grant of a certificate has been made, the sum in deposit becomes at once legally appropriated as duty. The sub-section prescribing refund is not discussed, and there is further distinction in that there the order seems to have been a final one whereas here it is conditional on security being furnished. I hold that the money had to be refunded, and direct that this be done now. No order for costs of this application.

D.

*Revision allowed.***ODDH CHIEF COURT**

Second Civil Appeal No. 329 of 1937

November 24, 1939

HAMILTON, J.

BACHAN LAL—DEFENDANT—APPELLANT
*versus***GOBARDHAN AND OTHERS—PLAINTIFFS****AND OTHERS—DEFENDANTS—RESPONDENTS***Presumption—Part of share in village sold—Presumption that corresponding share of vendor's house is also sold, if arises.*

When a part of a share in a village is sold, no presumption arises that similar share of the house of the vendor standing on the share is also sold, though such presumption arises when the whole share is sold and nothing is reserved. 93 Ind. Cas. 287 (1) and 104 Ind. Cas. 155 (2), explained.

S. C. A. against the decree of the Additional Civil Judge of Unao, dated May 13, 1937.

Mr. Hyder Husain, for the Appellant.

Mr. M. Wasim, for Respondents Nos. 1 to 3.

Judgment.—This is a second appeal by a defendant against whom a decree was passed and whose appeal was dismissed by the Additional Civil Judge.

The facts as far as they affect this appeal are that one Badlu owned 32 pies in village Narharpur. In 1866 he sold a 16 pies share, that is to say, half of what he owned, to the plaintiffs but distinctly stated that he reserved his residential house. He made other sales of part of his share in which he did not mention the house, but eventually in 1891 he sold a 2 pies share which was all that he had left, to the plaintiffs and in this deed he expressly declared that he was selling the entire residential house. The defendants urged that as in deeds in their favour there was no express mention of the house being

excluded as had been done in the deed of 1886, they were entitled to a share in the house. This view found favour in the Courts below, but the suit was nevertheless dismissed on the ground that the plaintiff had possession over the whole house. The learned Additional Civil Judge refers to *Balram Singh v. Ganga Singh* (13 O. L. J. 432) (1) and *Krishna Kumari Devi v. Rajendra Bahadur Singh Deo* (6 O. W. N. 1150) (2) as supporting his view that when there is no mention in a deed that the sale of a share does not include the sale of a house standing on that share it must be held that the house goes with the share. These authorities hold good in a case where a complete share has been sold and nothing is reserved and, therefore it is presumed that a house standing on this share is also sold. The same presumption does not arise when the whole share is not sold but only a part of it because when only a part of a share is sold, much is reserved; as for instance the balance of the share which is not sold. I know of no authority to the effect that when a person buys part of another person's share in a village the presumption is that he buys a corresponding share in the house of his vendor in the village. I am not, therefore, prepared to hold that because, when a whole share is sold it is presumed that a house on it is sold, one should also hold that when part of a share is sold a similar share in a house in the share must be sold. This being so, there is no force in this appeal which is dismissed with costs.

S.

Appeal dismissed.

(1) 13 O L J 432; 93 Ind. Cas. 287; A I R 1936 Oudh 358.

(2) 6 O W N 1150; 104 Ind. Cas. 155; 2 Luck 43; 13 O L J 846; A I R 1927 Oudh 240.

PATNA HIGH COURT

Appeal No. 302 of 1937

February 13, 1939

JAMES AND ROWLAND, J.J.

Musammal DULHIN AND OTHERS—**APPELLANTS***versus***HARIHAR GIR AND OTHERS—JUDGMENT—****DEBTORS AND OTHERS—RESPONDENTS.**

Civil Procedure Code (Act V of 1908), s. 48—Art. 182, Limitation Act (IX of 1908), should not be invoked in determining starting point for limitation under s. 48—Limitation under s. 48 cannot be extended by amendment of decree.

In construing s. 48, Civil P. C., the Court ought to limit itself to examination of the provisions of

the Code itself and not import the provisions of other enactments, more particularly Art. 182, Lim. Act, which by its own terms applies only to the period for execution of a decree or order not provided for by s. 48, Civil P. O. An amendment of a decree does not therefore give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years prescribed by s. 48. The period of twelve years under s. 48 is final and cannot be extended by any amendment of the decree. 60 Ind. Cas. 318 (1), dissented from, 175 Ind. Cas. 558 (8), distinguished, 46 Ind. Cas. 107 (3), 138 Ind. Cas. 93 (4), *Ganesh Das v. Vishan Das* (5), 151 Ind. Cas. 541 (6) and 45 Ind. Cas. 436 (7), followed. [p. 375, col. 1.]

A. from the original order of the Sub-Judge, Gaya, dated August 16, 1937.

Dr. Sir Sultan Ahmed and Mr. Syed Hasan, for the Appellants.

Sir M. N. Mukherji, Messrs. P. C. Manuk, Sarjoo Prasad, Rai G. S. Prasad, Rai Paras Nath, R. J. Bahadur, G. C. Das and N. K. Prasad II, for the Respondents.

Rowland, J.—The only point for decision is whether as held by the Subordinate Judge, the application presented to him for execution of a mortgage decree by sale of the mortgaged properties was barred by time. The Subordinate Judge was of opinion that s. 48, Civil P. O. was a bar. The plaintiff (now decree-holder) had sued on three mortgage bonds and obtained a preliminary decree dated June 23, 1922, for approximately Rs. 42,000. The decree mentioned as usual a period of grace which having expired, the decree-holder applied for and obtained a decree-absolute for sale dated December 19, 1923. He applied to execute this decree on August 16, 1926, and was met by an objection on behalf of some of the judgment-debtors that the decree in the form in which it had been drawn was not executable because the debts due on the three mortgage bonds were separate debts secured on different items of property and the amounts for which the several properties were liable must be specified in the decree before it could be executed. The Subordinate Judge disallowed this objection, but, on appeal, this Court on August 3, 1928, reversed that decision and said referring to the judgment in the original suit that the decree as it stood could not be executed and the Subordinate Judge must proceed to execute the decree substantially as three decrees. That being so, the order of the lower Court directing execution to proceed was set aside and the case remanded for disposal according to law. Thereafter on September 13, 1928, the decree-holder suffered the execution to be dismissed for default.

He next applied in 1930 for amendment of the decree which was duly ordered to be done on July 16, 1930. Subsequently he found that some further amendment was necessary and obtained orders to that effect on August 27, 1932, and September 24, 1932. On July 8, 1933, he made his second application to execute the decree and this application was dismissed on June 20, 1934, for default in prosecution. The third application to execute the decree was presented on January 2, 1937, and is the application, against which the objection under s. 48, Civil P. O., has been allowed by the Subordinate Judge. The Subordinate Judge was of opinion that the period of 12 years began to run from December 19, 1923, the date of the decree absolute and expired in December 1935.

For the appellants, reference is made to the words in s. 48 "12 years from the date of the decrees ought to be executed" and it is said that when there was no executable decree in existence before July 16, 1930, the decree sought to be executed must be considered to be of that date and 12 years will run from that date and it has further been suggested that September 24, 1932, again gives a starting point available to the decree-holder for computing the period of 12 years laid down in s. 48. In support of this contention reference is made to *Baldeo Shukul v. Syed Yusuf*, 60 Ind. Cas. 318 (1) where a Single Judge of this Court took the view that the words "decree sought to be executed" must include the amended decree. The learned Judge did not quote authority for his view, but he referred to what was generally understood to be the law under the old Lim. Act when Art. 179 had to be construed. It may be that the learned Judge was referring to such decisions as that in *Muhammad Suleman Khan v. Muhammad Yar Khan* (2) in which although Art. 179, as it then stood, contained no reference to the date of the amended decree as distinct from the date of the decree itself, the date of decree had been held for the purposes of that Article to mean or at least to include the date of the amended decree where there had been an amendment. It may be noticed here that subsequent to that decision both the Lim. Act of that time and the Civil P. O. have been repealed and their place taken by new enactments Article 182 which takes the place of Art. 179 in the Lim. Act has been amplified and now makes specific

(1) 60 Ind. Cas. 318.

(2) 17 A 39; A W N 1894, 191.

provisions for a period of three years' limitation to run from the date of an amended decree where there has been an amendment.

In s. 48 on the other hand the words are "date of decree sought to be executed," without any qualifying reference to possible amendments subsequent to the date of the original decree. It has therefore been argued for the respondents that in construing s. 48 we ought to limit ourselves to examination of the provisions of the Code itself and not import the provisions of other enactments, more particularly Art. 182, Lim. Act, which by its own terms applies only to the period for execution of a decree or order not provided for by s. 48, Civil P. O.

In support of this view we have been referred to decisions of the High Courts in Bombay, Allahabad, Calcutta, Lahore and the Chief Court of Lucknow. In Bombay the matter came under consideration in *Narsingrao v. Bando Krishna* (3). In this case the decree had been passed under the old Code and the Court considered the words in s. 205 "the decree shall bear the date the day on which the judgment was pronounced." It was said that this language was imperative and was designed to meet precisely a case of this sort where owing to certain oversights or irregularities a delay has intervened between the delivery of the judgment and the formal drawing of a correct decree. This was laid notwithstanding that the decree which was at first drawn was incapable of execution until it was amended. I may in passing mention that this case was not apparently brought to the notice of the learned Judge of this Court who decided *Baldeo Shukul v. Syed Yusaf*, 60 Ind. Cas. 318 (1). Both those decisions were examined in *Faqir Chand v. Kundan Singh* (4) where the learned Judges drew special attention to the wording of col. 1 of Art. 182 and held that the amendment of a decree does not give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years allowed by s. 48. That is, the period of twelve years under s. 48 is final and cannot be extended by any amendment of the decree. The view of the Lahore High Court is expressed in *Ganesh Das v. Vishan Das* (5) in which the above Bombay and Allahabad decisions were also followed by the Chief Court of

(3) 42 B 309; 46 Ind. Cas. 107; A I R 1918 Bom. 217; 20 Bom L R 481.

(4) 54 A 622; 138 Ind. Cas. 93; A I R 1932 All. 351; (1932) A L J 471; Ind. Rul. (1932) All. 363.

(5) A I R 1935 Lah. 292.

Oudh in *Narendra Bahadur Singh v. Oudh Commercial Bank, Ltd.* (6). In Calcutta a similar view was taken in a decision apparently unreported but which was taken on appeal to His Majesty in Council and the judgment of the Judicial Committee is reported in *Khulna Loan Co. v. Jnanendra Nath Bose* (7). The report shows that the Subordinate Judge had proceeded on the view that the period of twelve years provided in the case of a decree does not certainly begin to run until the decree becomes operative and capable of execution but the High Court took the opposite view observing:

"The terms of s. 48 seem to us to be perfectly clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by O. XX, r. 6, and we cannot understand how there can be any other date of the decree, from which limitation should run."

Their Lordships of the Judicial Committee simply stated that they saw no reason to differ from the judgment of the High Court. I think that we are bound to follow these authorities and cannot hold that time for the purposes of s. 48 is to be calculated from a date prescribed elsewhere than in that section. I should, however, state that we have been referred to a recent decision of this Court in *Ram Ranbijaya Prasad Singh v. Kesho Prasad Singh* (8) which is said to favour a different view. The facts in that case are not quite on all fours with those before us, for the question there was whether the starting point for the period of twelve years under s. 48 was the date of the decree of the original Court or the date of the final order of the Appellate Court. The point decided was that time would run from the final order of the Appellate Court, and in the course of the judgment reference is made to Art. 182 in support of that proposition. The learned Judges did not say that the decree sought to be executed in s. 48 was the decree of the Appellate Court as has been sometimes held; if that had been their reading of the scope of s. 48, then it would not have been necessary to invoke Art. 182 in the determination of the starting point for limitation under s. 48 in cases where there has been an appeal. But whether the observations in *Ram Ranbijaya Prasad Singh v. Kesho Prasad Singh* (8) are in their entirety correct or not with reference

(6) 10 Luck. 208; 151 Ind. Cas. 541; A I R 1934 Oudh 463; 11 O W N 1103; 7 R O 132 (F B).

(7) 22 O W N 145; 45 Ind. Cas. 436; A I R 1917 P O 85 (P O).

(8) 19 P L T 424; 175 Ind. Cas. 558; A I R 1938 Pat. 401; 4 B R 612; 10 R P 633.

to Art. 182 (2), I do not think we are to treat those observations as applicable to cases falling within all the sub-clauses of Art. 182. Such a view would have a surprising result if applied to Art. 182 (5), and one which I do not think can have been intended by the learned Judge. So I think we should not regard these observations as applying to sub-cl. (4) or any other sub-clause than No. 2. And in dealing with the matter before us, I feel no doubt that we ought to follow the current of authority in Bombay, Allahabad, Lahore, Calcutta and Lucknow and to hold that the application presented on January 2, 1937, to execute the decree dated December 19, 1923, was barred by s. 48, Civil P. O. I would dismiss this appeal with costs to each act of contesting respondents.

James, J.—I agree to the order proposed by my learned brother and I agree with his view that we must regard ourselves as bound by the current of authority on this question to accept as correct the view of the learned Subordinate Judge, although if the matter were *res integra*, I should feel more difficulty. In *Muhammad Suleman Khan v. Muhammad Yar Khan* (2) the Allahabad High Court was dealing with Arts. 178 and 179, Lim. Act of 1877. Sir Sultan Ahmad for the appellants suggests that s. 230 of the former Civil P. O. would also have applied to that case; but the application in execution with which the learned Judges were dealing had been made within twelve years of the original decree, so that whether the provisions of s. 230 applied or whether they did not, the Court in that particular case was not required to consider them. Sir Sultan Ahmad suggests that the remark with which the judgment ends, that with regard to any future application in execution, para. 4 of col. 3 of Art. 179 contains the limitation which will be applicable, implies that the learned Judges had considered the question of whether after twelve years from the date of the original decree execution would or would not be barred by the provisions of s. 230. If it had been clear that s. 230 did apply to that particular case, the decision would have been of considerable authority in support of Sir Sultan Ahmad's view, because any *obiter dictum* of Sir John Edge is to be treated with respect; but it is not clear that s. 230 did apply in this case at all.

In 1808, when both of these Acts were repealed and re-enacted, a new s. 48, Civil P. O., took the place of the old s. 230; and Arts. 181 and 182 took the place of Arts. 178

and 179 of the Schedule in the Lim. Act. Art. 182 was amended in such a manner as to give statutory authority, to the decision of Sir John Edge and Banerji, J., but applications governed by s. 48, Civil P. O., were excluded from its operation; and s. 48 merely said that limitation was to run from the date of the decree of which execution was sought. In favour of the appellants' view we have the decision of a Single Judge of this Court in *Baldeo Shukul v. Syed Yusuf*, 60 Ind. Cas. 318 (1); but the Allahabad High Court expressly dissented from that decision in *Faqir Chand v. Kundan Singh* (4) and the weight of authority in general appears to be against it. I find some difficulty in treating the decision of this Court in *Ram Ranbijaya Prasad Singh v. Kesho Prasad Singh* (8) in the manner in which Sir Sultan Ahmad suggests, as authority for the view that in looking for the starting point for limitation under s. 48, Civil P. O., we must apply the conditions laid down in Art. 182 of the Schedule to the Lim. Act. In that case the learned Judges were dealing with para. 2 of col. 3, of the Schedule and not with para. 4; but I find it difficult to act upon the general proposition that the provisions of Art. 182 should be held in any way to affect s. 48, Civil P. O.

The provisions of Art. 182 cannot be read into Art. 183, as is clear from the decision of the Judicial Committee of the Privy Council in *Abdul Majid v. Jawahir Lal* (9) wherein it was held that the decision of the Appellate Court could only afford a new starting base for limitation under Art. 183 when there was a decree of the Appellate Court in which the original decree merged; and if Art. 182 cannot be invoked to find the starting point for the twelve years' rule of limitation prescribed by Art. 183, it appears to me difficult to hold that it can be invoked to find the starting point for the twelve years' rule under s. 48, Civil P. O., since Art. 182 prescribing the three years' rule for petitions of decree-holders in execution, is expressly excluded from application where the twelve years' rule may apply, under Art. 183 of the Schedule or s. 48, Civil P. O. In *Khulna Loan Co. v. Jnanendra Nath Bose* (7) their Lordships of the Judicial Committee approved of the decision that the period of twelve years under s. 48 ran, not from the date when the

(9) 36 A 350; 23 Ind. Cas. 649; A I R 1914 P O 66; 12 A L J 624; 16 Bom. L R 395; 18 O W N 963; 19 O L J 626; 27 M L J 17; (1914) M W N 485; 16 M L T 44; 1 L W 483 (P O).

decree became operative and capable of execution, but from the date of the decree; and I consider that the decisions of the Allahabad High Court in *Faqir Chand v. Kundan Singh* (4) of the Bombay High Court in *Narsingrao v. Bando Krishna* (3) and of the High Court at Lahore in *Ganesh Das v. Vishan Das* (5) leave us no option but to hold that the view taken by the learned Subordinate Judge was right and to dismiss the appeal.

s.

Appeal dismissed.

OUDH CHIEF COURT

Testamentary Case No. 1 of 1939

Civil Miscellaneous Application No. 925 of 1939

November 24, 1939

YORKH. J.

Mrs. VIOLET PETERSON—APPLICANT
versus

In the matter of THE ESTATE OF THE LATE
MRS ADELAIDE ELIZABETH
FORBES—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 10—Applicability to proceedings for probate of will—Two rival applications for probate—Date of institution, whether date when application was filed or date when caveat was entered—Succession Act (XXXIX of 1925), ss 295, 273.

Proceedings for obtaining probate of a will are not suits. The direction in s. 295, Succession Act, is only that the procedure of a suit shall be followed and not that proceedings, on becoming contentious, shall "become" regular suits instituted on the date of their becoming contentious. Section 10 of the Civil P. O. is, therefore, not strictly applicable to such proceedings. Even assuming, however, that it is applicable in principle, it is clear that as between rival applications for probate it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious. The only date which can be regarded as the date of institution with a view to deciding which of two rival "suits" is "previously instituted" must be the date on which the petition was filed and not the date on which the caveat was entered.

[Case-law referred to.]

Order.—On September 26, 1939, my learned brother Bennett, J. declined to take into consideration an application* for stay of proceedings in this Court under s. 10 of the Civil P. O. on the ground that Mr. Forbes and Mr. O'Neill not having filed any caveat or affidavit had at that time no right to be heard in the case. Subsequently on October 13, Mr. O'Neill alone filed a caveat supported by an affidavit, but did not present any fresh application under s. 10. November 24 being fixed for

the evidence on behalf of the caveator, on November 20, that is to say, only four days ago, Mr. Walford on behalf of Mr. O'Neill presented a fresh application under s. 10 of the Civil P. O.

The facts which give rise to the consideration of this application are as follows:

It is common ground between the parties that the late Mrs. Forbes had executed a will on January 23, 1938. She apparently left Lucknow for Mussoorie on June 5, 1939 but died at Dehra Dun on the morning of June 6. Mr. Forbes returned to Lucknow not long afterwards, but took no immediate action with a view to obtaining probate of his mother's will of which he and the applicant Mrs. Peterson were co-executors. On July 12, Mrs. Peterson filed the present application for probate as executrix under the will. It is said that prior to her doing so, she had been approached by her brother with a view to their making a joint application in the Calcutta High Court, which was more suited to Mr. Forbes as a forum because he had business in that part of India and is not at the present time ordinarily a resident in India. It is not disputed that on July 4, Mr. O'Neill informed Counsel for the petitioner that on or about June 22, 1939, Mr. Forbes had discovered among the late Mrs. Forbes's papers a codicil in the terms of which the petitioner Mrs. Peterson ceased to be an executrix. It is said by the learned Counsel on his behalf that Mr. Forbes after that date instructed his solicitors to file an application in the Calcutta High Court for the probate of the will and codicil. On July 12, as mentioned above, Mrs. Peterson filed her application in this Court and on July 26, having come to know that her brother was intending to file an application at Calcutta, she entered a caveat in the Calcutta High Court, a course of action said to be permissible under the rules of that Court. It was not till August 3, that Mr. Forbes filed his application in the Calcutta High Court. On August 9, Mrs. Peterson followed up her caveat by filing an affidavit in support of it in the Calcutta High Court with the consequence that the proceedings in that Court became contentious and the provisions of s. 295 of the Indian Succession Act (Act XXXIX of 1925) came into effect. Meanwhile citations had been served on Mr. Forbes and Mr. O'Neill, who is an executor under the terms of the alleged codicil though not of the original will, on August 17, 1939. They did not, however,

*Page of 184 Ind. Cas. 535.—[Ed.]

as mentioned above enter a caveat or take any action in this Court.

It is important to note that notice to produce the will had been served on Mr. O'Neill and Mr. Forbes on July 14, 1939, and that on July 17, Mr. Forbes somewhat disingenuously wrote on the back of the summons that the will which he was asked to produce had been sent to Calcutta in connection with his application for probate "made" in the Calcutta High Court that application in fact not having been made, a fact of which he could not but be aware. It was not indeed until July 28, that he himself at Calcutta signed the necessary papers so that the application could be made on August 3.

Subsequently Mrs. Peterson filed an application in the Calcutta High Court under s. 10 of the Civil P. O. asking for the proceedings in that Court to be stayed pending the disposal of the proceedings in this Court. That application was dismissed on August 30. I have nothing before me except a copy of the formal order. It appears that several points were argued but the main ground was probably the fact that at the date when this matter was argued at Calcutta, there being no caveat or affidavit filed in this Court the proceedings in this Court, were without any defendant and it could not be said that the proceedings at Calcutta were between the same parties. In fact the application to the Calcutta High Court under s. 10 of the Civil P. O. was obviously premature.

The matter came up for hearing again in this Court on September 4, and again on September 26, when Mr. Forbes and Mr. O'Neill sought to oppose the application in this Court without filing a caveat or affidavit, and it was for that reason that my learned brother on September 21 declined to hear them in the case and in consequence Mr. O'Neill did ultimately file the caveat on October 13, on which date, as the will was then before the Court, having been procured from Calcutta, evidence in formal proof of the will was taken and put on the record.

Learned Counsel for the caveator Mr. O'Neill has sought to argue before me really only one point. After reciting the sequence of events he contends that there is a previously instituted suit within the meaning of s. 10 of the Civil P. O. between the same parties proceeding in the Calcutta High Court and that therefore this Court should not proceed with the trial of the present suit, the matter in issue

here being directly and substantially the same as that which is in issue in the Calcutta High Court. Put in simple words he says that there is a prior suit pending in the Calcutta High Court and that therefore this Court should stay these proceedings until the matter has been finally decided by the Calcutta High Court. He suggests that that Court is already dealing with the whole matter and the application before this Court only relates to half of it. This, however, is scarcely a correct statement because the caveat itself brings the second half of the matter into issue before this Court. He suggests that there is a danger of contradictory decisions and he remarks that the petitioner has not again moved the High Court at Calcutta under s. 10 of the Civil P. O. after the proceedings became contentious in this Court. Learned Counsel has referred to a number of cases which are reported in 14 O. W. N. 924 at 9 [*Ramani Debi v. Kumud Bandhu Mookerjee* (1)] I. L. R. 41 Cal 819 [*Saroja Sundar Basak v. Abhoy Charan Basak* (2)] O. W. N. 541 [*Radhashyam Das v. Ran Sundari Dassi* (3)] I. L. R. 22 Bom. 261, pages 263, 264 and 266, *Chotalal Chunil v. Bai Kabubai* (4)] and I. L. R. 53 Bom. 8 [*Venidas Nemchand v. Bai Champav* (5)]. In none of these cases, however, was the question considered at what date an application for probate was to be considered to have become a suit. The use of the term "become suit" is itself a very loose use of language and not supported by the terms of s. 295 of the Indian Succession Act. In those cases it was merely considered in a general way that an application for probate became contentious only on the filing of a caveat supported by an affidavit, and thus became a suit in the sense that it had to be tried as a suit. The gist of the learned Counsel's argument is that when a caveat and affidavit are filed the proceedings then become a suit and it is to be taken that the suit is instituted on the date on which the proceedings become contentious. In effect this amounts to saying that the date of institution of such so-called suit is entirely at the mercy of the caveator, a proposition which is absurd when thus baldly stated. One might almost as well say that a suit becomes instituted

(1) 14 O. W. N. 924 at p. 926; 7 Ind. Cas. 126.

(2) 41 O. 819; 24 Ind. Cas. 27; A. I. R. 1915 Cal. 743.

(3) 24 O. W. N. 541; 59 Ind. Cas. 661; A. I. R. 1920 C. 743.

(4) 22 B. 261 at pp. 263, 264, 266.

(5) 53 B. 829; 123 Ind. Cas. 123; 31 Bom. L. R. 10 A. I. R. 1930 Bom. 29; Ind. Rul. (1930) Bom. 128.

only when the written statement is filed by the defendant, a proposition which is patently absurd.

To my mind it is clear on the analogy of a pauper application under O. XXXIII, r. 8, of applications under s. 47 of the Civil P. O. when those proceedings are treated as suits, and of an application under s. 95 subsequently treated a plaint in a suit such as was discussed in 16 Ind. Cas 443 [*Bhut Nath Pal Mistry v. Chandra Binode Pal Chowdhary* (6)] that any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation for a suit, must be considered to date back as a plaint to the date on which it was filed as an application.

In point of fact the conduct of the caveator and the other applicant to the Calcutta High Court, Mr. Forbes, in this case is, to my mind, open to criticism. Section 279 (1) of the Indian Succession Act provides that :

"Every person applying to any of the Courts mentioned in the proviso to s. 273 for probate of a will or letters of administration of an estate intended to have effect throughout British India."

As is the case with reference to the present application shall state in his petition, in addition to the matters respectively required by s. 276 and s. 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last afore-said :

"Or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon."

Sub-section (2) provides that :

"The Court to which any such application is made under the proviso to s. 273 may, if it thinks fit, reject the same."

The clear intention of this section was to prevent from arising the very situation which has arisen in the present case and the Courts having to decide a question of priority between competitive applications made to different Courts. No copy of the application to the Calcutta High Court is before me and it is not possible to say whether compliance has been made with the provisions of the section, but I am inclined to suppose that it cannot have been complied with because the application to this Court had been made three weeks before the application was made at Calcutta, and the bulk of the property is

(6) 16 Ind. Cas. 443; 16 O L J 34.

situated in this province, and if those facts had been brought to the notice of the Calcutta High Court in the application itself, that Court would perhaps have declined to take up the application made to it in the light of sub-s. (2) of s. 279.

As a result of the action taken by the caveator, however, this question, which does not seem ever to have come up for decision before, has now to be decided as to whether the application of the caveator of this case to the Calcutta High Court though later in date does take priority in view of the fact that the proceedings there became contentious before it become so here.

In the first place it is clear that s. 10 of the Civil P. O. is not in terms applicable to cases of this kind. My attention has been drawn to a long series of cases in which it has been held that proceedings in s. 295 of the Indian Succession Act are not suits, as indeed is apparent from the wording of the section. The following cases have been referred to : 68 Ind. Cas. 671 [*Maung Tun Yin v. Ma Sein Yin* (1)], I. L. R. 8 Rangoon 474 [*Ko Maung Gyi v. Daw Tok* (8)], I. L. R. 50 All. 238 [*Kanhaiya Lal v. Gendo*] (9) I. L. R. 33 Bom., 256 [*Sundrabai Sahab v. The Collector of Belgaum* (10)] and 7 O. W. N. 373 at p. 375 [*T. Nathan v. Mrs. A. S. Nathan* (11)].

The wording of s. 295 is in any case quite clear. It provides that :

"In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Civil P. O. 1908 in which the petitioner for probate ... shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."

It is quite clear that the direction here is only that the procedure of a suit shall be followed and not that proceedings on becoming contentious, shall "become" regular suits instituted on the date of their becoming contentious. Section 10 of the Civil P. O. is, therefore, not strictly applicable. Even assuming, however, that it is applicable in principle, I am clear that as between rival applications for probate, it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious.

(7) 68 Ind. Cas. 671; 11 L B R 331; A I R 1923 Rang 9.

(8) 6 R 474; 112 Ind. Cas 427; A I R 1928 Rang. 249.

(9) 50 A 238; 107 Ind. Cas. 34; 25 A L J 972; A I R 1928 All 51.

(10) 33 B 256; 2 Ind. Cas. 283; 10 Bom. L R 1197.

(11) 7 O W N 373 at p. 375; 123 Ind. Cas. 220; Ind. Rul. (1930) Oudh 172; A I R 1930 Oudh 272.

The only date which can be regarded as the date of institution with a view to deciding which of two rival "suits" is "previously instituted" must, in my opinion, be the date on which the petition was filed. Applying the principles stated in s. 10 of the Civil P. O. on that basis, I am not able to hold that the matter in issue in these proceedings before me is also directly and substantially in issue in a previously instituted suit between the same parties litigating under the same title, etc., etc.

The application accordingly fails and is dismissed.

s.

Application dismissed.

LAHORE HIGH COURT

Criminal Appeal No. 721 of 1938

January 9, 1939

YOUNG, C. J. AND BLACKER, J.

EMPEROR—PROSECUTOR

versus

JIWAN DAS MILAWA RAM—

ACCUSED—RESPONDENT.

Criminal trial—Evidence—Witness—Statement to Police—Repudiation of portion—Duty of Court.

When a witness is confronted with a portion of his Police statement which he repudiates, the Police Officer recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the Police Officer perfunctorily whether a particular document represents the witness's statement as a whole should be condemned. It is the obvious duty of the Judge to apply his mind to the question whether he is satisfied that the denial is to be rejected.

Or. A. from an order of the Sessions Judge, Mianwali, dated May 28, 1938.

Mr. *Mohammad Monir*, the Assistant Advocate-General, for the Crown.

Mr. *B. R. Puri*, for the Respondent.

Blacker, J.—Jiwan Das was tried by the learned Sessions Judge of Mianwali on charges under ss. 302 and 307, I. P. C., for the murder of Rahman and the attempted murder of *Mst. Fatto* at Manda Khel on March 16, 1938. The assessors gave a unanimous verdict of guilty on both charges, but in spite of this, the learned Sessions Judge acquitted him. The Crown has appealed against this order of acquittal and the respondent has been represented by Counsel before us. The facts of the case are that the deceased and his mother, *Mst. Fatto* who has given evidence in this case were neighbours of the accused. There was some dispute between them about a boundary but this had been ostensibly patched up

by a compromise between the parties some days before the occurrence. On the day of occurrence, however, there was an altercation between two of the children of the families in which their mothers *Mst. Fatto*, the injured person and *Mst. Dewan*, the wife of the respondent were implicated. These two women abused each other and then the respondent came and also abused *Mst. Fatto*. He then went up the roof of his house and taking a double-barrelled shot gun, fired a shot at her which wounded her. This attracted to the spot her son Rahman who was working in his loom a short distance away and he was also shot and killed. Karamullah and his mother, *Mst. Pathani* were standing by watching the occurrence and the accused also aimed his gun at them but as they took shelter behind the wall the pellets struck the wall. Karamullah then went to the Police Station which is about four miles away and promptly reported this incident. In this report, however, he implicated Jetha Nand, the son of the respondent also. Jetha Nand was not implicated by the other witnesses in Court. Karamullah was accompanied when he went to the Police Station by Nawaz Khan, one of the prosecution witnesses and his mother *Mst. Pathani* who is also a prosecution witness. The Sub-Inspector who was questioned on this point states that the report of Karamullah in which he falsely implicated Jetha Nand was not recorded in their presence as he was taken inside a room and they stayed outside. There is no reason to disbelieve this witness on this point. Other witnesses to the occurrence are Hidayat-Ullah, Khan Zaman, Ghulam Hussain, Mohammad Khan and Suleman. The reason why the learned Sessions Judge has acquitted the respondent appears to be that he has been influenced by the medical evidence in thinking that the story that the Respondent fired from a higher level is false. He has accordingly subjected all the prosecution witnesses to a very severe criticism and has come to the conclusion that none of them can be relied upon. He is therefore of opinion that he cannot tell the circumstances in which Rahman met his death and he has accordingly acquitted the respondent. In coming to this conclusion, the learned Sessions Judge has not, in our opinion, fully appreciated the weight of the undoubted facts that this occurrence took place in daylight, that *Mst. Fatto* must know who fired at her and that no conceivable theory has been put forward by any

body as to why she should name any other person as the person who fired at her than the person who actually did.

Be that however as it may, the findings of the learned Sessions Judge appear to us to be based on false inferences drawn from the evidence. (His Lordship then examined the evidence and proceeded). There is only one circumstance which tells in any way against the evidence of Nawaz Khan and *Mst. Fatto*, and that is that their story in Court is inconsistent with their Police statements in one particular, namely that after she was shot *Mst. Fatto* ran away into her house. They have both denied making such statements and it must be confessed that it seems unlikely that the woman, at any rate, would have made such a statement as it would be quite inconsistent with the rest of her story that she had witnessed the firing upon her son. In this connection we consider it necessary to comment upon the slipshod manner in which it has been attempted to prove that these witnesses did make the statements which they deny having made. A mere perfunctory question was put to the Sub-Inspector of Police whether the statements as a whole were recorded correctly by him during the investigation, to which he replied in the affirmative. No effort was, however, made to ask him the specific question whether the witnesses did make those two particular statements which they now deny having made and whether their actual statements accurately and could not in any way have misunderstood them. This is very important in this case first because, the witnesses deny having made the statements, and secondly, because it seems to us unlikely that they did make them in the exact form in which they appear in the record, and thirdly, because there is not such a very great difference between them and the statements given in Court as to put it beyond the bounds of reasonable possibility that the Police Officer who was not examining them with a view to extracting every detail of the story with meticulous accuracy could not have misunderstood them on this point. We consider that in every such case when a witness is confronted with a portion of his Police statement which he repudiates, the Police Officer recording his statement should be questioned specifically with regard to that portion of the statement. We cannot but condemn the practice of merely asking the Police Officer perfunctorily whether a particular document represents the witness's

statement as a whole. Whenever a witness denies having made a previous statement, it is the obvious duty of the Judge to apply his mind to the question whether he is satisfied that the denial is to be rejected. But even giving this discrepancy the fullest possible weight in favour of the accused, the utmost result to which we could come would be that these witnesses are slightly improving their story in order to make it fit in with the position that *Mst. Fatto* was a direct eye-witness of the shot fired at her son. If she were not an eye-witness, the effect of her evidence would be just as good. If she is herself shot and within a few seconds her son rushes out and is also shot, in the absence of very strong evidence to the contrary, the presumption is overwhelming that the same person fired both shots.

We are therefore of the opinion on considering all the evidence that there is no reason whatever to reject the story told by *Mst. Fatto*, *Mst. Pathani* and *Nawaz Khan*. *Mst. Fatto* was certainly there; *Mst. Pathani* was a neighbour and obviously must have been there; and *Nawaz Khan* has given good reasons for being there. The credit of these persons is also enhanced by the fact that they have refused to endorse the false implication of *Jetha Nand* and it is impossible to understand the position taken up by the learned Sessions Judge when he assumes that they would have falsely implicated *Jetha Nand* if the Sub-Inspector had not already told them that *Jetha Nand* had an *alibi*. There is no evidence that when they made that statement at the Police Station either they or the Sub-Inspector knew that *Jetha Nand* could prove an *alibi* and the probabilities are strongly against this. We are of the opinion therefore that the acquittal of the respondent is totally unjustified and amounts to a miscarriage of justice. We therefore agree with the assessors in this case and not with the learned Sessions Judge and we accept the Government appeal. *Jiwan Das*, respondent, is accordingly found guilty on both charges of the murder of *Ranman* and the attempted murder of *Mst. Fatto*. We are unable to see any extenuating circumstances in the case justifying our passing any sentence lesser than the death penalty. We accordingly order *Jiwan Das* to be hanged by the neck till he is dead. We do not consider it necessary to pass a separate sentence under s. 307, I. P. C.

D.

Appeal accepted.

BOMBAY HIGH COURT
Criminal Appeal No. 493 of 1938
May 9, 1939

B. J. WADIA AND KANIA, JJ.
EMPEROR—PROSECUTOR

versus

JHINA SOMA—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 297, 537—Omission of Judge to explain to jury all essential elements of offence charged against accused, when vitiates trial—Prosecution, if can urge in appeal that Sessions Judge omitted to explain law to jury—Criminal trial—Trial by jury—Defences taken by accused in alternative, inconsistent—Whether proves that evidence led on behalf of prosecution should have been believed by jury—Verdict—Interference.

Under s. 297, Criminal P. C., it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that Advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative. It is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. An important non-direction to the jury or an omission to direct them on an important point, amounts to misdirection; but s. 297 must be read along with the provisions of s. 537 of the Code. It is necessary, however, that the misdirection should be such as to occasion failure of justice, such failure of justice as would vitiate the trial or proceedings. There is no ground for broadly assuming that if even a mandatory provision of the Code is infringed, the result in all cases must be to vitiate the trial irrespective of whether it has or has not occasioned failure of justice. 160 Ind. Cas. 1060 (1), referred to. [p. 334, col. 1.]

Omission by Govt. to take a ground that the Sessions Judge omitted to explain the law to the jury, would not debar the prosecution from urging it in the appeal.

In a criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is also entitled to the benefit of a reasonable doubt. Even if the defences taken up by the accused in the alternative were inconsistent, that would not necessarily prove that the evidence led on behalf of the prosecution, who must establish the guilt of the accused, should have been believed by the jury. [p. 334, col. 2.]

No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce. 139 Ind. Cas. 272 (2), referred to. [*ibid.*]

Or. A. against an order of the Sessions Judge, Surat.

Mr. B. G. Rao, Assistant Government Pleader, for the Crown.

Messrs. G. C. O'Gorman and V. N. Chhatrapati, for the Accused.

B. J. Wadia, J.—This is an appeal by the Govt. of Bombay against the acquittal of the accused on the charge of murder and abetment of the commission of the offence of murder. The third accused is the father of the first and second accused who are brothers. The charge against them was that first accused on or about May 5, 1938, at about 9-30 P. M. at Malvan did commit murder by intentionally causing the death of Ranchhod Bhula of Vasan, and that the second and third accused abetted the commission of the said offence of murder by the first accused, and thereby committed an offence under s. 302, I. P. C., so far as the first accused was concerned, and under ss. 302 and 114, I. P. C., so far as the second and third accused were concerned. The accused were tried by the learned Sessions Judge at Surat with the help of a jury. The jury unanimously came to the conclusion that the accused were not guilty of the offences with which they were charged, and the learned Judge agreeing with the verdict of the jury acquitted and discharged the accused on August 5, 1938.

The facts leading up to the alleged offence are that on the day in question (May 5, 1938) there was a marriage procession proceeding from the village of Vasan towards Malvan at about lamplight. Vasan is in the Ohikhli Taluka, while Malvan is in the Taluka of Bulsar. The occasion of the procession was the marriage of one Jogi, son of Bhangia Lala. Several persons from Vasan joined the procession including the wife of the deceased, her parents and her aunt. The deceased who had gone to Billimora to get a wedding present for the bridegroom joined the procession later. The procession was on the move after lamplight, but as the little child of the deceased wanted to ease herself, the deceased, his wife, her parents and her aunt stayed behind. Thereupon the three accused came up along with one Chankka, followed by another person, Ukadia Lala. It is alleged that the first accused shouted, "Where is the Khandhad?" The deceased Ranchhod said that he was there. It is further alleged that thereupon the third accused caught the deceased by the neck, and the second accused held his hands, and the first accused started giving him blows with a penknife; the deceased fell down and died almost instantaneously. The defence of the accused was that they

were not the aggressors; the aggressors were the deceased and Chankka; that there was a scuffle, and that the deceased was hit accidentally by a thrust of the penknife in the hand of Chankka who really intended the blow for the first accused. In the alternative, the accused alleged that they killed the deceased in exercise of their right of private defence, *viz.*, defending their person against the attacks of the deceased and Chankka. Accused No. 1 in the afternoon of the next day made a complaint in which he charged Chankka and the deceased, not knowing that he was dead, with having attacked his brother (accused No. 2) and also himself when he went to help his brother. There was a long trial, several witnesses were examined on behalf of the prosecution, but no evidence was led on behalf of the accused, and the learned Sessions Judge summed up the case at great length to the jury. As I have stated before, the jury came to the unanimous conclusion that the accused were not guilty, and the learned Judge agreeing with the verdict of the jury, ordered their acquittal and discharge.

The main grounds of appeal are: (a) that the direction given by the Judge to the jury as to the consideration of the alternative defences was not proper and should have been placed more clearly; (b) that the point whether there was occasion for reasonable apprehension in the mind of the opponents (accused) justifying the killing of the deceased was not explained to the jury in a proper way; (c) that having regard to the medical evidence and to the conduct of the first and second opponents after the commission of the murder, and to the facts stated in the counter-complaint of the first opponent, the verdict of the jury was unreasonable and unjust; and lastly, (d) that the point as to why the opponents happened to be on the spot was not put to the jury in respect of its bearing on the possible guilt of the opponents. The Govt. therefore pray that the order of acquittal be set aside and the accused dealt with according to the law, and if necessary, process be ordered to issue against the accused under s. 427, Criminal P. O.

The Govt. have lodged this appeal under s. 417, Criminal P. O., which lays down that the Local Govt. may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. It is provided by

s. 418 (1) that an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by a jury in which case the appeal shall lie on a matter of law only. Under s. 423 (2), it is provided that nothing contained in the section shall authorize the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to misunderstanding on the part of the jury of the law as laid down by him. An appeal therefore lies in cases tried by the jury on questions of law only, and under the criminal procedure, the verdict of the jury is to be considered final where there is no error of law or misunderstanding on the part of the jury of the law as laid down by the Judge, or any misdirection by the Judge, and the Judge has agreed with the verdict of the jury.

It was contended on behalf of the Crown that there was a misdirection in so far as the learned Judge did not expound the law relating to the offences to the jury. It is true that in the heads of the charge to the jury there is no reference to the sections under which the accused are charged. Under s. 257, Criminal P. O., it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that Advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative and it cannot be too emphatically stated that in cases tried with the help of a jury it is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. That the provision of the Code is mandatory was again laid down recently by the Full Bench in *Emperor v. Puttan Hassan* (1), and it is indeed surprising how a Sessions Judge who is usually a man of considerable experience, can proceed to charge the jury without, in the first instance, explaining the law on the subject. Such explanation is necessary in all cases and is certainly very important.

(1) 38 Bom. L R 19; 160 Ind. Cas. 1060; A I R 1931 Bom. 52; (1936) Cr. Cas. 164; 37 Cr. L J 366; 60 B 599; 8 R B 293 (F B).

in a case where the charge is one of murder. It is incumbent upon the Judge to explain what is culpable homicide under s. 292, I. P. C., and under what circumstances culpable homicide amounts to murder, and under what circumstances it does not, under s. 300. An important non-direction to the jury or an omission to direct them on an important point, amounts to misdirection; but we must read s. 297 along with the provisions of s. 537 of the Code. In that section it is laid down that

"subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity (as mentioned in sub-cl. (a) of that section) or of the omission to revise any list of jurors or assessors in accordance with s. 324 or of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection, has in fact occasioned a failure of justice."

There are therefore three categories coming under this section, first, where there is an error, omission, or irregularity, in any stage of a trial or enquiry or proceeding; secondly, where there is an omission in revising the list of jurors or assessors; and thirdly, in the case of misdirection in the charge to the jury. It is necessary, however, that the misdirection should be such as to occasion failure of justice, such failure of justice as would vitiate the trial or proceedings. The misdirection causing failure of justice may at times arise in relation to the case for the prosecution; but in the majority of cases the effect of a misdirection to the jury comes up for consideration on the ground that it has prejudicially affected the accused. There is, however, no ground for broadly assuming that if even a mandatory provision of the Code is infringed, the result in all cases must be to vitiate the trial irrespective of whether it has or has not occasioned failure of justice. It was undoubtedly the bounden duty of the Sessions Judge to explain the law to the jury before dealing with the evidence, but I do not think that the omission to read and explain the relevant sections in this case has been such as can be said to have occasioned a failure of justice. It was pointed out to us by the learned Counsel for the accused that this ground was not even taken by Govt., but that would not debar the prosecution from urging it in the appeal.

The only other ground that was mentioned to us was that the alternative defence, viz., that the accused acted in self-defence or defence of their person, was not fully and properly explained to the jury. The learned Judge, however, clearly pointed out the alter-

native defence to the jury, and we find it stated by the Judge in para. 4 of his charge to the jury that it was suggested that it was the deceased who was the aggressor and caused serious injuries to accused No. 2, and that a reasonable apprehension arose in the mind of the accused about their own safety, and that on account of that apprehension they attacked the deceased in self-defence and killed him. At the end of his long summing-up the learned Judge also told the jury that, although the defence of self-defence was not raised by the accused and was not suggested in the cross-examination of the prosecution witnesses, and although it was inconsistent with the other defence put forward by the accused, it was still open to the jury to consider it and to see whether, in the circumstances of the case, it was made out or not. The learned Judge was right in putting this alternative defence to the jury for their consideration in the way he did. It was, however, open to the jury to come to the conclusion on the evidence of the witnesses, whom they had seen and whom they had heard, that the prosecution had failed to establish the case against the accused. In a criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is also entitled to the benefit of a reasonable doubt. Even if the defences taken up by the accused in the alternative were inconsistent, that would not necessarily prove that the evidence led on behalf of the prosecution, who must establish the guilt of the accused, should have been believed by the jury. It was for the jury to consider what weight they should attach to the evidence that was led before them. Apart from the omission to explain the law, the learned Judge summed up the evidence very clearly and fairly on both sides, and left the matters which were within the province of the jury entirely for their consideration. Under the circumstances, we see no reason to interfere with the verdict. No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce. There is a case reported in *Emperor v. Bai Lali* (2) where the Sessions Judge had disagreed

(2) 34 Bom. L R 896; 139 Ind. Cas. 272; 23 Cr. L J 745; Ind. Rul. (1932) Bom. 490(1).

with the verdict of the jury and submitted the case under s. 307, Criminal P. O. to the High Court, and yet the High Court held that, unless there was any perversity in the verdict or any misdirection there was no reason why they should interfere with the verdict. Taking all the facts of the case and the evidence into consideration, I am of opinion that the appeal fails and must be dismissed.

Kanla, J.—I agree. Section 297, Criminal P. O., in very clear terms enjoins the Sessions Judge to charge the jury by summing up the evidence for the prosecution and defence, and laying down the law by which the jury is bound. The omission to do this may or may not cause a miscarriage of justice. Section 537 of the O de provides that if a misdirection (and an omission to lay down the law would be a misdirection) causes a failure of justice, it would vitiate the trial. Therefore, in the present case we have to find whether the Court failed to lay down the law as provided in s. 297, and if so, whether there was a miscarriage of justice. Unless both those questions were answered in the affirmative, the verdict should not be disturbed.

On going through the record it appears that the learned Sessions Judge has not re-capitulated the relevant sections of the I. P. O. To that extent it may be stated that there was omission to lay down the law. It appears very clearly, however, that in different portions of his summing up he had stated to what extent and under what circumstances the right of private defence of person could be exercised by the accused. He had also pointed out that this defence was not put forward in the cross-examination of the witnesses, but was seriously urged in the course of the argument of the Advocate for the accused. He also properly pointed out at the close of the summing up that, in spite of the failure of the Advocate for the accused to set up this defence and to cross-examine the prosecution witnesses on that point, and although the defence was inconsistent with the other defence, if the jury on the materials before them thought that a case of self-defence of person was established, it would be their duty to consider it, and give effect to their conclusion. To that extent therefore the learned Judge considered the evidence and gave directions on the point of private defence, and I do not think therefore that the charge suffers from any serious omission. On going through the

whole record, I do not think that there has been any failure of justice occasioned in this case, and therefore I do not think this Court should interfere with the unanimous finding of the jury.

I cannot allow this case to pass without emphasizing that the provisions of s. 297, Criminal P. O. are emphatic, and overlooking the same is likely to give rise to a miscarriage of justice and considerable waste of public time and money. It is necessary that the provisions of this section should be rigidly adhered to and not overlooked. Even at the cost of repetition, the law should clearly be expounded, especially when the charge is one of murder; otherwise serious consequences are likely to ensue which a high judicial officer could and should avoid.

s.

Appeal dismissed.

MADRAS HIGH COURT Criminal Revision Case No. 54 and

Petition No. 50 of 1939

August 25, 1939

PATANJALI SASTRI, J.

In re O. KANNIAH MAISTRY AND

OTHERS—PETITIONERS

Madras Gaming Act (III of 1930), ss. 3, 4, (ii), 6—Payment or sharing profits in fulfilment of betting on horse race, whether gaming—No particular person found guilty under s. 4 (ii)—Conviction of accused under s. 109, Penal Code (Act XLV of 1860), read with s. 4 (ii) Madras Gaming Act, propriety of—S. 6, scope of—Finding of instrument of gaming in place searched under s. 5.

The definition of 'gaming' in s. 3 of the Mad. Gaming Act has included only the actual wagering or betting on a horse race, and payments in fulfilment of such agreement cannot be regarded as part of such betting and is consequently not gaming. *Bradford v. Dawson* (1), relied on.

Where no particular person is found to have committed the offence under s. 4 (ii) of the Act, which the accused could be said to have abetted, his conviction under s. 109, I. P. O. read with s. 4 (ii) Mad. Gaming Act as accessories either before or after the betting is wrong.

Section 6, Mad. Gaming Act only enacts, that gaming instruments found in any place entered or searched under the provisions of s. 5 shall be evidence that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Police Officer. But, the section, does not say that the mere finding of gaming instruments in such a place shall be evidence of gaming. There is obviously a wide difference between a person being present at a particular place for the purpose of gaming and his gaming at the place. It is only the latter act that is constituted an offence under s. 4 (ii) of the Act and not the former.

Or. R. Case and P. to revise order of the Sub-Divisional Magistrate of Saidapet, dated September 10, 1938.

Messrs. K. S. Jayarama Ayyar, G. Gopalaswamy and M. C. Rajagopalan, for the Petitioners.

The Public Prosecutor, for the Crown.

Order.—The petitioners were prosecuted in this case for an alleged offence under s. 4 (ii), Mad. Gaming Act, 1930. The learned Appellate Magistrate, however, observed that there was no betting at the time of the night when the instruments of betting were seized by P. W. No. 1 under s. 5 of the Act and that the petitioners were there only for the purposes of payment or sharing of profits. But he has held that the petitioners must be regarded as accessories either before or after the betting and found them guilty under s. 109, I. P. C. read with s. 4 (ii), Gaming Act. This is clearly wrong as no particular person is found to have committed the offence under s. 4 (ii) of the Act, which the petitioners in this case could be said to have abetted. The learned Public Prosecutor has not attempted to support the conviction on this ground. He urged, however, that the conviction could be upheld on two other grounds. First, he contended that payment of money or sharing of profits in pursuance of betting on a horse race is also gaming as such distribution of prizes and dividends to winners is a fulfilment of the betting or wagering agreements. But the definition of 'gaming' in s. 3 of the Act has included only the actual wagering or betting on a horse race, and payments in fulfilment of such agreement cannot be regarded as part of such betting; see *Bradford v. Dawson* (1).

The learned Public Prosecutor next contended, that having regard to the statutory rule of evidence enacted in s. 6 of the Act, the conviction of the petitioners can be sustained as supported by evidence. S. 6 only enacts, so far as it is material for the purposes of the case, that gaming instruments found in any place entered or searched under the provisions of s. 5 shall be evidence that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Police Officer. But, as I understand this section, it does not take the prosecution in this case far enough, for it does not say that the mere finding of gaming instruments

(1) (1897) 1 Q B 307; 66 L J Q B 191; 76 L T 54; 18 Cox C C 473; 45 W R 347; 61 J P 134.

in such a place shall be evidence of gaming. There is obviously a wide difference between a person being present at a particular place for the purpose of gaming and his gaming at the place. It is only the latter act that is constituted an offence under s. 4 (ii) of the Act and not the former. I am therefore of opinion that s. 6 of the Act cannot be invoked to sustain the conviction in the circumstances of this case. I set aside the conviction and sentence as well as the order of confiscation. The fine paid by the petitioners as well as the amount seized from them will be refunded.

D.

Conviction set aside.

RANGOON HIGH COURT Special Bench

First Appeal No. 55 of 1938

February 2, 1939

ROBERTS, C. J., MYA BU and MOSELY, JJ.
S. T. R. M. CHETTYAR FIRM—APPELLANT
versus

ANDATHAL AND OTHERS—RESPONDENTS.
Civil Procedure Code (Act V of 1908), O. XXI, r. 54—Prohibitory order on judgment-debtor—Personal service, if essential.

The Code does not require personal service of the prohibitory order on the judgment-debtor. The omission to require service of a notice on the judgment-debtor in person in r. 54, O. XXI, was intentional. No notice other than the publication of the order is necessary. Except in the cases covered by O. XXI, r. 22, and except where the Court issues of grace of its own motion, notice to the judgment-debtor to show cause against attachment, the judgment-debtor has no notice, actual or constructive, of attachment before a prohibitory order is issued under O. XXI, r. 54, as that is the first stage in execution by attachment of immovable property. 164 Ind. Cas. 1044 (2), 50 Ind. Cas. 261 (4) and 89 Ind. Cas. 107 (7), referred to, 120 Ind. Cas. 142 (1), explained and distinguished.

F. A. from an order of the Assistant District Court, Hanthawaddy, in Civil Execution No. 7 of 1936.

Mr. P. B. Sen, for the Appellant.

Messrs. Aiyar and Wan, for Respondents Nos. 1 and 4.

Mosely, J.—This is an appeal by the S. T. R. M. Chettyar Firm of Pyawbwe, Hanthawaddy District, whose property was sold in execution by its partner Somasundaram Chettyar against the decree-holder-respondent No. 1 and respondents Nos. 2, 3 and 4, the auction-purchasers. In Civil Regular No. 30 of 1933 of the Assistant District Court of Hanthawaddy, the plaintiff sued the firm in question carrying on business by its partner Somasundaram Chettyar, and also sued the four partners in

their personal capacity, namely the above Somasundaram Chettyar whose address is given as Mogul Street, Rangoon, Thenappa Chettyar deceased, by his legal representative Subbiah Chettyar of Ramnad, Madras, Visvanathan Chettyar, and Meenatchi Achi of Madras. The suit was decreed against the firm and partners. In the execution case in question, No. 7 of 1936, the judgment-debtors were: (1) the firm; (2) Somasundaram Chettyar; (3) Subbiah Chettyar as legal representative; (4) Nachiappa Chettyar, minor son of Visvanathan by his guardian *ad litem*, the bailiff, Hanthawaddy; and (5) Meenatchi Achi. It appears that the last two judgment-debtors had been adjudged insolvent in Madras. One of the grounds of objection in the present case is that notice to the Official Receiver as their legal representative was not issued under O. XXI, r. 22. I note that the trial Court went astray in quoting *Maung Ohn Tin v. P. R. M. P. S. R. M. Chettyar Firm* (1) as authority for the proposition that notice was unnecessary to the Official Receiver. That case was a case where the Official Receiver was impleaded in his capacity as an ordinary receiver in administration and not as Official Receiver. However, in the present case, these notices under O. XXI, r. 22 are altogether immaterial, as execution was applied for against the property of the partnership firm and not against the personal property of the partners: *vide* O. XXI, r. 50 (a). The next objection is that the prohibitory order (O. XXI, r. 54) was not served on Somasundaram Chettyar, the managing partner. It is objected by Mr. Aiyar for respondent No. 1 that such notice is unnecessary. That has been laid down in First Appeal No. 22 of 1936 *Nayasha Kursoon Bee Bee v. S. P. S. T. R. M. Chettyar Firm* (2) which I note has been reported in an unauthorized report. We have been invited by Mr. P. B. Sen for the appellant to have this ruling re-considered. It has been given effect to in Burma Courts Manual, Circular No. 30, Item No. 18, and it is therefore desirable to re-consider it if there are grounds for doing so, though that may not be essential for the decision of this case. Order XXI, r. 54, sub-rr. (1) and (2), read as follows:

"(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(1) 7 R 425; 120 Ind. Cas. 142; A I R 1929 Rang. 311; Ind. Rul. (1930) Rang. 14.

(2) 164 Ind. Cas. 1044; A I R 1936 Rang. 403; 9 R Rang. 172.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate."

Sub-r. (3) need not be considered. It was added by this Court to deal with the date form which the order is effective. First, Appeal No. 22 of 1936 *Nayasha Kursoon Bee Bee v. S. P. S. T. R. M. Chettyar Firm* (2) quotes four decisions: *Sinnappan v. Arunachalam Pillai* (3), *Ramanayakudu v. Pedda Basappa* (4), *Abdul Ghafur Khan v. Akram Hasan* (5) and *Ganga Din v. Khushali* (6) and says that these are no authority for the contention that personal service of the prohibitory order on the judgment-debtor is necessary. These cases are directed to the point, it is said, that an attachment is effective not from the date of ordering it but from the date of publishing it. No doubt, it is said, there are, in these cases, dicta to the effect that the judgment-debtor must receive notice of the attachment, but he does receive such notice, either actual or constructive, because before the order for attachment is made, he is called up to show cause against it, and therefore he must either be present before the Court at the time when the order is made, or he must have had an opportunity of being present. The form of the notice is addressed to the judgment-debtor personally as well as to the public. I agree that the section of the Code does not require personal service of the notice on the judgment-debtor. A perusal of the rules of O. XXI which deal with the attachment of other descriptions of property, rr. 43, 44, 46, 47, 48 and 51 to 53, of which r. 46 (2) and r. 47 are the only ones which particularize notice to the judgment-debtor as the requisite method of informing him of the attachment, is sufficient to show that the omission to require service of a notice on the judgment-debtor in person in r. 54 was intentional. As was said in a case quoted to us, *Sher Khan v. Misri Lal* (7), which is only available in an unauthorized report, no notice other than the publication of the prohibitory order (wrongly styled

(3) 42 M 844; 53 Ind. Cas. 207; A I R 1920 Mad. 804; 37 M L J 375; (1919) M W N 678; 10 L W 391; 26 M L T 281 (F B).

(4) 42 M 565 at p. 566; 50 Ind. Cas. 261; A I R 1919 Mad. 594; 36 M L J 284; 26 M L T 45.

(5) 46 A 741; 83 Ind. Cas. 878; A I R 1924 All. 747; 22 A L J 703.

(6) 7 A 702; A W N 1885, 179.

(7) A I R 1926 Oudh 45; 89 Ind. Cas. 107.

there "sale notice") is necessary. *Ramanayakudu v. Pedda Basappa* (4) says, at p. 566, that O. XXI, r. 54, sub-r. (2) contemplates that the person prohibited must have the opportunity afforded by the application (affixing?) mentioned in sub-r. (2) of r. 54 of knowing that he is so prohibited.

Except in the cases covered by O. XXI, r. 22, and except where the Court issues of grace of its own motion notice to the judgment-debtor to show cause against attachment, the judgment-debtor has no notice actual or constructive of attachment before a prohibitory order is issued under O. XXI, r. 54, as that is the first stage in execution by attachment of immovable property. It may be in some cases that notice to the judgment-debtor, though not obligatory under r. 54, is desirable. A case of this kind might be where the property is attached in the non-cultivating season, and lies so far from any village that the judgment-debtor may not know of the attachment. In any case the evidence and the materials on record show that notice in this execution case was served on Vyravan who was living in the firm's house at Pyawbwe and was working and collecting rents on behalf of the firm. In my opinion until the contrary is proved, he must be held to have an ostensible authority to accept notice on behalf of the managing partner (O. V, r. 12). It is unnecessary to consider the evidence, that of Ohidambaram, and the affidavit of service of the prohibitory order itself that a prohibitory order was issued to Somasundaram Ohettyar in another execution case, No. 15 of 1936, of the same Court, by another decree-holder attaching the same land in question, which was sold in execution at the same sale, that decree-holder being allowed rateable distribution, for that attachment would not fix this debt on the property.

Another objection is that notice to verify the sale proclamation issued under O. XXI, r. 66 by substituted service was obtained under false pretences; but there is nothing on the record to satisfy me that this was so. It is true that the address of the judgment-debtor had once been given as Mogul Street; but there is evidence that he was also residing at Pyawbwe from time to time, and he appears to have kept himself out of the way, and Vyravan refused to accept service of any summons or notice to him. It would have been more satisfactory perhaps if the process-server had been called by the decree-holder, but his affidavit was evidence and it was always open to the

present appellant to call him. The last objection is one under O. XXI, r. 90, that there is a material irregularity in publishing or conducting the sale in that the property was misdescribed in the proclamation. We have heard Mr. P. B. Sen at length on the point and it appears to me that the schedule gave all the particulars of the property sold that could be reasonably required. It was not necessary to give the amount for which the houses in question were rented, nor was it necessary to describe one plot of land as suitable for a mill site when there is no evidence that it was peculiarly suitable therefor and all that is said is that a proposal for its use as such had once been abandoned.

The evidence on the record that the granary was sold for a wholly insufficient price is, in my opinion, quite unreliable. There is evidence that judgment-debtor, throughout knew of the sale, and it was not shown that he suffered any substantial injury by reason of any irregularity. What is more, the grounds put forward by him could have been put forward before the sale was conducted (O. XXI, r. 90, sub-r. (a) as amended by Schedule Notification No. 44 of January 27, 1937). No irregularities were disclosed which went to the root of the proceedings, or affected the auction-purchasers. I would therefore dismiss this appeal with separate costs against the decree-holder and the auction-purchasers, Advocate's fee in each case five gold *mohurs*.

Mya Bu, J.—I concur.

Roberts, C. J.—I agree.

D.

Appeal dismissed.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 553 of 1939

August 17, 1939

ALLSOP, J.

In the matter of BENARES BANK, LTD.,
BENARES

Companies Act (VII of 1913), s. 277-N—Order under, when should be passed, stated.

It was never the intention, of the Legislature in enacting s. 277-N, Companies Act, that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the Company should be prevented under the orders of the Court from seeking legal remedies to which they would otherwise have been entitled. It may be that the directors and the Chairman of a Company are actuated by the best of motives and that they think and hope that their arrangements are those best suited to meet the liabilities of the Company, but that is no ground in law for passing

an order under s. 277-N, Companies Act, unless the Court really is satisfied that the position of the Company is embarrassed only temporarily.

Mr. B. Malik, for the Applicant.

Messrs. H. S. Muhammad Hussain, R. K. Malaviya, Shah Habeeb, J. Swarup, M. A. Kasmi and Raj Bahadur Jaini, for the Opposite Party.

Order.— This is an application filed on July 11, 1939, that this Court should pass an order under s. 277-N, Companies Act, staying the commencement or continuance of all actions and proceedings against the applicants for a period of one year with liberty to apply for an extension of time. The application is made on behalf of the Benares Bank, Ltd. A learned Judge of this Court passed an *interim* order during the vacation on July 12, 1939. He had before him a report of the Registrar of Joint Stock Companies as required by sub-s. (2) of s. 277-N. This report recommended that proceedings should be stayed as contemplated by s. 277-N for a period of four months upon certain conditions and the learned Judge passed an order accordingly, but he directed that notice should be published in certain newspapers which he indicated and that the matter should be put up again before me after a month so that any creditors or depositors might make objections to the application. He made it clear that the order which he passed was liable to be recalled or modified upon the basis of any objections that might be filed. I may mention that one of the conditions under which the order for stay of proceedings was passed was that the bank should have three representatives of the depositors upon its Board.

The matter is before me now in pursuance of the order passed by the learned Judge on July 12, and certain applications have been put in by depositors and creditors. There are three applications on behalf of three persons who request that the Board should be directed to pay them sums of money which they deposited in order to obtain drafts on other banks in Bombay. These drafts were dishonoured because the bank suspended payment and it is urged that the money should be paid back. Then there are three applications that the number of directors representing the depositors should be increased from 3 to 6 or 8. Learned Counsel who appears on behalf of the applicants has, however, in the course of arguments, urged that the *interim* order for staying proceed-

ings should be recalled. There is finally an application on behalf of Bate Krishna Das directly urging that the order for stay of proceedings should be withdrawn. This is supported by Mr. Malaviya who has put in *vakalatnama* on behalf of a number of other persons who are alleged to be depositors in the bank. I may say at once that I cannot pass any order to the directors to make payments of money deposited in order to obtain drafts for payment upon other banks. This is a matter which must be decided in the proper way in the proper Court.

I have to consider the main question whether the order staying proceedings under s. 277-N, Companies Act, should be withdrawn or whether it should be confirmed under the same conditions or under different conditions. This question really turns upon the answer to the further question whether the bank is entitled to ask the Court to pass an order of this kind. In order to do so, it must establish that it is temporarily unable to meet its obligations and I consider that the intention of obtaining a report from the Registrar of Joint Stock Companies is that he should examine and inform the Court of the true financial position of the Company. The Registrar's report, in spite of his recommendation, is on the facts absolutely against the Company on this point because he has undoubtedly found that the Company is not liable to meet its obligations and that its assets are about Rs. 7 lacs less than its liabilities. It has been argued on behalf of the bank that the Registrar of Joint Stock Companies and the accountant who assisted him have under-estimated the assets of the bank and a reference has been made particularly to a sum alleged to be due from a firm called Laik and Banerji. It may be that the estimate of the Registrar of Joint Stock Companies is too conservative, but if I reject that estimate, there is nothing else before me which could satisfy me that the position of the bank is essentially secure. Even if it is true that the assets of the Company have been under-estimated in the report, it still seems at least likely that the capital has been wholly or in part dissipated and that the bank is not really in a solvent condition. In these circumstances I do not think that it can fairly be said that the Company is unable to meet its obligations only temporarily. The Chairman of the Board of Directors was present in Court and was permitted to present argu-

ments himself in favour of the Company's application. In the course of these arguments he said that the Company wished to call meetings of creditors and to enter into some scheme of composition with them. He gave an outline of the scheme.

The Company is to pay at the rate of 1½ per cent. per annum on sums deposited with them. There are said to be about 400 depositors who have sums of Rs. 100 or less in deposit with the Company. These are to be paid off within two years. The remaining 4,000 depositors who have larger sums in deposit are to be offered payment of 6½ per cent. in 1939 and 1940, 12½ per cent. in 1941 and 1942 and higher percentage in the three following years during which their claim will finally be met. Even on this scheme, it is obvious that the Company have no hope of meeting all its liabilities for another period of six years and these liabilities are liabilities only to the depositors. It does not appear whether anything will be left over for the shareholders of the Company; it may be that the directors and the present Chairman are actuated by the best of motives and that they think and hope that their arrangements are those best suited to meet the liabilities of the Company, but although that may be so, that is no ground in law for passing an order under s. 277-N, Companies Act, unless the Court really is satisfied that the position of the Company is embarrassed only temporarily. I am very far from being convinced of this fact from the material before me. I must at least suspect very strongly that the financial position of the Company is very far from being secure. It was never the intention, I am sure, of the Legislature in enacting s. 277-N, Companies Act, that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the Company should be prevented under the orders of the Court from seeking legal remedies to which they would otherwise have been entitled. The Court could only undertake the responsibility of barring these legal remedies to which people would ordinarily be entitled if it was certain within reasonable limits that they would not suffer any real loss by being deprived of these remedies. I cannot say that I am satisfied that the Company is in a solvent condition essentially and therefore I am unable to maintain the order passed for the time being under s. 277-N, Companies Act. I direct that

the order shall be withdrawn and that the application made by the Company shall be dismissed. I make no orders as to costs.

s.

Order accordingly.

BOMBAY HIGH COURT

Second Appeal No. 232 of 1937

June 14, 1939

LOKUR, J.

Sayad MOHIUDDIN Sayad NASIRUDDIN

—PLAINTIFF—APPELLANT

versus

KHATIJA BI AND ANOTHER—DEFENDANTS—

RESPONDENTS

*Muhammadian Law—Marriage—Shafi sect of Sunnis—
—Marriage of adult virgin without her consent—
—Validity.*

Under the Muhammadian Law, marriage is a contract, and even among the Shafi sect of Sunnis, the marriage of an adult virgin is invalid if it is performed without her consent and against her wish. 113 Ind. Cas. 306 (1), relied on, *Mahomed v. Zahiroodin* (3), referred to.

S. A. from the decision of the Assistant Judge, Dharwar, in Appeal No. 7 of 1936.

Mr. S. R. Parulekar, for the Appellant.

Mr. G. P. Murdeshwar, for Respondent (Defendant No. 1.)

Judgment.—This second appeal arises out of a suit filed by the plaintiff for restitution of conjugal rights against defendant No. 1 whom he alleges to have married on May 30, 1934. The parties belong to the Shafi sect of Sunni Muhammadans. Defendant No. 1 contended that as she was an adult virgin at the date of the marriage, that as the marriage was performed without her consent and against her wishes, the marriage was invalid, and that the plaintiff was not entitled to claim restitution of conjugal rights against her. Both the lower Courts upheld her contention, and the suit was dismissed. It is not disputed in this Court that the parties are Sunni Muhammadans belonging to the Shafi sect, that at the date of the alleged marriage defendant No. 1 had attained puberty, and that the marriage was performed by her father against her wishes and without the consent either of herself or of her mother with whom she was then living in her maternal uncle's house. The only issue argued is whether such a marriage is valid according to the law by which Shafi Muhammadans are governed. The only pertinent case to which my attention has been drawn is that

in *Hussan Kutti v. Jainabha* (1). In that case Odgers and Madhavan, Nair, JJ. have discussed the views of the accident text-writers as well as the views of the modern jurists and have come to the conclusion that the consent of an adult virgin is essential for the validity of her marriage among the Shafi sect of Sunnis. It is true that according to the ancient texts, which have been cited in that case, not only female minors, but also adult women who are virgins, may be disposed of in marriage by the father or paternal grandfather without their consent, and the following is quoted at p. 41 from the Minhaj :

"Not only female minors, but adult women who are virgins may be disposed of irrevocably in marriage by the father, or failing him by the paternal grandfather with or without their consent; but their consent is nevertheless considered desirable."

Later on, the same text says (p. 42):

"It is, however, always commendable to consult her as to her future husband, and her formal consent to the marriage is necessary if she has already lost her virginity."

As observed by Jenkins, O. J. in *Mahomed v. Zuhirooddin* (2), the Shafi school itself possesses a substantive system, as one *inter partes*, and is not a subordinate offshoot from co-existing schools, the special characteristic of the Shafi school being adherence to precedent, a conservative tendency that would resist modification by fluctuating customs. Hence, if there is a clear dictum in any ancient text that the consent of an adult virgin is not required for the validity of her marriage, then the views of modern writers ought not to be given effect to. But after considering the views of all the ancient texts, Ameer Ali has thus recapitulated the law at p. 303 of his *Muhammadian Law*, Edn. 5, Vol. 2 :

"Under the Maliki and Shafei Law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorized *wali*, who would act as her representative. Under the Hanafi and Shiah Law, the woman can consent to her own marriage either with or without a *wali*."

This is the only distinction between the necessity of consent as required by the Maliki and Shafei Law and that as required by the Hanafi and Shiah Law. The learned Judges of the Madras High Court have accepted this opinion and held that even among the Shafis, the marriage of an adult virgin is invalid if it is performed without her consent. In this case not only did

(1) 52 M 39; 113 Ind. Cas. 306; A I R 1928 Mad. 1285; 65 M L J 828; 28 L W 710; Ind. Rul. (1929) Mad. 101.

(2) 5 Bom. L R 8.

defendant No. 1 not give her consent, but she had actually approached the Police to have the marriage prevented, and the marriage was ultimately forced upon her against her wishes. Under the Muhammadan Law marriage is a contract, and the marriage thus celebrated under compulsion cannot be regarded as valid. I therefore agree with the findings of the lower Courts and dismiss the appeal with costs.

S.

Appeal dismissed.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 448 of 1938

April 27, 1939

IQBAL AHMAD AND BAJPAL, JJ.

Saiyed SHABAN ALI—PLAINTIFF—

APPLICANT

versus

Sheikh MOHAMMAD ISHAQ—DEFENDANT
—OPPOSITE PARTY

Stamp Act (II of 1899), ss. 2 (16), 6—Document held lease as well as agreement.

Held, on construction that the document executed by the lessee was a lease as well as an agreement and was, therefore, chargeable only as a lease under s. 6, Stamp Act.

Misc. Case from reference submitted by the Inspector of Stamps, Allahabad, dated April 30, 1938.

Mr. A. M. Khwaja, for the Applicant.

Messrs. Inam-ullah and Shabban Ali, for the Opposite Party.

Mr. S. K. Dar, for the Crown.

Bajpal, J.—This a reference under s. 61, Stamp Act, and the question that we have got to decide is whether paper No. 7-U is a lease as well as an agreement or only an agreement. The learned Judge of the Small Cause Court was of the opinion that the document was an agreement only, whereas the Inspector of Stamps held the view that it was a lease as well as an agreement. We have perused the document and we have come to the conclusion that it is a lease as well as an agreement. It is executed not by the lessor but by the lessee, and the latter covenants that he would take certain premises from the lessor, make certain alterations in the premises at his own cost, pay Rs. 9 a month as rent and the period of occupation was fixed as five years. It was also stipulated that the executant will not leave the premises for five years and if he did vacate the premises within five years, he would be liable for the rent

of five years. The document was executed on December 11, 1927, on a general stamp of 8 annas. As we said before, the terms of the document leave no room for doubt that it is a lease as well as an agreement. 'Lease' under the Stamp Act "includes a *kabuliyat* or other undertaking in writing... to occupy or pay or deliver rent for immovable property." Under s. 6, Stamp Act, if an instrument is so framed as to come within two or more of the descriptions in Sch. I and if the duties chargeable thereunder are different the instrument will be chargeable only with the highest of such duties. The document, is a lease as well as an agreement, and as the duty for a lease is higher, it will be chargeable only as a lease. The annual rent reserved is Rs. 108, that is to say, it exceeds Rs. 100 and does not exceed Rs. 200. As a conveyance, a duty of Rs. 2 is chargeable. In case of a lease, where the lease purports to be for a term in excess of three years, as it is in the present case, the duty is the same as on a conveyance for a consideration equal to the amount or value of the average annual rent reserved. We therefore declare that the document is chargeable as a lease, and we determine the amount of duty thereon as Rs. 2. Annas 8 having already been paid, the deficiency is Re. 1-8-0. Under s. 35 of the Act, a penalty is also leviable and such a penalty shall be ten times the amount of the deficiency, that is Rs. 15. We make the above declaration and we direct that a copy of our judgment will be sent to the Collector.

s. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 333 of 1938

March 17, 1939

DAVIS, J. C. AND TYABJI, J.
MANGHANMAL GIANCHAND—
APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Bombay District Police Act (IV of 1890), s. 39-A—Rules under—R. 17—Order of District Magistrate under—Interference by High Court under s. 435, Criminal Procedure Code (Act V of 1898).

When the District Magistrate passes orders under r. 17 of the Rules for licensing and controlling places of public entertainment framed under s. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District whichever he may be called, is not acting as an inferior Court within the meaning of s. 435, Criminal P. C. He is acting as

an executive officer in the exercise of powers conferred upon him under s. 39-A, Bombay District Police Act. High Court cannot, therefore, under s. 435, Criminal P. C., interfere with this order.

Cr. R. App. to revise an order of the District Magistrate, Hyderabad, dated October 15, 1938.

Mr. Hardasmal Vishensingh, for the Applicant.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, J. C.—This is an application in revision against an order of the District Magistrate of Hyderabad asking this Court to set aside an order purporting to have been passed by the District Magistrate of Hyderabad, whereby he ordered the applicant to close a hotel for a period of six months. It is intelligible that a certain confusion attached to this order, because not only did it appear from the notice served upon the applicant that the order was not even signed by the District Magistrate, but when we called for the papers and looked at the order ourselves, we found ourselves quite unable to decipher the handwriting in which the order was written; nor was the learned Advocate-General, despite his best endeavours, more successful. We therefore returned the papers and asked the learned District Magistrate to decipher the order for us and to inform us under what Act, or section of the Act, or statutory rule his order was made. We have now been favoured by the learned District Magistrate with a copy of the order as deciphered by him and he also informs us that the order was made by him under r. 17 of the Rules for licensing and controlling places of public entertainment framed under s. 39-A, Bombay District Police Act. We would suggest in future not only to save himself but other people trouble, the learned District Magistrate might put at the head of his order, as is customary or should be customary, the section of the Act and the Rule under which it is made and he might see when a copy of the order is served upon the parties who are to obey it, the copy of that order should show that the order was signed by him and not by a subordinate in his office.

These questions apart, however, the learned Advocate-General has taken a preliminary objection, and we think a quite proper preliminary objection, that this Court has no jurisdiction to deal with this

order of the District Magistrate, now its nature and contents have been disclosed to us; for, it is an order passed by him as an executive officer under the Bombay District Police Act. For the applicant, however, it is contended that the District Magistrate, when he passed this order, was acting as a Court and was therefore subject to our jurisdiction in revision under s. 435 and the following sections of the Criminal P. O.; but, though it is true that in the District Police Act under s. 3 (d) a district is defined as "territorial division constituting a district for the purposes of the Criminal P. O." and a District Magistrate is nowhere specifically defined but is referred to, for instance, in s. 13 as a Magistrate of the District who is presumably the same person as a District Magistrate appointed under s. 10, Criminal P. O., nevertheless it does not appear to us to follow that every act of the Magistrate of the District under the Bombay District Police Act is the act of an inferior Criminal Court within the meaning of s. 435, Criminal P. O. Section 32, Criminal P. O., and the following relevant sections refer clearly to Courts. The District Magistrate is under s. 10, Criminal P. O., also a Magistrate of the First Class, and ss. 32, 33 and 34 refer to the Courts of Magistrates.

It therefore appears to us clear that before we can exercise our jurisdiction in revision under s. 435, Criminal P. O. we should be satisfied that the act of the District Magistrate which we are asked to revise is an act of the Court of the District Magistrate. It appears on the face of it impossible to say that when the District Magistrate passes orders under r. 17 of the Rules for licensing and controlling places of public entertainment framed under s. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District whichever he may be called, is acting as an inferior Court within the meaning of s. 435, Criminal P. O.; in our opinion it is clear that he is acting as an executive officer in the exercise of powers conferred upon him under s. 39-A, Bombay District Police Act.

If his order is *extra vires* and is disobeyed and accused be prosecuted, convicted and punished, then doubtless this Court would have jurisdiction over the inferior Court which so convicted or punished, then doubtless the question as to whether the order of the District Magistrate was *extra vires* or *intra vires* of the powers conferred upon him under the Bombay District Police

Act, could be inquired into and determined; but until that stage we do not see how we can exercise powers over the orders of the Magistrate in this matter as an inferior Criminal Court. Presumably the applicants consider themselves aggrieved by the order of the Magistrate of the District which they contend is *ultra vires*. They can seek an appropriate remedy in a Civil Court unless the Legislature has by its enactment barred any remedy in a Civil Court. That aspect of the matter we are not now called upon to deal with in any way. We therefore reject this revision-application accordingly.

D.

Application rejected.

CALCUTTA HIGH COURT

Civil Rule No. 656 of 1939

August 14, 1939

NASIM ALI AND NARSING RAU, JJ.

ABDUL LATIF—DEFENDANT—

PETITIONER

versus

ABDUL GANI SERANG—PLAINTIFF—

OPPOSITE PARTY

Transfer of Property Act (IV of 1882), s. 58 (c)—Mortgage by conditional sale and sale with condition of re-purchase—Difference—Bengal Agricultural Debtors Act (VII of 1936), ss. 34, 2 (8)—"Liability" in definition of "debt"—Debt secured by mortgage by conditional sale, whether debt within s. 34.

A mortgage by conditional sale is transaction essentially different from a sale with a condition of re-purchase. In a sale with a condition for re-purchase, the ownership vests in the transferee from the date of the document and there is no question of any debt being in existence after the transaction. In a case of mortgage by conditional sale, the debt subsists and a right to redeem remains with the debtor.

The definition of "debt" found in s. 2 (8), Ben. Agricultural Debtors Act includes "secured and unsecured" liabilities. All mortgage-debts are secured liabilities, although in a simple mortgage there is a personal liability flowing from the covenant to pay, while in a mortgage by conditional sale, there is no such covenant and consequently there is no personal liability. Consequently, a debt secured by mortgage by conditional sale is a debt within the meaning of s. 34, Ben. Agricultural Debtors Act.

O. Rule issued from an order of the Munsif Sandwip (Noakhali), dated March 17, 1939.

Mr. Obaidul Haq, for the Petitioner.

Mr. Nripendra Chandra Das, for the Opposite Party.

Nasim Ali, J.—This Rule is directed against the order of the Munsif at Sandwip, dated March 17, 1939, rejecting the defendant-petitioner's application for vacating his order, dated April 5, 1938,

staying the hearing of a certain suit for foreclosure on the basis of a mortgage by conditional sale executed by him in favour of the plaintiff-opposite party. The only point for determination in this Rule is whether a suit for foreclosure of a mortgage by conditional sale executed for the purpose of securing the payment of money advanced by way of loan is a suit in respect of a "debt" within the meaning of s. 34, Ben. Agricultural Debtors Act, 1935. "A mortgage" as defined in s. 58, T. P. Act,

"is the transfer of an interest in specific immovable property, for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

A mortgage by conditional sale is a transaction essentially different from a sale with a condition of re-purchase. In a sale with a condition for re-purchase the ownership vests in the transferee from the date of the document and there is no question of any debt being in existence after the transaction. In a case of mortgage by conditional sale, the debt subsists and a right to redeem remains with the debtor. The provisions of O. XXXIV, r. 2, Civil P. C., support this view. The person entitled to the benefit of an *obligatio* was in Roman law termed creditor, while he who was bound by it was called debtor. Every obligation, of whatever nature, as vested in or belonging to a creditor, and availing against a debtor is an obligation arising out of a debt.

"There is of course a narrower sense, in which these terms are applicable only to those obligations which constitute debts; that is to say, obligations to pay a definite or liquidated sum of money: Salmond's Jurisprudence, 4th Edn., p. 423."

Section 2, cl. (8), Ben. Agricultural Debtors Act, defines the word "debt" thus:

"Debt" includes all liabilities of a debtor in cash or in kind, secured or unsecured, whether payable under a decree or order of a Civil Court or otherwise, and whether payable presently or in future."

The word "liabilities" in this definition is not confined to "personal liabilities of the debtors," as the word "personal" is not mentioned in the definition. The definition includes "secured and unsecured" liabilities. All mortgage debts are secured liabilities, although in a simple mortgage there is a personal liability flowing from the covenant to pay while in a mortgage by conditional sale there is no such covenant and consequently there is no personal liability. There is nothing in this definition to suggest that the words "liabilities of a debtor" in the definition are to be given a restricted meaning. My conclusion therefore is that a debt

secured by mortgage by conditional sale is a debt within the meaning of s. 34, Ben. Agricultural Debtors Act, 1935. The result therefore is that this Rule is made absolute. The order complained of is set aside. The hearing of this suit is stayed under s. 34, Ben. Agricultural Debtors Act, 1935. The petitioner will get his costs. Hearing fee is assessed at one gold *mohur*.

Narsing Rau, J.—The main question in this case is whether a loan secured by a mortgage by conditional sale constitutes a debt within the meaning of the Ben. Agricultural Debtors Act, 1935. The term "debt" as used in the Act is defined in s. 2(8) as including all liabilities of a debtor in cash or in kind, secured or unsecured, whether payable under a decree or order of a Civil Court or otherwise and whether payable presently or in future. There are certain exceptions, of which the only relevant one is that the term does not include any amount, the liability for the payment of which is only contingent.

The contention on behalf of the creditor is that the words "of a debtor" in the above definition imply a personal liability of the debtor. In a mortgage by conditional sale, the mortgagor does not bind himself to re-pay the mortgage money. All that he does is ostensibly to sell the mortgage property on condition that on default of payment of the mortgage money on a certain date, the sale shall become absolute or on condition that on such payment being made, the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller. In none of these cases, so the argument proceeds, is there any covenant by the mortgagor to re-pay the loan to the mortgagee. It is true that in certain contingencies mentioned in s. 68 (1), T. P. Act, the mortgagee may have a right to sue for the mortgage money even in the case of a mortgage by conditional sale. But the liability of the mortgagor in these events, it is argued, is only a contingent liability and as such, specifically excluded from the definition of debt in the Ben. Agricultural Debtors Act.

I do not think that the term "debt" can be given this narrow interpretation for the purposes of the aforesaid Act. There is no reason why we should limit the expression "liabilities of a debtor" to mean certain liabilities of a debtor and not others. Even in the case of a mortgage by conditional sale, it is quite clear that

there is certain date on which the mortgage money becomes due. Under s. 60, T. P. Act, at any time after the principal money has "become due" the mortgagor has a right of redemption. This applied to all mortgages, whether by conditional sale or in any other form. It follows therefore that even in the case of mortgage by conditional sale there is a certain date on which the principal money "becomes due." The language of s. 67, T. P. Act, leads to the same conclusion. It seems to me that when money becomes due, it is a liability of the debtor, whatever may be the precise manner in which the liability can be enforced. In a mortgage by conditional sale the manner of enforcement is by a suit for foreclosure. But this does not alter the fact that there is pre-existing liability for the mortgage money. If the framers of the Ben. Agricultural Debtors Act intended to exclude from the definition of "debt" money advanced on a mortgage by conditional sale, as distinguished from other forms of mortgage, they would have said so in unequivocal terms in one of the many exceptions that have been inserted in the definition in question. I therefore agree that the question must be answered in the affirmative, and that the Rule must be made absolute.

D.

*Rule made absolute.***LAHORE HIGH COURT**

Letters Patent Appeal No. 6 of 1939

March 22, 1939

ADDISON AND RAM LALL, J.J.

RANJIT SINGH AND OTHERS—APPELLANTS
versusChaudhri NAWAB KHAN AND OTHERS—
RESPONDENTS

Custom (Punjab)—Village—Tests—Sohna, if village or town—Landlord's right to challenge alienation of house belonging to non-proprietor—Such alienations taking place for long period—Effect on onus—Second appeal—Finding of fact based on evidence—If can be set aside—Question of fact at issue—Case depends on evidence.

A place which has got the public buildings which has had a population for 70 years or more of over five thousand, which has got paved streets and which collected octroi dues over 50 years ago, must be regarded as a town. The mere fact that the tenure is the place *bhaisachara* does not in any way conflict with its being a town and not a village. On these tests, Sohnā is not a village. [p. 396, col. 2.]

Sohnā is not a village but a town. The landlords there have no right to challenge an alienation of a house belonging to a non-proprietor unless the landlord can show that the house was built on land granted by the proprietary body out of the *shamilat deh*.

Broadly stated, it may be taken as a rule that where a large number of unchallenged alienations by non-proprietors have been taking place for a very long period, the onus should be placed on the landlords to show that they have a right to control those alienations. This they may be able to show by proving a grant and then the case would be governed by the terms of that grant. To hold otherwise would be to hold that a rule of custom had been established and before a finding of fact on such a point could be upset, a certificate as regards custom must first be obtained from the District Judge. [p. 400, col. 1.]

It is true that once the onus is placed on the landlords, it is an onus which is almost impossible to discharge but that is no ground for shifting the onus when a large number of instances of sales and mortgages extending over a century have been established and in not one case has there been a successful challenge. The conclusion is almost inevitable that the landlords had no right to challenge an alienation of a house belonging to a non-proprietor unless the landlord could show that the house was built on land granted by the proprietary body out of the *shamilat deh*. [p. 399, col. 2.]

The fact that the lower Court has omitted to mention a certain piece of evidence does not show that it did not consider it and in any case where the finding is based on evidence, the finding is not liable to be set aside in second appeal, even if the High Court is inclined, to come to a contrary conclusion. [p. 399, cols. 1 & 2.]

Where a question of fact is at issue, each case must depend on its own merits and on the evidence led in that case.

L. P. A. against the judgment of Mr. Justice Abdul Rashid, dated October 27, 1938.

Messrs. Jagan Nath Aggarwal, Asa Ram Aggarwal and D. N. Aggarwal, for the Appellants.

Dr. Khalifa Shuja-ud Din, for the Respondents.

Ram Lall, J.—On October 19, 1925, Lekh Ram mortgaged with possession his half share of the house in dispute to Qutab-ud-Din. On December 9, 1939, Bidhu, defendant No. 3, who owned the other half of this house, mortgaged his share also to Qutab-ud-Din. On August 19, 1932, both Lekh Ram and Bidhu sold the equity of redemption to Jahangiri Mal, defendant No. 1. On July 3, 1933, the present suit was instituted by the proprietors of Sohnā, where this house is situate, on the ground that Sohnā was a village and that the alienors, Lekh Ram and Bidhu, were non-proprietors in the village and that therefore they had not acquired any right which they could transfer by sale. The issues framed in the case were :

"1. Whether Sohnā is a village or whether the houses in suit were built on village common land ?

2. In case the above issue is proved, whether defendants Nos. 2 and 3 were full proprietors or complete owners of the houses in dispute ?

3. In case Issue No. 1 is not proved, whether defendants Nos. 2 and 3 had no power to alienate the houses in dispute under law and custom?"

The trial Court held that Sohna was a town and not a village but that the house in question stood on common land. In the face of this decision on Issue No. 1, a decision on Issue No. 2 was not necessary, and regarding Issue No. 3, it held that Sohna being a town, defendants Nos. 2 and 3 had succeeded in proving that they had a right to alienate a house built on the *abad-i-deh* by virtue of many alienations which had admittedly taken place and this almost amounted to a custom. On appeal, the learned District Judge also held that Sohna was a town and therefore the burden of proving that the non-proprietors had not the right to alienate the sites of their houses lay heavy on the proprietors which the proprietors had failed to discharge. The learned District Judge further held that the ancestors of these non-proprietors had settled in Sohna along with the founder and had been in possession of their houses since times immemorial and that therefore they were not bound by any entries in a subsequent *wajib-ul-ars* restricting their rights of alienation. In other words, on this part of the case, the learned District Judge held that the portion on which the house in suit stood had been proved to be any longer a part of the *shamilat deh*. In this view the learned District Judge dismissed the appeal of the plaintiffs before him who then preferred a second appeal to the High Court. The learned Single Judge, before whom this case was argued in second appeal, held that the question whether Sohna was a town or a village was one of fact and that finding could not be disturbed in second appeal ordinarily, but he was of the opinion that the learned District Judge had ignored oral and documentary evidence in arriving at his conclusion and, that this consideration vitiated his finding on the question of fact.

The learned Judge then proceeded to examine the evidence which, in his view, the learned District Judge had ignored and came to the conclusion that the non-proprietors in Sohna had not the right to sell the sites of their houses and accepted the appeal, making no order as to costs throughout. An appeal has been preferred under the Letters Patent and the principal ground urged by Mr. Jagan Nath Aggarwal for the appellants before us has been that the findings arrived at by the learned District

Judge were findings of fact after a consideration of the whole evidence and were therefore not liable to be disturbed in second appeal. The learned Counsel has argued further that the evidence referred to by the learned Single Judge is either of a perfectly neutral character or, if properly construed, helps him and supports the findings of fact arrived at by the learned District Judge. We have heard lengthy arguments in this case and are of the opinion that there is considerable force in this contention. The basic findings in the case are: (1) that Sohna is a town and not a village; and (2) that the non-proprietors settled in Sohna with the founders and that for a period of over a century they had been alienating the sites of their houses, which they could have acquired by purchase of the *shamilat* lands and that these alienations had in some cases been witnessed by the proprietors and in any case were made without any objection by the proprietors.

As to whether Sohna is a town or a village, the census reports from the year 1868 on to the year 1931 indicate that the population has varied roughly between five and seven thousand during these decades. The test adopted by the Census Commissioner as to whether a place was a town or not, was that a place was a town in which there was a continuous collection of houses with about five thousand population. Sohna was declared to be a town within the meaning of s. 3, Punjab Pre-emption Act, *vide* Notification No 677 of November 10, 1908, printed as Appx. 3-A to Ellis's Law of Pre-emption, Edn. 6 at p. 465. At p. 245 of the *Gurgaon District Gazetteer* for the year 1910, Sohna is described as a thriving town, prettily situated in a well wooded country:

"The streets are mostly narrow and tortuous, but picturesque and well paved with flag-stones. An old ruined mosque has been converted into a resthouse. . . . The other public buildings are the school, dispensary, Police Station and post office. . . . The town is of considerable antiquity and has been occupied in succession by three different races, the Kamboh, Khanzadas and Rajputs."

The present town was apparently founded in the early part of 17th century A.D. In the 1883 *Gazetteer*, it appears there was income derived from octroi. It appears to me that a place which has got the public buildings which Sohna has got, which has had a population for 70 years or more of over five thousand, which has got paved streets and which collected octroi dues over 50 years ago, must be regarded as a town. The evidence of Prabhu Dial, draftsman,

who is the first witness for the plaintiffs, shows that there are two or three bazars and 300 or 400 shops which are all *pacca* and that the main bazar road is metalled. The evidence of P. W. No. 3 Chaudhri Ochan Singh, Secretary, District Board, Gurgaon, is to the effect that there is a civil hospital, a veterinary hospital and a school at Sohna. The learned Single Judge laid some stress on the fact that Prabhu Dial, draftsman, produced a number of plans of houses and vacant sites which the proprietors of Sohna had acquired by the non-proprietors abandoning the village and on the fact that Abdul Rahman Patwari (P. W. No. 2) said that Sohna was a village. The learned Judge, however, omitted to make a distinction between a house built by a non-proprietor on village land with the consent of the proprietors and a house built by such a non-proprietor on a site purchased by him. In the first case the site would revert to the proprietors on abandonment by the non-proprietor but in the second case it would be transferred by sale. Regarding the evidence of the Patwari, the learned Single Judge ignored his cross-examination which clearly showed that in the latest *jamabandi* Sohna was shown as a Qusba and that in the *misal haquiyat* of 1906-07 it was also shown as a Qusba. The learned Single Judge then referred to the evidence of the Revenue Assistant (P. W. No. 10) Mir Muhammad Hassan wherein he stated that in the revenue records the word "Qusba" was not used. This is obviously incorrect and in cross-examination this witness had to admit that the word was used in relation to Sohna but he said that it had been wrongly used without giving any reason therefor. He admitted that from the point of view of census Sohna was a town. It appears to me, therefore, that of the three witnesses, whose oral evidence has been referred to by the learned Single Judge, the statement of each one corroborates the finding that Sohna is a town and not a village.

So far as the documentary evidence referred to by the learned Single Judge is concerned, the first document examined is Ex. D. W. 55/30 which, in his view, indicated that Sohna was a village. This document (Ex. D. W. 55/30) is an extract from the pedigree table showing the rights of the proprietors of Qusba Sohna attached to the Record of Rights prepared at the time of the 1877 settlement. All that this document shows, after giving the early

history of Sohna, is that the tenure prevalent there is *bhaiachara gheir mukammil* and this merely indicates, in my opinion, that the settlers in the village comprised a miscellaneous collection of people and not one family or tribe. In para. 135 (p. 65) *et seq.* of the Punjab Settlement Manual by Sir James Douie, Edn. 4, it is stated that *bhaiachara gheir mukammil* means that possession is the measure of right. In para. 137 it is stated as follows:

"*Pattidari* was once applied only to estates held on ancestral shares, and villages in which other kinds of customary shares prevailed were called *bhaiachara*. But in the Punjab *bhaiachara* is restricted to tenures in which possession has become the measure of right, and all villages held on ancestral or any other well-known scheme of shares are classed as *pattidari*."

In para. 139 the remark occurs:

In perfect *bhaiachara* tenures all the lands are held in severalty, but customary shares, if they ever existed, have disappeared and each man's holding or rather the portion of the total revenue which he pays, has become the sole measure of his rights and liabilities. In a *pattidari* tenure, the share regulates the revenue payable, in a *bhaiachara* tenure the revenue payable regulates the share."

The fact that the tenure in Sohna is *bhaiachara* does not, in any way, conflict with its being a town and not a village. The learned Single Judge appears to me to be incorrect when he says that all the inhabitants of the village live on agriculture, for, as I have pointed out already, a place which has several hundred *pacca* shops must have other means of livelihood than agriculture only. The learned Single Judge then went on to say that it was not very material for the decision of the case whether Sohna was a village or a town, once it was established that the site in dispute was a part of the *shamilat deh*. He said that the trial Court had come to the conclusion that it had been established beyond doubt that the site in dispute was a portion of the village common land and the proprietary body of Sohna was its owner, a finding which according to him, was not disturbed by the learned District Judge on appeal. It appears to me that the learned Single Judge is wrong in holding that it is immaterial whether Sohna is a town or a village because the whole frame of the issues is based on this assumption and the finding on the question whether it was a town or a village would have a very important bearing on the onus. It was only if Issue No. 1 was proved in the affirmative that Issue No. 2 arose at all and in that case only would the non-proprietors have to show

that they had full proprietary rights and in case it was not proved to be a town, then the onus of proving Issue No. 3 would be on the proprietors to show that the non-proprietors had not the power to alienate. The learned Single Judge also appears to me to be wrong in holding that the District Judge did not disturb the finding of the trial Court that the site in dispute formed a part of the village common land; for the learned District Judge says in his judgment that there is no proof that the alienors got the site of their house from the proprietors. The District Judge held that he was not concerned in this case with the rights of other non-proprietors who might be proved definitely to have obtained sites from the proprietors after 1877 with permission to build over them as their case would be governed by grant. In the present case, however, he held it proved on the evidence that the ancestors of defendants Nos. 2 and 3 (Lekh Ram and Bidhu) had settled along with the founders and had been in possession since times immemorial. In the earlier part of his judgment he held that as the ancestors of defendants Nos. 2 and 3 had settled with the founders of Sohna and had been in possession of their holdings long before 1877, the *wajib-ul-arz* prepared subsequently did not touch them or their rights.

The learned Single Judge then went on to consider the *wajib-ul-arz* of Sohna both for the year 1863 and for the year 1877. In the 1863 *wajib-ul-arz* it was stated that nobody had the power to make new *abadi* in and build a house on the *shamilat* land without the consent of all the proprietors and that those living in the land owned by the proprietors had no power to alienate. In the 1877 *wajib-ul-arz* it is stated that the *malba* of the house of a non-proprietor shall be possessed by the proprietors in case he leaves the house and goes away, but it is significant that seven tribes mentioned by name were given the right of alienating the sites of their houses. The learned Single Judge was of the opinion that from the fact that the restriction on the rights of the proprietors was in favour of only seven tribes which included Brahmins, Mahajans and Kayasths, it was apparent that the proprietors were anxious to see that the number of these excepted tribes was not enlarged. It is clear that a large number of alienations by non-proprietors have been taking place from time immemorial. A judgment, dated November 24, 1922, by Lala Kashmiri Lal, Munsif of Gurgaon, gives a

number of instances of such alienations and mentions a number of such instances in which the proprietors attested such alienations by non-proprietors. The learned Single Judge has referred to this judgment (D. W. No. 55/18 at p. 707 *et seq* of the record of this case) as showing that the *wajib-ul-arz* for the year 1907-08 was the same as that prepared in 1877 and has held that the burden of proving that the Kumbars had the right to alienate the sites of their houses lay heavily on them. The learned Judge admits that a large number of instances had been established but considers that it had to be established, and it had not been successfully established, that the old custom had been replaced by a new one whereby the non-proprietors had acquired full rights of alienation of the sites of their houses. He refers to 56 sales by non-proprietors, 15 of which were for sums less than Rs. 100, another 15 were made in favour of *biswedars*. As to the mortgages, he found that out of 42, 8 were for amounts below Rs. 100, 10 were open to challenge at the date of the institution of the suit and 6 were made by members of the seven privileged tribes mentioned above. The truth appears to me to be that from time to time the non-proprietors during the course of 300 or 400 years that Sohna has been in existence have been making alienations of their village sites, in some cases to the proprietors and in other cases to others, and between 1863 and 1877, the seven tribes had by instances established their right to make alienations. The 1877 *wajib-ul-arz* (Ex. P-26) throws a very instructive light on the situation. It says:

"If any non-proprietor wants to build a new house other than the house in which he resides, he is competent to do so in the *ikata* of his house, or on the land purchased by him. The remaining land belongs to us. The non-proprietor cannot build houses on it without our consent or permission."

The obvious meaning of this appears to me to be this: if a non-proprietor builds a house on the *shamilat deh* with the permission of the proprietary body, the right in the land vests in the proprietors, and if and when the non-proprietor abandons the house, both the land and the *malba* belong to the proprietors and neither the land nor the *malba* is, therefore, alienable. Where, however, a non-proprietor elects to purchase land, anything that he builds on this land together with its site belongs to him exclusively and can always be made the subject of a sale or other alienation without any challenge from the landlords. It is significant that during the 300 or 400 years

that this class of alienation has been taking place, there is not one successful instance brought on the record in which such a sale of a house built by non-proprietor on land purchased by him has been challenged. As I have said already, there is a conclusive finding of fact that the ancestors of defendants Nos. 2 and 3 settled with the founders, perhaps 300 years ago long before any *wajib-ul-arz* was recorded, and the onus was very heavy on the proprietors to show that the site of the house in question was not acquired by any one of the ancestors of defendants Nos. 2 and 3 by purchase and unless and until they could show this, they could not succeed. The only instance relied upon is Ex. D. W. No. 55/18 and there the *ratio decidendi* was that there was not an iota of evidence on the file to show that the house was given by the proprietors to the alienors or their ancestors.

The learned District Judge examined the large number of alienations cited including sales and mortgages and found on an examination of this evidence that the Kumbars had been selling and mortgaging their houses as full owners. In some of these cases the amounts involved were as much as Rs. 400: *vide* mortgage deed (Ex. D. W. No. 55/1) at p. 633 of the present record in which two shops were mortgaged for Rs. 450 in *Sambat* 1891 corresponding to the year 1834. Another sale was made in this Qusba (*vide* Ex. D. W. No. 15/6 on 24th May 1856) of a passage in front of a shop, and on September 10, 1866 (*vide* Exhibit D. W. 15/2), one *Musammam* Rahiman, caste Mughal of Qusba Sohna, mortgaged a *haveli* to one Kallu Mal Mahajan for Rs. 200. There are numerous such instances and having regard to the fact that the value of money was much more 70 years ago than it is to day, the consideration for these alienations cannot be said to be inconsiderable.

It appears that the learned District Judge recorded distinct findings based on evidence a good part of which he mentioned in his judgment. The first of these findings was in agreement with the lower Court that Sohna was a town. No piece of evidence mentioned by the learned Single Judge or in arguments before us materially disturbs this finding, even if we assume that some pieces of evidence were not given full weight by the learned District Judge. The fact that he omitted to mention them does not show that he did not consider them and in any case where the finding is based on evidence, the finding was not liable to be

set aside in second appeal, even if we were inclined, which we are not, to come to a contrary conclusion. The second finding the learned District Judge arrived at again after full examination of the evidence but in disagreement with the first Court was that the non-proprietors defendants in this case or some of their ancestors could, according to the *riwaj-i-am*, have purchased the sites of these houses and may have done so. This again was a finding of fact which was based on good evidence and indeed no evidence has been placed before us which would shake the conclusion arrived at by the learned District Judge.

Here again even if we were inclined to come to a contrary conclusion, the finding was one which was not liable to be disturbed in second appeal. It is true that once the onus is placed on the landlords, it is an onus which is almost impossible to discharge but that is no ground for shifting the onus when a large number of instances of sales and mortgages extending over a century have been established and in not one case has there been a successful challenge. The conclusion is almost inevitable that the landlords had no right to challenge an alienation of a house belonging to a non-proprietor unless the landlord could show that the house was built on land granted by the proprietary body out of the *shamilat deh*.

The learned Single Judge has relied on a decision reported in *Sewa Singh v. Ghulam* (1), where a Division Bench of this Court upheld the proposition that there was no presumption in favour of the right of alienation by a non-proprietor in the village and it was held on the facts of that case that the place in question was a village and not a town. In *Sewa Singh v. Ghulam* (1), no question of principle was decided but the custom to transfer a tenancy without the consent of the landlord was held to be not proved. It was only held there that a certain quantum of evidence was not sufficient. A place with a population of five thousand souls was there held to be a village, but there was neither a Municipality nor a notified area; neither a hospital nor did the place possess any commercial importance, but was only a centre for the supply of troops generally inhabited by blacksmiths, carpenters, weavers, etc., besides the proprietors—a place which had never been described as having achieved the dignity of a Qusba. On these facts, too, that decision

(1) A I R 1923 Lah. 467; 82 Ind. Cas. 522.

is distinguishable. That decision largely followed the rule stated in *Ram Bilas v. Lal Bahadur* (2), a case based only on all instances and in *Tajammul Husain v. Banwari Lal* (3), different view appears to have prevailed to that laid down in the earlier Allahabad case. But it must be remembered that where a question of fact is at issue, each case must depend on its own merits and on the evidence led in that case. Broadly stated, it may be taken as a rule that where a large number of unchallenged alienations by non-proprietors have been taking place for a very long period, the onus should be placed on the landlords to show that they have a right to control those alienations. This they may be able to show by proving a grant and then the case would be governed by the terms of that grant. To hold otherwise would be to hold that a rule of custom had been established and before a finding of fact on such a point could be upset, a certificate as regards custom must first be obtained from the District Judge.

Lastly it appears to me that there is corroboration for the view that the landlords in this case cannot contest the alienation owing to the fact that Jahangiri Mal, the purchaser of the house in dispute, was a Mahajan and Mahajans are one of the seven privileged castes who were excepted in the *wajib-ul-are* of 1877. If a Mahajan non-proprietor can transfer the site of his house without objection, *a fortiori* it appears that he can also acquire one without such an objection from the proprietors unless indeed the proprietors can show that in that particular case they have an interest of a proprietary character in the site in question, an interest which they derive from the terms of the grant of the site to a non-proprietor. In this view of the matter I would accept this appeal and leave the parties to bear their own costs throughout.

Addison, J.—I concur.

D. *Appeal allowed.*

(2) 30 A 311; 5 A L J 456; A W N 1908, 112.

(3) 48 A 77; 88 Ind. Cas. 752; A I R 1926 All. 43; 23 A L J 932; L R 8 A 179 Rev.

NAGPUR HIGH COURT

Criminal Appeal No. 220 of 1939

September 9, 1939

NIVOGI, J.

REWASHANKAR MOOLOHAND

—APPELLANT

versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), s. 193—Complaint

for perjury in a case, when should be lodged—Interest of justice—Proper considerations.

Though it is ordinarily in the interest of justice to bring the perjurer to book and check such offences, it is the duty of the Court to see whether it would ultimately promote the interests of justice if the perjurer is prosecuted. Where it is transparent that the criminal case is calculated to hamper the fair trial in the Civil Court, no prosecution for perjury should be lodged till after the case is decided by the Civil Court. 90 Ind. Cas. 445 (1), relied on.

Or. A. from the order of the Court of the Sessions Judge, Hoshangabad, dated June 27, 1939.

Mr. T. J. Kedar, for the Appellant.

Mr. W. R. Puranik, Advocate-General, for the Crown.

Judgment.—This is an appeal under s. 476-B of the Criminal P. O. against an order passed by the Sessions Judge, Hoshangabad, directing a complaint to be laid against the appellant for the offence of perjury punishable under s. 193, L.P.O.

The case is an off-shoot of a Session case arising out of the murder of one Ugra Patel. Six persons were put on trial; 3 of them were acquitted in the Court of Session and the rest in the High Court. In that case it was alleged that Ugra Patel after his dying declaration had been recorded executed a will on June 26, 1938, a copy of which was filed as Ex. P-43. The will was admittedly scribed by the appellant. He, when examined as P. W. No. 39 in the Sessions case, stated that he had never gone to the hospital and had neither scribed the will in the presence of the testator nor the latter signed it in his presence. His statement contradicted his endorsement: "signed; scribe Rewashankar Moolchand Dube of Harda, read over". It is also contradicted by the testimony of Vishnupant (P. W. No. 42) who was an attesting witness to the will.

At the instance of the District Magistrate, the learned Sessions Judge ordered a complaint to be filed as already stated against the appellant.

I do not disagree with the learned Sessions Judge that it is ordinarily in the interest of justice to bring the perjurer to book and check such offences, but the question is whether it would ultimately promote the interests of justice if the appellant is prosecuted at this stage. In the first instance it must be borne in mind that the issue as to the execution of the will was, as observed by the High Court, not material in the criminal case. It would be

material in the Revenue and Civil Courts where there is bound to arise a controversy as to the genuineness of the will. The final decision will rest with the Civil Court. Nothing should be done to anticipate or prejudice the result of the civil litigation that is sure to ensue at no distant future. Is the contemplated criminal prosecution of the appellant likely to promote the ultimate ends of justice? That is, in my opinion, problematic. In the Criminal Court, all efforts would on one side be concentrated on securing the conviction and on the other acquittal of the accused. The witnesses, who would be produced to depose to the execution of the will, are apt to be influenced more by the considerations as to fate of the accused than by the desire to prove the genuineness or otherwise of the will itself. The forces that would operate on the mind of the witnesses in the Criminal Court are calculated to warp their attitude in the witness-box and commit them to a course which they would find it impossible to rectify in the Civil Court. It is transparent that the criminal case is calculated to hamper the fair trial of the issue in the Civil Court. It is on similar considerations that in *Faujdar Rai v. Emperor* (1), the order passed in that case making a complaint was set aside.

The lower Court's order is set aside and the complaint is directed to be withdrawn.

D.

Appeal allowed.

(1) 26 Or. L.J. 1565; 90 Ind. Cas. 445; A.I.R. 1926 Pat. 25; 7 P.L.T. 199.

OUDH CHIEF COURT Special Bench

Civil Reference No. 5 of 1938
November 22, 1939

THOMAS, C. J., ZIA-UL HASAN AND
HAMILTON, J.J.

HIMAYATULLAH—APPLICANT

versus

PARBHOO DAYAL AND OTHERS—

OPPOSITE PARTY

Stamp Act (II of 1899), ss. 60 (1), 40 (2)—Reference under s. 60 (1)—Proper time for—If competent after certificate by Collector under s. 40 (1) (a):

The proper time for making the reference under s. 60 (1), Stamp Act, is before the Court passes an order impounding the document. Where the document has been impounded and sent to the Collector under s. 38, the certificate of the Collector is conclusive of the matter under s. 40 (2) and subsequent reference under s. 60 (1) is incompetent and High Court has no jurisdiction to entertain it. 177 Ind. Cas. 733 (1), relied on.

C. Ref. made by the Munsif, Kheri.

Mr. R. N. Shukla, for the Applicant.

Mr. R. N. Shukla, for Opposite Party No. 4.

Judgment.—This reference by the learned Munsif of Kheri purports to be under s. 60 of the Stamp Act (II of 1899).

In a Small Cause Court Suit (No. 1660 of 1936 *Himayat Ullah v. Parbhu Dayal and others*), the plaintiff brought a suit on the basis of a promissory note and a receipt, Exs 1 and 2. It appears that the promissory note was executed by one Mahraj Bahadur in favour of Ohhote, defendant No. 4, who transferred his rights to Himayat Ullah by making the following endorsement on the receipt Ex. 2.

"To-day July 23, 1936, I having sold the claim including interest under the pro-note for Rs. 100 due against Mahraj Bahadur to Himayat Ullah... received its full consideration. The aforesaid vendee will have the right to recover the entire pro-note amount including interest from Mahraj Bahadur to which I will have no objection".

The learned Munsif held that the above endorsement amounted to a sale of an actionable claim and not a mere negotiation of a promissory note. He therefore ordered it to be impounded. The plaintiff paid the duty and penalty and the document was admitted in evidence. After the case had been decided, the impounded document was sent to the Collector under the provisions of s. 38 of the Stamp Act for necessary action, who obtained the opinion of the Stamp Officer, which is as follows:

"The endorsement on the pro-note is exempt from stamp duty under s. 14 (proviso) and Exemption 1 (a), Art. 62 of Sch. I of the Stamp Act. The Impounding Officer has wrongly realised Rs. 11"...

The Collector accepted the opinion of the Stamp Officer and directed that the learned Munsif may be accordingly informed.

In the opinion of the learned Munsif the opinion of the Stamp Officer is incorrect.

In our opinion it is not necessary for us to decide this question as we are of opinion that the reference made by the learned Munsif is incompetent.

Section 60 (1) of the Stamp Act provides:

"If any Court, other than a Court mentioned in s. 57 feels doubt as to the amount of duty to be paid in respect of any instrument under proviso (a) to s. 35, the Judge may draw up a statement of the case and refer it, with his own opinion thereon, for the decision of the High Court or Chief Court to which, if he were the Chief Controlling Revenue authority, he would under s. 57 refer the same."

The reference before us does not fall under s. 60 (1) and so far as we have been able to find out, there is no other section

which covers this reference. There was no doubt in the mind of the Court as to the amount of duty which was to be paid in respect of this instrument. In our opinion the proper time for making the reference was before the learned Munsif passed the order impounding the document. Under s. 40 (1) of the Stamp Act when the Collector receives any instrument sent to him under s. 38, sub-s. (2) not being an instrument chargeable with a duty of one anna only or a bill of exchange or promissory note, he shall adopt the following procedure :

"(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped or that it is not so chargeable, as the case may be."

Under cl. (2) of the same section "every certificate under cl. (a) of sub-s. (1) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein." By this reference the learned Munsif is really asking us to open the question which has become conclusive. We are supported in the above view by a Full Bench decision of this Court reported in 1938 O. W. N. 983, (*Sita Ram v. Gaya Din*) (1). Under the circumstances the reference is not competent, and we have no jurisdiction to entertain it.

We accordingly reject the reference and direct that the papers be returned to the Court concerned. The amount of Rs. 11 which has been realised by the impounding Officer will be returned to the plaintiff as pointed out by the Stamp Officer.

s. *Reference rejected.*

(1) 1938 O W N 983; 177 Ind. Cas. 738; AIR 1938 Oudh 226; 11 R O 72; 1938 O L R 445; 14 Luck. 227 (F B).

ALLAHABAD HIGH COURT

First Appeal No. 57 of 1938 and

Civil Revision No. 262 of 1938

July 27, 1939

IQBAL AHMAD AND BAJPAT, JJ.

GOKARAN SINGH—DEBTOR—APPELLANT

versus

BRIJ BHUKAN SINGH AND OTHERS—

CREDITORS—RESPONDENTS

U. P. Encumbered Estates Act (XXV of 1934), ss. 4, 13—Proceedings before special Judge—Creditor dying during pendency of proceedings—Failure to bring his legal representatives on record—Effect—Whether extinguishes creditor's claim—Limitation Act (IX of 1908), s. 5—Applicability, to applications under O. XXII, rr. 3 and 4, Civil Procedure Code (Act V of 1908).

U. P. Encumbered Estates Act was passed with a view to provide for the relief of encumbered estates in the United Provinces. The Preamble indicates that the relief under the Act is given to the landlord who is the owner of the encumbered estate. Ordinarily in a suit, relief is granted to the plaintiff in the suit. The landlord must, therefore, in view of the wordings of the Preamble, be regarded as the plaintiff in the proceedings under the Act, and the position of the creditor is that of the defendant. If therefore a claimant creditor dies during the pendency of the proceedings before the Special Judge, r. 4 and not r. 3 of O. XXII, Civil P. C., applies. The omission to bring on record the legal representatives of the deceased creditor has the effect of causing an abatement of the debtor's application only so far as the legal representatives of the deceased creditor are concerned and not of extinguishing the claim of the creditor.

The provisions of s. 5, Lim. Act are applicable to applications for substitution of names under O. XXII, rr. 3 and 4 of the Civil P. C.

F. A. from an order of the Special Judge, Shahjahanpur, dated July 19, 1937.

Mr. L. N. Gupta, for the Appellant.

Mr. N. C. Vaish, for the Respondents.

Iqbal Ahmad, J.—This appeal arises out of proceedings under the U. P. Encumbered Estates Act (XXV of 1934), and the cardinal question that arises for decision in the appeal is as to whether in proceedings under the Act, the debtor-applicants or the creditor-claimants are to be treated as plaintiffs in proceedings before the Special Judge. The facts are undisputed and are as follows: Thakur Gokaran Singh, appellant, filed an application before the Collector under s. 4 of the Act and the Collector in accordance with s. 6 of the Act forwarded the application to the Special Judge. The appellant then, in pursuance of the provisions of s. 8 of the Act, filed a written statement before the Special Judge, embodying the particulars of the debts due from him, and one of the creditors named in the written statement was one Mulu Singh. The notices prescribed by s. 9 of the Act were then published and Mulu Singh on April 18, 1936, filed a written statement embodying the particular of his claim. Thereafter Mulu Singh died on October 30, 1936, and no application to bring upon the record the legal representatives of Mulu Singh was filed within ninety days of the death of Mulu Singh. More than three months after the death of Mulu Singh his legal representatives filed an application for being brought upon the record. This application was opposed by Gokaran Singh appellant who contended that as no application for substitution of names was filed within ninety days of the death of Mulu Singh, the pro-

ceedings so far as Mulu Singh was concerned, abated, and as such, in view of the provisions of s. 13 of the Act the claim of Mulu Singh must be deemed to have been duly discharged. This contention of the appellant was overruled by the learned Special Judge who granted the application filed by the legal representatives of Mulu Singh and ordered their names to be brought on the record. In our judgment, the decision of the learned Judge is perfectly correct and ought to be affirmed.

By r. 6 framed by the Local Govt. under the Act, proceedings under the Act are to be governed by the provisions of the Civil P. O. of 1908, for the time being in force so far as they are applicable and not inconsistent with the provisions of the Act and of the rules framed by the Local Govt. In view of this rule, the provisions of O. XXVI, Civil P. O., are applicable to proceedings under the Encumbered Estates Act, and the controversy between the parties in the Court below centered round the question whether r. 3 or r. 4 of O. XXII, Civil P. O., was applicable to the case. It was contended by Gokaran Singh, appellant, that as Mulu Singh was creditor and had filed a written statement preferring his claim against Gokaran Singh, Mulu Singh's position was that of plaintiff in the proceedings and the omission of his legal representatives to have themselves brought upon the record in place of Mulu Singh within the time limited by law had the effect of causing an abatement of the claim embodied by Mulu Singh in his written statement. In support of this contention reliance was placed on r. 3 of O. XXII, Civil P. O., which provides about proceedings for substitution of names on the death of one of several plaintiffs or of sole plaintiff in an action. Clause 2 of r. 3 lays down that where within the time limited by law no application is made for substitution of names as regards the deceased plaintiff, the suit shall abate so far as the deceased plaintiff is concerned. The legal representatives of Mulu Singh, on the other hand, placed reliance on r. 4 which provides about substitution of names of the legal representatives of a deceased defendant. Clause 3 of r. 4 lays down that where within the time limited by law no application is made to bring upon the record the legal representatives of the deceased defendant, the suit shall abate as against the deceased defendant. Mulu Singh's representative contended that the position of Mulu Singh was that of a defendant and the omission to

bring upon the record his legal representatives within the time limited by law had the effect of causing an abatement of Gokaran Singh's application so far as Mulu Singh's legal representatives were concerned. They, however, submitted that they did not desire to take advantage of the omission of Gokaran Singh to apply for substitution of names within limitation and that, as they were anxious that the controversy between the parties be decided once and for all, they themselves had made an application for substitution of names.

In order to decide as to whether the application of Gokaran Singh abated so far as Mulu Singh was concerned, or whether the claim of Mulu Singh became extinguished in consequence of the omission to bring upon the record his legal representatives, it was necessary to determine whether the position of Gokaran Singh or the position of Mulu Singh was that of the plaintiff in the proceedings. It appears from the Preamble to the Act that the Act was passed with a view "to provide for the relief of encumbered estates in the United Provinces." The Preamble indicates that the relief under the Act is given to the landlord who is the owner of the encumbered estate. Ordinarily, in a suit, relief is granted to the plaintiff in the suit. The landlord must therefore in view of the wordings of the Preamble, be regarded as the plaintiff in the proceedings. Further, the initiation of legal proceedings rests with the plaintiff and as the machinery of the Act can be set in motion only on an application by the landlord, the landlord's position must be that of a plaintiff in proceedings under the Act. This conclusion is supported by the provisions of s. 20 of the Act which provides that under certain circumstances the landlord applicant can ask the Special Judge to quash the proceedings initiated on the application filed under s. 4 of the Act. A plaintiff in an action can put an end to the action by withdrawing the same, but this cannot be done by a defendant. There is no provision in the Act entitling a creditor to terminate the proceedings initiated under the Act. This also shows that the position of the landlord applicant is that of the plaintiff and the position of the creditor is that of the defendant.

The learned Counsel for Gokaran Singh argued that as in accordance with s. 9 of the Act 'claim' is preferred by a creditor he must be looked upon as plaintiff in the proceedings, and in this connection he

invited our attention to ss. 10 and 14 of the Act where a creditor is described as a 'claimant.' He argued that as the creditor is the claimant, his position is that of the plaintiff. We are unable to agree with this contention. As we have said before, it is the landlord who claims relief and it is with a view to grant relief to the landlord that the creditors are called upon to submit their respective claims before the Special Judge. The proceedings before the Special Judge are primarily with a view to grant relief to the landlord applicant and the decrees that are passed in favour of the creditors in accordance with s. 14 of the Act are wholly and solely with the object of granting relief to the landlord-applicant. It is further to be noted that the landlord is described in the Act as the 'applicant' and an applicant can be more fittingly described as a plaintiff than a creditor who in pursuance of the provisions of the Act is called upon to submit a written statement embodying the particulars of his claim. We therefore hold that Gokaran Singh's position in the proceedings was that of the plaintiff and the omission to implead Mulu Singh's legal representatives had the effect of causing an abatement of Gokaran Singh's application so far as Mulu Singh was concerned. Mulu Singh's legal representatives, however, filed an application for substitution of names. This application was beyond time. But the provisions of s. 5, Lim. Act, are applicable to applications for substitution of names under O. XXII, rr. 3 and 4 of the Code. It was therefore open to the learned Special Judge to extend to Mulu Singh's legal representatives the benefit of s. 5, Lim. Act, and to order the legal representatives of Mulu Singh to be brought on the record. We therefore take it that in granting the application of Mulu Singh's legal representatives, the Special Judge did intend to, and did, as a matter of fact, extend the period of limitation for the application under s. 5, Lim. Act. For the reasons given above, we dismiss this appeal with costs.

8.

*Appeal dismissed.***PATNA HIGH COURT**Appeal from Original Order No. 228
of 1938

October 4, 1939

ROWLAND AND CHATTERJI, JJ.

Mst. RAZIA BEGUM alias
CHHUNA BEGUM—APPLICANT—
APPELLANT
versusRai Bahadur KISHUNDEO NARAIN
MATHA AND OTHERS—OPPOSITE PARTY
—RESPONDENTS.

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), ss. 13, 14—Applicability—Whether apply where execution sale is completed before passing of Act—Civil Procedure Code (Act V of 1908), O. XXI, r. 66 (as amended by Patna High Court)—Held, that there was no irregularity in entering valuation in sale proclamation.

There is nothing either in the Bihar Money-lenders (Regulation of Transactions) Act, 1939, or in the Bihar Money-lenders Act, 1938, to express the intention of the Legislature to invalidate a completed sale which was otherwise good. In order that ss. 13 and 14 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939, may be applicable, it is necessary that the execution should be still pending. On the sale of immovable property being confirmed, execution is complete. Hence where the execution sale has been completed before the passing of the above Act, ss. 13 and 14 of that Act have no application. 185 Ind. Cas. 129 (1) and 160 Ind. Cas. 105 (2) (2), distinguished.

In the execution the sale proclamation contained an entry of the value as given by the decree holder and also mentioned the valuation arrived at in the High Court in earlier proceeding by an agreement between the decree-holder and the judgment-debtor. The sale took place on April 7, 1937.

Held, that it was not open to the judgment-debtor to contend that the entries regarding valuation in the sale proclamation constituted a substantial irregularity in the proceedings for sale.

A. from an order of the Subordinate Judge, Muzaffarpur, dated February 9, 1938.

Mr. Rai T. N. Sahay, for the Appellant.

Messrs. S. N. Bose and K. Dayal, for the Respondents.

Rowland, J.—This is an appeal by the judgment-debtor, four of whose properties were sold in execution of a mortgage decree. On an application to set aside the sale of all the properties on the ground of alleged irregularities and inadequacy of price, the Subordinate Judge set aside the sale of two properties Lots Nos. 2 and 4 of the sale and refused the application and confirmed the sale of the other two, namely Lots Nos. 1 and 3 of the sale. This appeal is against the confirmation of the sale of Lots Nos. 1 and 3. It was objected in the Court below that the processes in execution had been suppressed. This point was found against the judg-

ment-debtor and that finding is not challenged in appeal.

The objection pressed here is that too low a valuation was entered in the sale proclamation in consequence of which the properties have been sold below their value causing loss to the judgment-debtor. The decree-holder had taken out execution of his decree in 1930 and the case came before this Court in Civil Revision No. 36 of 1931. In that case the valuation to be set by the Court on the properties was fixed by the agreement as follows :

Lot No. 1 Rs. 7,000

Lot No. 3 400

At that time O. XXI, r. 66 of Civil P. O. required a value assessed by the Court to be entered in the sale proclamation. This rule was amended with effect from January 1, 1936. Thereafter its requirements were that the Court should enter in the sale proclamation the valuation placed on the property by the decree-holder and by the judgment-debtor, respectively, and no other valuation. In the present execution the sale proclamation contained an entry of the value as given by the decree-holder and also mentioned the valuation arrived at in the High Court. The decree-holder's valuation of Lot No. 1 was Rs. 1,200 and of Lot No. 3 Rs. 45. These figures as well as the valuation put down in the High Court in the earlier proceeding were entered in the sale proclamation. This was done in pursuance of an order of the Court, dated October 10, 1936, in Miscellaneous Case No. 199 of 1936 and the order shows that the two valuations were entered in the sale proclamation by agreement of both parties. In my view it is not now open to the judgment-debtor to contend that the entries regarding valuation in the sale proclamation constituted a substantial irregularity in the proceedings for sale. This I say with reference to the state of the law as it was then at the time of the sale proclamation and of the sale itself which took place on April 7, 1937; Lot No. 1 was purchased by a third party at Rs. 3,000 and Lot No. 3 at Rs. 50.

As regards the adequacy of the price fetched, the Subordinate Judge refers to the evidence regarding the value of Lot No. 1 and appears to be of opinion that apart from the valuation on which the parties agreed in the High Court the remainder of the evidence did not support the view that the property was worth more than Rs. 3,000 or that the judgment-debtor had suffered any material loss. He seems,

however, to have thought himself bound to hold that the property was worth Rs. 7,000 because this value had been placed on it in the High Court six years earlier.

As regards Lot No. 3, this consisted of 4 *bighas* 7 *kathas* 11 *dhurs* of railway *khanta* land regarding which there seems to have been practically no evidence before him except the fact that its value had been fixed at Rs. 400 in the High Court. The Subordinate Judge may perhaps have relied on his own experience of the value of arable land and he expresses the opinion that the price seems to be rather a low price. When the proceedings leading up to the sale were found to have been free from irregularity, he held that the sale could not be set aside. Assuming that the law remained as it was at the time of the sale, I think we should clearly be bound to affirm the decision of the Subordinate Judge.

But it is argued for the appellant that we ought to have regard to the provisions of the Bihar Money-lenders (Regulation of Transactions) Act, 1939, ss. 13 and 14 and that the sale not being held in accordance with the provisions of those sections ought to be set aside—s. 13 requires the Court executing the decree to make an estimate of the value of the property of the judgment-debtor which is sought to be sold and of that portion of the property, the proceeds of the sale of which are likely to be sufficient to satisfy the decree. Section 14 requires that the proclamation of the intended sale shall include only so much of the property, the sale of which will be sufficient and shall state the value of the property, or portion of the property to be sold as determined under s. 13. Further it enacts that the property is not to be sold at a price lower than the price specified in the sale proclamation unless the decree-holder consents to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for the property in the sale proclamation. It is contended that these sections of the Act being retrospective, apply to an execution instituted before the commencement of the Act and that an execution though commenced earlier must be continued in accordance with the provisions of the Act. If indeed the sale proclamation was still to be issued at the time when the Act came into force, I have no doubt that the Act would be applicable and the sale proclamation would have to be framed in accordance with its

provisions. Even if a sale proclamation had issued and the sale were still to be held and the judgment-debtor asked that the sale should be held in accordance with the provisions of the Act and for that purpose a fresh sale proclamation should be issued, it would be the duty of the Court to comply with that request and issue the sale proclamation and hold the sale in accordance with that Act. This is the effect of the decision in *Bishun Singh v. Palakdhari Singh* (1), but in the present case the sale was completed before either the Bihar Money-lenders (Regulation of Transactions) Act, 1939, or the Bihar Money-lenders Act, 1938, was passed and there is nothing in either of those Acts to express the intention of the legislature to invalidate a completed sale which was otherwise good. We are referred for the appellant to the Privy Council decision in *K. C. Mukerjee v. Ramratan Koer* (2) but in my opinion what was there decided does not apply to the case before us. Their Lordships were considering the effect of the words in s. 26 (N) of the Bihar Tenancy Act. The words are "shall be deemed to have given", and their Lordships held that the substantive rights of landlords and their accrued causes of action were being abrogated by this provision in the enactment in the circumstances. It was said "respect for pending suits over old transfers cannot be assumed". In the Bihar Money-lenders (Regulation of Transactions, Act, s. 13 is no doubt made applicable to applications for execution whether made before or after the commencement of the Act and this section with s. 14 gives directions as to the preliminaries which are to precede a sale and the manner in which the sale is to be held. But in order that these sections may be applicable, it seems to be necessary that the execution should be still pending and it has been held that on the sale of immovable property being confirmed, execution is complete. The order confirming the sale was passed on February 9, 1938, before either of the Acts which have been referred to were enacted. I am, therefore, of opinion that those provisions do not operate to invalidate the sale.

In the result, I would dismiss the appeal

(1) 1939 P W N 667; 185 Ind. Cas. 129; A I R 1939 Pat. 592; 6 B R 109; 12 R P 304.

(2) 15 Pat. 268; 160 Ind. Cas. 105 (2); A I R 1936 P O 49; 1936 O L R 69; 1936 A L R 101; 8 R P O 142; 40 C W N 283; 17 P L T 25; (1936) M W N 35; 2 B R 225; 70 M L J 105; 62 C L J 419; 43 L W 336; 63 I A 47 (P O).

with costs. There will be one set of hearing fee to be divided between the decree-holder and the auction-purchaser.

Chatterji, J.—I agree.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

Application in First Appeal No. 227 of 1939

August 10, 1939

BENNET AND VERMA, JJ.

Mst. RAM KAILASH KUNWARI—

PLAINTIFF—APPLICANT

versus

L. ISHWAR SARAN AND OTHERS—

DEPENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—Application for leave to appeal as pauper—Notice issued to respondent—Right of respondent to be heard on merits of appeal—Notices—Provisions of O. XXXIII regarding notice to be understood as incorporated in O. XLIV, r. 1, so far as applicable.

The wording of the proviso to O. XLIV, r. 1, Civil P. O., directs the Court to reject the application unless upon a perusal thereof and of the judgment and decree, certain matters appear to the Court. The word "perusal" implies that this is not to be the subject of argument by Counsel and that there is no right of Counsel to argue on the merits of the proposed appeal. The amendment of the Allahabad High Court directing notice to issue to the respondent does not give him any right to be heard on the point. All that he can argue is on the question of whether the proposed appellant is or is not a pauper. 153 Ind. Cas. 195 (1), explained.

Although there is no express provision in O. XLIV, Civil P. O., applicable to appeals for the issue of a notice yet the provisions, in so far as they are applicable, contained in O. XXXIII ought to be understood to be incorporated inasmuch as it is expressly laid down in O. XLIV, r. 1. 153 Ind. Cas. 195 (1), followed.

Mr. Sri Narain Sahai, for the Applicant.

Mr. Baleshwari Prasad, for the Respondents.

Mr. S. K. Dar, for the Crown.

Bennet, J.—This is an application of an unsuccessful plaintiff to appeal as a pauper. She was allowed to sue as a pauper in the Court below. By our order of September 5, 1938, we stated:

"We have gone through the judgment of the Court below and the application for leave to appeal as a pauper. We consider that it has been established that the case does come within the provisions of the order of pauper appeals. Accordingly, we direct that notice should issue to the opposite party to show cause why this application should not be allowed. The notice will be solely on the question as to whether the appellant is or is not a pauper," and notice was also to issue to the learned Govt. Advocate. To-day the Standing Counsel for Govt. states that he does not

desire to oppose the application. In fact, under the provisions of O. XLIV, r. 2, no notice need have been issued. Mr. Baleshwari Prasad for the respondents has objected to the previous order and claims that he is entitled to argue on the merits of the proposed appeal and to show that it does not come under the proviso to O. XLIV, r. 1. He refers for this proposition to a Full Bench ruling, *Powdhari v. Ram Sanwari* (1), in that case, p. 962* shows:

"By the order issuing notice, the Division Bench did not express any opinion as regards the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust."

The Full Bench decided that, under these circumstances, the mere issue of notice did not preclude the Bench hearing the matter after the issue of notice from considering the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. On p. 965* the Full Bench further observed:

"We do not of course mean to lay down that the Court is bound to issue notice to the opposite party, nor do we lay down that once notice has been issued, the Court is compelled to hear the opposite party and cannot change its mind and review its previous order under s. 151, Civil P. O."

The Full Bench therefore does not support the proposition advanced by Mr. Baleshwari Prasad. Mr. Baleshwari Prasad, however, points out that the book of rules framed by this High Court has an amendment to this O. XLIV, r. 1, as follows:

"Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents."

This amendment, he states, is not mentioned by the Full Bench ruling and he argues that it was not brought to the notice of the Full Bench. The amendment is dated prior to the Full Bench ruling as the amendment is dated January 14, 1933, and the Full Bench ruling is of September 3, 1934, almost two years subsequent. There is a passage on p. 964* in the Full Bench ruling which states:

"No doubt there is no express provision in O. XLIV, applicable to appeals for the issue of a notice but the provisions, in so far as they are applicable, contained in O. XXXIII, ought to be understood to be incorporated inasmuch as r. 1 expressly lays down."

This refers to the words in r. 1:

"Subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable."

(1) (1934) A L J 961; 153 Ind. Cas. 195; A I R 1934 All 1604; 7 R A 463 (F B).

*Pages of (1934) A L J—[Ed.]

Obviously, the provisions in O. XXXIII, r. 6, in regard to notice are applied in this manner to O. XLIV, r. 1. The amendment on which Counsel lays stress makes provision only for notice to the respondent and makes no provision for notice to the learned Govt. Advocate or Standing Counsel, which is contained in O. XXXIII, r. 6, and which is the practice of this Court in cases where the proposed appellant has not been permitted to appear as a pauper in the Court below. The Full Bench therefore was perfectly correct, in our opinion with due respect, in referring to the provisions of O. XXXIII, for the issue of notice. Now the argument of learned Counsel is that the amendment directing notice to issue to the respondent implies that the notice shall entitle the respondent to argue the matters referred to in the proviso to r. 1. If this had been the intention of this High Court in adding an amendment to O. XLIV, r. 1, we consider that the amendment would have stated this matter plainly and that the amendment would have altered the wording of proviso 1. The wording of the proviso has not been altered and it directs the Court to reject the application unless upon a perusal thereof and of the judgment and decree, certain matters appear to the Court. Now the word "perusal" implies that this is not to be the subject of argument by Counsel and that there is no right of Counsel to argue. At the most it may be argued that the Full Bench ruling states that the Court may, if it desires, obtain the assistance of Counsel. But the Full Bench ruling nowhere lays down that the Court is bound to hear Counsel on the point. The procedure in O. XXXIII, shows that there is rejection of an application to sue as a pauper under r. 5 and this may be based on r. 5, sub-r. (d) "where his allegations do not show a cause of action;" that is the trial Court may examine the merits of the proposed plaintiff, but it does not examine those merits after hearing Counsel for each side on the subject. To hear Counsel for each side on the merits of the proposed appeal would be tantamount to giving some decision on the merits of the appeal. In our opinion, this is exactly what O. XLIV, r. 1 proviso is designed to avoid. The course is objectionable. Firstly, because such an expression of opinion by an Appellate Court after hearing Counsel is something which will prejudice one party or the other, and secondly, this would introduce a difference between the pro-

cedure of the trial Court and of the Appellate Court.

For these reasons, we think that there are no merits in the argument of the learned Counsel for the respondents and that he has no right whatever to be heard at any stage of the proceedings under O. XLIV, r. 1 on the merits of the proposed appeal. All that he can argue is on the question of whether the proposed appellant is or is not a pauper and on that point, he has not brought any affidavit or other materials. He asked for further time. The order was dated, nearly a year ago on September 5, 1938. We think there are no merits in the request for further time. As already pointed in the present case the appellant sued as a pauper and under O. XLIV, r. 2 proviso, the issue of notice was not necessary. We accordingly hold that the applicant is a pauper and we allow the applicant to appeal as a pauper.

s.

Application allowed.

CALCUTTA HIGH COURT

Appeal No. 1545 of 1937

May 9, 1939

B. K. MUKHERJEE AND LATIPUR

RAHMAN, JJ.

KITAB ALI AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

ANIL BEHARY DUTTA AND OTHERS—

RESPONDENTS

Adverse possession—Possession of wrong-doer, nature of—His possessory right, whether heritable and transferable—Possession after his death by heir, if on behalf of all heirs.

The possession of a wrong-doer held for a term less than the period of limitation is a good title against the whole world with the exception of the true owner. This possessory right even though it has not ripened into ownership by lapse of the statutory period, is a right in immovable property which is heritable and transmissible according to law. The possession continued by some of his heirs would be regarded as possession on behalf of the whole unless and until it is shown that there is an exclusion or ouster of the other co-sharers. Mere exclusive possession by a co-sharer is not sufficient to extinguish the rights of the other co-sharers unless and until definite ouster is found. *Asher v. White Lock* (1), *Gossain Dass Chunder v. Isur Chunder Nath* (2) and 61 Ind. Cas. 546 (3), relied on.

A. from the appellate decree of the District Judge, Tippera, dated April 19, 1937.

Messrs. Priya Nath Dutta and Himangshu Chandra Chaudhury, for the Appellants.

Messrs. Upendra Kumar Roy and Nani Gopal Das, for the Respondents.

B. K. Mukherjee, J.—This is an appeal on behalf of the plaintiffs and it arises out of a suit for partition. The plaintiffs' case is that the properties in suit with the exception of plots Nos. 13 and 14 in village Warup belonged to one Kadir Sarkar who was the common ancestor of the plaintiffs and defendants Nos. 1 to 4. The two plots Nos. 13 and 14 were acquired with the profits of those properties after the death of Kadir. Kadir died in the year 1892 leaving a wife Pearjan, three sons and three daughters born of her and another son named Jaha Bux, born of a pre-deceased wife. Plaintiffs Nos. 1 to 10 claimed their title through these three daughters of Kadir and plaintiffs Nos. 11 to 15 are the descendants and heirs of one of the sons of Kadir, named Aserabali, whereas plaintiffs Nos. 16 to 18 are the heirs of Jaha Bux, the son of Kadir by his first wife. Defendant No. 1 is Elim Ali, the only son of Kadir who is still living, and defendants Nos. 2 to 4 are the heirs and successor of Abbas Ali, the remaining son. Defendants Nos. 5 to 7 purported to have acquired the interest in the suit properties by reason of their purchase at a sale in execution of a money decree obtained against defendants Nos. 1 to 4. The plaintiffs' case is that they were in possession of this property jointly with defendants Nos. 1 to 4 and joint possession being found inconvenient, they now claim their shares according to Muhammadan Law.

The suit was contested primarily by defendant No. 7 and his case was that with the exception of plots Nos. 8 and 9 of Sch. II, the rest of the properties did not belong to Kadir but were acquired by his three sons, Elim, Abbas and Aserab, either jointly or severally. It is said that Aserabali made a gift of his shares in the properties to his two daughters and the daughters in their turn sold them to their uncles Elim and Abbas. The interests of these persons were put up to sale in execution of a mortgage-decree and was purchased by defendants Nos. 5 to 7. The trial Court on a consideration of the evidence came to the conclusion that plots Nos. 1 to 12 of village Warup and plot No. 1 of village Shibpur were the properties left by Kadir. With regard to the rest, the finding was that the plaintiffs failed to show that they had any interest in them. The trial Court gave the plaintiffs a preliminary decree in respect of these thirteen items of property and directed that a

Commissioner should be appointed to make the partition in accordance with the shares set out in the plaint.

Against this decision there was an appeal taken to the lower Appellate Court and the lower Appellate Court has reversed the decision of the trial Judge and has dismissed the plaintiffs' suit. The learned District Judge did not dispute the finding of the Subordinate Judge that the thirteen items of property with regard to which a decree was given by the latter were the properties of Kadir. He held, however, that Kadir's interest in these properties was sold in execution of a money decree in the year 1888 and it was purchased by one Wajuddi. Wajuddi did not take possession of those properties and Kadir remained in occupation of these lands till his death in the year 1892. The learned Judge was of opinion that as Kadir's possession was merely of a wrong-doer and he had not acquired any title to these properties by adverse possession continued for a period of twelve years, he had no interest in the property which could devolve upon his heirs on his death and although after his death the possession was continued by his three sons, their possession was on their account as independent trespassers and they themselves acquired a good title to the property to the exclusion of the other heirs of Kadir. In this view of the case the Court was of opinion that neither the daughters nor Jaha Bux acquired any title to the properties in suit. It is against this decision that the present second appeal has been preferred.

It seems to me that in coming to his decision the learned Judge misdirected himself on a question of law. The possession of a wrong-doer held for a term less than the period of limitation is a good title against the whole world with the exception of the true owner. This possessory right even though it has not ripened into ownership by lapse of the statutory period, is a right in immovable property which is heritable and transmissible according to law: *vide Asher v. White Lock* (1), *Gossain Dass Chunder v. Issur Chunder Nath* (2) and *Ram Piari v. Budh Sen* (3). On the death of Kadir, therefore, whatever right he had in the property did devolve upon all his heirs, and the possession that was continued by some of his heirs

(1) (1866) 1 Q. B. 1; 35 L. J. Q. B. 17; 11 Jur. (N.S.) 925; 13 L. T. 254; 14 W. R. 26.

(2) 3 O. 224.

(3) 43 A. 164; 61 Ind. Cas. 546; A. I. R. 1921, All 389; 18 A. L. J. 995.

would be regarded as possession on behalf of the whole unless and until it was shown that there was an exclusion or ouster of the other co-sharers. In this case the trial Judge came to the conclusion that the possession of the three sons of Kadir was not in any way adverse to his other heirs. The question of ouster has not been considered by the District Judge, who was of opinion that the possession of the three brothers was that of independent trespassers and consequently on their own account. It is true that the lower Appellate Court has referred to certain acts of possession which were exercised by these three sons of Kadir and they might show that they were enjoying the properties exclusively but nevertheless mere exclusive possession by a co-sharer is not sufficient to extinguish the rights of the other co-sharers unless and until definite ouster is found. I think that the lower Appellate Court has not considered the case from that aspect at all. In these circumstances the decree of the lower Appellate Court should be set aside and cases should be sent back to that Court in order that the appeal should be re-heard in the light of the observations made above.

The Court below will proceed on the footing that all the heirs of Kadir succeeded to his possessory right after the death of the latter, and it will decide on evidence as to whether the three sons were possessing the property to the exclusion of other co-sharers on assertion of a hostile title. If such adverse possession is proved, the order of dismissal passed by the lower Appellate Court will stand except with regard to plots Nos. 8 and 9 of Sch. II, which are not claimed by defendants Nos. 5 to 7. The plaintiffs in that case would have a decree in respect of these plots only. If on the other hand, no ouster or exclusion is found, the plaintiffs would be entitled to a decree as passed by the trial Court. The appeal is thus allowed and the case is remanded. There will be no order as to costs in this appeal. Future costs will abide the result.

Latifur Rahman, J.—I agree.

D.

Case remanded.

BOMBAY HIGH COURT

Civil Application No 47 of 1939

February 22, 1939

BEAUMONT, C. J. AND N. J. WADIA, J.
SHANKAR DYAMANGONDA PATIL

—APPLICANT

versus

PUTTABAI GURUNATHGONDA

K. PATIL AND OTHERS—OPONENTS

Civil Procedure Code (Act V of 1908), O. XLV, r. 7—Privy Council Rules, r. 9—Time for lodging security, if can be extended under r. 9 beyond limit specified in O. XLV, r. 7.

The discretion given to the Court by r. 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion, the Court must have regard to the fact that under O. XLV, r. 7, the extension of time for giving security is strictly limited, and it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that Rule. 101 Ind. Cas. 555 (1) and 132 Ind. Cas. 438 (2), relied on, 138 Ind. Cas. 663 (3) and 143 Ind. Cas. 559 (4), dissented from.

Messrs. W. B. Pradhan and S. R. Joshi, for the Applicant.

Mr. R. A. Jahagirdar, Government Pleader, for Opponents Nos. 1 and 3.

Beaumont, C. J.—This is an application to allow the applicant to give substituted security for the cash payment, which he was required to make in relation to an appeal to the Privy Council. The application raises a point of practice, which has led to a difference of opinion between this High Court and other High Courts. Under O. XLV, r. 7, Civil P. O., an applicant desiring to appeal to the Privy Council is required, within 90 days or such further period, not exceeding 60 days, as the Court may, upon cause shown, allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date, to furnish security in cash or in Govt. security. The decree in the present case was passed on January 19, 1938, and the certificate was issued on December 14, 1938. Therefore it seems to me clear that under O. XLV, r. 7, no extension of time could be given beyond six weeks from December 14, 1938. But it is argued that an extension can be allowed under r. 9 of the Privy Council Rules, which came into force on the same day as the amendment to O. XLV, r. 7, which prescribed the period which I have referred to. Rule 9 is in these terms :

"Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the

security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such direction as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires."

Under s. 112, Civil P. O., the rules made by the Privy Council prevail in any conflict between them and the provisions of the Code, so that, if r. 9 of the Privy Council Rules conflicts in any way with O. XLV, r. 7, the provisions of r. 9 must prevail. The view which has been taken by a Full Bench of this Court in *Nilkanth Balwant v. Vidya Narsinha Bharati* (1), is that under r. 9 a general discretion is given to the Court to make such order as the justice of the case requires, and if the justice of the case requires the extension of time for giving security beyond that specified in O. XLV, r. 7, the Court has jurisdiction to make the order. That case has been followed by a Division Bench of this Court in *Reianshidaya v. Gudnaya* (2). However the Madras High Court in *Poornananthachi v. Gopala-swami Odayar* (3), and the Allahabad High Court in *Bahadur Lal v. Judges of the High Court, Allahabad* (4), take a different view. They think that r. 9 of the Privy Council Rules does not empower the Courts to extend the time beyond the limit specified in O. XLV, r. 7.

The learned Govt. Pleader has suggested that the matter should be referred to a Full Bench of five Judges, but as at present advised, I think the view taken by this Court in *Nilkanth Balwant v. Vidya Narsinha Bharati* (1), is the correct view. It seems to me that the discretion given to the Court by r. 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion we must have regard to the fact that under O. XLV, r. 7, the extension of time for giving security is strictly limited, and I think that it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the

(1) 51 B 430; 101 Ind. Cas. 555; A I R 1927 Bom. 217; 29 Bom. L R 352 (F B).

(2) 33 Bom. L R 487; 132 Ind. Cas. 438; A I R 1931. Bom. 278; Ind. Rul (1931) Bom 326

(3) 55 M 835; 138 Ind. Cas. 663; A I R 1932 Mad. 484; 62 M L J 665; (1933) M W N 557; 35 L W 679; Ind. Rul. (1932) Mad. 601.

(4) 55 A 432; 143 Ind. Cas. 559; A I R 1933 All. 241; (1933) A L J 207; Ind. Rul. (1933) All. 290.

limit specified in that Rule. In the present case apparently an order was made (rightly or wrongly) *ex parte* extending the time to February 25 next, that is to say, for a period which still has three days to run, but it is obvious that if we are to accede to this application on the merits, a further extension will have to be allowed. The applicant, who is a minor, says that he is unable to provide the Rs. 4,000 in cash which is required of him. But he says that he can raise the money on the security of immovable property worth at least Rs 40,000. Obviously, there would have to be an inquiry as to the value of the property which he proposes to substitute. But whatever the value of that property may be, I can see no reason why this application should not have been made within the period limited by O. XLV, r. 7. The applicant has known his financial position ever since the decree was passed. If the property is really worth as much as he alleges, I should have thought he would have had no difficulty in raising the sum which he requires on the security of that property. In my opinion, on merits, no case is made out for authorizing the applicant to give substituted security.

In the special circumstances of this case we grant under r. 9 an extension of fourteen days to give the security in cash. If it is not deposited, the application will be dismissed with costs. If it is deposited, costs will be costs in the appeal.

N. J. Wadia, J.—I agree.

s. Order accordingly.

CALCUTTA HIGH COURT

Civil Appeal No 61 of 1937

June 23, 1938

EDGLBY, J.

RAM KISHON RAM BHAKAT AND
ANOTHER—DECREE-HOLDERS—APPELLANTS
versus

SATYA NARAIN BHAKAT AND OTHERS
—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)
—Application for execution to Court which passed the decree and not to transferee Court, whether to proper Court—Transferee Court not taking steps towards execution—Decree re-transferred to Court passing it—Order of re-transfer, if final.

After a decree has been transferred to another Court for execution, the proper Court to which a subsequent application for execution should be made is the transferee Court, as that is the Court whose duty it then is to execute the decree so far as it can be executed by that Court. Consequently, an execution application to the Court transferring the

decree is not one made to a proper Court. 38 Ind. Cas 682 (1), relied on.

Where the transferee Court has taken no steps towards the execution and the decree is re-transferred by it to the Court passing it, the order of re-transfer is not the final order on an application within the meaning of Art. 182 (5), Limitation Act.

O. A. from the Appellate order of the District Judge, Murshidabad, dated July 29, 1937.

Messrs. Gopendra Nath Das and Sambhurnath Banerjee, for the Appellants.

Mr. Urukram Das Chakravarty, for the Respondents.

Judgment—A preliminary objection has been put forward to the effect that no appeal lies in this case, having regard to the provisions of s. 102, Civil P. C. In view of the fact that the suit with reference to which this appeal arises appears to have been valued at Rs 403, the preliminary objection must prevail. An alternative application has, however, been filed to the effect that the appeal may be treated as an application for revision, and this application has been granted.

It appears that the plaintiffs obtained a decree in the Court of the Munsif at Rampurhat on February 25, 1931. This decree was put into execution at Rampurhat and a sum of Rs. 80 was realized. On February 1, 1933, the decree-holders applied to the Munsif at Rampurhat for a certificate of non-satisfaction and for the transmission of the decree for execution to the Jangipur Court in accordance with the provisions of s. 39, Civil P. C. The decree was duly transmitted for execution to the Jangipur Court, but it appears that no further steps were taken at the Jangipur Court towards the execution of the decree with the result that on March 2, 1936, the decree was returned to the Court of the Munsif at Rampurhat. In the meantime, on January 31, 1936, the decree-holders filed a further application for execution at Rampurhat. This application appears to have been registered at Rampurhat on March 18, 1936, and it was subsequently transferred to the Munsif at Jangipur for execution. The application was ultimately dismissed on July 11, 1936. Subsequently, another application for execution was filed on January 30, 1937, and it is with this last application that we are now dealing. The first Court held that the application dated January 30, 1937, had been filed in time. The lower Appellate Court held, however, that the application in question was time-barred

on account of the fact that the previous application for execution dated January 31, 1936, had not been filed in the proper Court in accordance with law as required by the provisions of Art. 182 (5), Lim. Act.

It has been argued by the learned Advocate for the petitioners in this case that the application for execution, dated January 31, 1936, was properly received by the Munsif at Rampurhat, even although the decree had been transferred for execution to the Court of the Munsif at Jangipur. In my opinion, however, this case is governed by the principles which have been laid down by the Privy Council in *Maharajah of Bobbili v. Narasaraopeda Baliara Simhulu Bahadur* (1). In that case their Lordships of the Judicial Committee pointed out that after a decree had been transferred to another Court for execution, the proper Court to which a subsequent application for execution should be made was the transferee Court, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. It is quite clear from the facts of the case now before me that on January 31, 1936, the decree was actually pending for execution in the Court of the Munsif at Jangipur and it was in that Court that any further application for execution should have been filed. It was not until March 2, 1936, that the execution case was re-transferred by the Jangipur Court to the Rampurhat Court. The learned Advocate for the petitioners contends that this date, namely March 2, 1936, should be taken as the date of a final order passed on an application for execution within the meaning of Art. 182 (5), Lim. Act, and that if this contention is accepted, he argues that the present application for execution would be in time. In my opinion, however, it cannot be said that any final order with reference to the application for execution was passed on March 2, 1936. All that happened on this date was that the Jangipur Court re-transferred the execution proceedings to the Rampurhat Court and these particular proceedings remained in the same condition as they were, when they were transferred to the Jangipur Court on February 1, 1933. It certainly cannot be said therefore that any final order was passed on March 2, 1936, with reference to

(1) 43 I A 238; 36 Ind. Cas. 682; A I R 1916 P O 16; 39 M 640; 31 M L J 300; 18 Bom. L R 909; 14 A L J 1129; 20 M L T 472; 24 O L J 478; 4 L W 552; (1916) 2 M W N 541; 21 O W N 169; 1 P L W 26 (P O).

these proceedings. To my mind, it is quite clear that the application for execution, which was filed on January 31, 1936, was not made to a proper Court within the meaning of Art 182 (5), Lim. Act. It follows, therefore, that this case has been rightly decided by the Court below. The appeal is, therefore, dismissed. This application for revision is, therefore, rejected. I make no order with regard to costs.

D.

Application rejected.

MADRAS HIGH COURT

Appeal No. 165 of 1934

August 22, 1935

BURN, J.

MUNICIPAL COUNCIL, TANJORE—

APPELLANT

versus

SUNDARESAN—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Failure to represent execution petition returned for rectification, whether extends limitation.

It is not permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all.

A. against the order of the District Court, West Tanjore, dated June 29, 1934.

Mr. K. P. Ramakrishna Iyer, for the Appellant.

Judgment—The lower Courts are in my opinion right. It is not in my judgment permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all.

In this case the Municipal Council having presented an execution petition on August 15, 1929, which was returned for some defect, waited till August 14, 1932, and then filed a new execution petition. Allegation was made that the execution petition of 1929 had been "lost," but there was no pretence that the execution petition of 1932 was a revival or continuation of it. In fact, the execution petition of 1932 was not a revival or continuation of the execution petition of 1929; it was a new petition altogether. Now I do not think that Municipal Councils should be encouraged to indulge in such dilatoriness and neglect, as has been shown by the plaintiff Council in this case. The decree was passed in 1922 and it ought to have been executed long ago. The first

execution petition was in 1924 and there were properties brought to sale but for some reason the sale was not held. The next petition was filed in December 1927 and that was returned and finally dismissed as "not pressed." Then came the petition of August 1929 and after that, full three years were allowed to pass, with nothing done. In such circumstances, the learned District Munsif would, in my opinion, have been liable to grave censure if he had used any discretion he possessed in favour of the Council. This appeal is accordingly dismissed. There will be no costs as the respondent does not appear.

N.C.D.

Appeal dismissed.

CALCUTTA HIGH COURT

Civil Rule No. 220 of 1939

March 17, 1939

EDGLEY, J.

PULIN CHANLRA CHATTAPADHYA—

PLAINTIFF—PETITIONER

versus

KHETRA MOHAN GHOSE—DEFENDANT—

OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Purpose of security.

It is clear from the language of s. 17, Provincial Small Cause Courts Act, that the purpose for which security has to be furnished is to ensure the performance of the *ex parte* decree in case that decree is not set aside. The security to be furnished is not for the performance of the ultimate decree that might be passed in the event of the *ex parte* decree being set aside. 178 Ind. Cas. 181 (1), relied on.

Mr. Phanibhusan Chakravarty, for the Petitioner.

Dr. Pal and Mr. Panchanan Pal, for the Opposite Party.

Order.—From the record in this case it appears that the Court accepted as sufficient security under s. 17, Provincial Small Cause Courts Act, some property which was under attachment. It is urged on behalf of the petitioner that security such as this could not be regarded as security for the performance of the decree because with the setting aside of the *ex parte* decree, the attachment would come to an end. It appears, however, from the clear language of s. 17, Provincial Small Cause Courts Act, that the purpose for which security has to be furnished is to ensure the performance of the *ex parte* decree in case that decree is not set aside. I do not think it is possible to hold from the language of the section that it was the intention of the Legislature that the security to be furnished was for the performance of the ultimate decree that might be passed in the event of the *ex parte* decree being set aside. This was the

view which was accepted by the Bombay High Court in *Maganlal Pitambar Das v. Dahyabhai Chhaganlal* (1), and in my opinion the interpretation placed on s. 17, Provincial Small Cause Courts Act, in that case is correct. Having regard to the considerations mentioned above, this Rule must be discharged with costs. The hearing-fee is assessed at one gold mohur.

D. — Rule discharged.

(1) A I R 1938 Bom. 448; 178 Ind. Cas. 181; 40 Bom. L R 898; 11 R B 148.

BOMBAY HIGH COURT

Criminal Sessions Case No. 10 of 1939

July 20, 1939

LOKUR, J.

EMPEROR—PROSECUTOR

versus

LAVJI MANDAN—ACCUSED

Penal Code (Act XLV of 1860), ss. 115, 117, 109—Accused abetting commission of murder by public—Whether should be sentenced under s. 115 or s. 117—Such murder committed—Appropriate section of such offence is s. 109—Criminal trial—Sentence—Offence punishable under two different sections of Penal Code—Punishment should be under section imposing higher penalty.

Abetment has a reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. Section 117, I. P. O., deals with the former whatever be the nature of the offence abetted, while s. 115 deals with the latter, without having regard to the person or persons abetted. Section 115 is not confined to the abetment of a single person or a specified individual or individuals, and covers the case of the abetment of a class of persons also. It does not apply only if "no express provision is made by this Code for the punishment of such abetment." The words "such abetment" evidently refer to the abetment of the offence specified in the section itself, namely an offence punishable with death or transportation for life, and only ss. 121 and 131, provide for the punishment of the abetment of such offences. There is no express provision in the Code for the punishment of the abetment of murder. Hence, the abetment of the commission of murder, whether by a single individual or by a class of persons exceeding ten, falls under s. 115. In the latter case, it may fall under s. 117 also; but as s. 117 prescribes a lesser punishment, s. 115 is the more appropriate provision for such an offence. 146 Ind. Cas. 222 (1), not followed, 141 Ind. Cas. 578 (8), relied on.

Obiter.—If a person abets the commission of murder by the public, and murder is committed in consequence of the abetment, it cannot be said that the offence does not fall under s. 117, but the appropriate section for such an offence would be s. 109.

Where a person is found guilty of a criminal act which is punishable under two different sections of the I. P. O., he may be convicted under both the sections, but should be punished only under that section which imposes the higher penalty.

Messrs. S. D. Vimadlal and N. K. Petigara (Public Prosecutor), for the Crown,

Mr. K. H. E. Tarapore, for the Accused.

Judgment.—The offence said to have been committed by the accused consists in his publication of the cover page of his periodical called *Garjana*, containing an exhortation to the "Hindu society" that a "human beast" like the complainant "ought to be done to death like a dog." The question is whether this instigation of the Hindu public to murder the complainant falls under s. 115, I. P. C. Admittedly, it falls under s. 117, which prescribes punishment for abetting the commission of an offence by the public generally, or by any number or class of persons exceeding ten. Section 115 runs as follows:

"Whoever abets the commission of an offence punishable with death or transportation for life shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

It is contended that this section applies only if no express provision is made by the Code for the punishment of abetment, and since the abetment of the commission of an offence by a class of persons exceeding ten is punishable under s. 117, s. 115 cannot apply. This contention finds support in the ruling of the Lahore High Court in *Sania Singh v. Emperor* (1). In that case, Bhide, J. (sitting alone) held that if s. 117 applied, the offence would not fall under s. 115; but he observed (p. 660*);

"In the present instance, the speech was addressed to a large audience, and in this aspect of the question, it might be said that s. 117, I. P. C., is more appropriate. No direct authority is cited and the point is perhaps not free from doubt."

It seems that the ruling of the Calcutta High Court in *Emperor v. Dwarkanath Goswami* (2), which had then been recently published in *Emperor v. Dwarkanath Goswami* (2), was not brought to his notice. That ruling is of a Division Bench and is just the opposite of the view taken by him. There Jack and Ghose, JJ. held that the words "express provision" in s. 115 referred to sections (like ss. 121 and 131) in which specific cases of abetment of offences punishable with death or transportation for life were dealt with, and s. 117 was not an express provision for the abetment of such an offence. With respect, I prefer to agree

(1) A I R 1933 Lah. 660; 146 Ind. Cas. 222; (1933) Cr. Cas. 882; 34 Cr. L J 1207; 6 R L 187 (1).

(2) 60 C 427; 141 Ind. Cas. 578; A I R 1933 Cal. 47; (1933) Cr. Cas. 61; 34 Cr. L J 164; 37 C W N 91; Ind. Rul. (1933) Cal. 138.

*Page of A I R 1933 Lah.—[Ed.]

with this view. Abetment has a reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. Section 117 deals with the former whatever be the nature of the offence abetted, while s. 115 deals with the latter, without having regard to the person or persons abetted. It is not disputed that s. 115 is not confined to the abetment of a single person or a specified individual or individuals, and covers the case of the abetment of a class of persons also. It does not apply only if "no express provision is made by this Code for the punishment of such abetment." The words "such abetment" evidently refer to the abetment of the offence specified in the section itself, namely an offence punishable with death or transportation for life, and only ss. 121 and 131, I. P. C., provide for the punishment of the abetment of such offences. There is no express provision in the Code for the punishment of the abetment of murder. Hence, the abetment of the commission of murder, whether by a single individual or by a class of persons exceeding ten, falls under s. 115. In the latter case, it may fall under s. 117 also, but as s. 117 prescribes a lesser punishment, s. 115 is the more appropriate provision for such an offence. Although both the sections be applicable, there cannot be separate sentences under the two sections for the same criminal act, and the conviction should properly be under that section which inflicts the higher punishment.

Section 116, I. P. C., is similarly worded, and it applies where the offence abetted is punishable with imprisonment. If a class of persons exceeding ten be abetted to commit such an offence, s. 117 also would be applicable. If the offence abetted be theft, and the offence is not committed in consequence of the abetment, the punishment under s. 116 would be only a quarter of three years, that is to say, nine months, but under s. 117 it would be three years. Hence one who abets the public or a class of persons exceeding ten to commit theft, should be charged under s. 117 rather than under s. 116. In other words, where a person is found guilty of a criminal act which is punishable under two different sections of the I. P. C., he may be convicted under both the sections, but should be punished only under that section which imposes the higher penalty.

It may also be pointed out that if a person abets the commission of murder by the

public, and murder is committed in consequence of the abetment, it cannot be said that the offence does not fall under s. 117, I. P. O. But the appropriate section for such an offence would be s. 109, though it contains a similar proviso that the section would be applicable if no express provision is made by the Code for the punishment of such abetment. Similarly, if in consequence of such abetment, murder is attempted but only hurt is caused, the appropriate section would be para. 2 of s. 115. In the present case the accused is charged under ss. 115 and 117 in the alternative, and if it be found proved that he abetted the Hindu public to commit the murder of the complainant, the appropriate section under which he should be convicted is s. 115, I. P. O.

B. *Order accordingly.*

LAHORE HIGH COURT

Criminal Revision No. 1440 of 1936

November 23, 1938

DIN MOHAMMAD, J.

RAMPERSHAD—CONVICT—PETITIONER
versus

DHANNA AND ANOTHER—RESPONDENTS

Criminal Procedure Code (Act V of 1898), ss. 530, 561-A—Complaint under s. 420, Penal Code (Act XLV of 1860), disclosing offence under s. 477—Accused tried and acquitted under former section—Magistrate having no jurisdiction to try under s. 477, Penal Code (Act XLV of 1860)—Proceedings, validity of—Fresh trial, necessity of.

Where the fact disclosed in the complaint under s. 420 constitutes an offence under s. 477 and it is found that the Magistrate trying the case and acquitting the accused under the former section had no jurisdiction to try the same under the latter section, the proceedings before him are void and the accused should be re-tried under the latter section but he should not be allowed to adduce fresh evidence so as to fill in gaps under s. 561-A, Criminal P. O.

Cr. R. from an order of the Session Judge, Ambala, dated June 15, 1938.

Mr. D. N. Aggarwal, for the Petitioner.

Mr. Vishnu Datta, for Respondent No. 1.

Mr. Nazir Hussain, Assistant Legal Remembrancer, for the Crown.

Order.—One Ram Pershad lodged a complaint under s. 420, I. P. O. against Dhanna and Sardara. The allegations made in the complaint were that the accused owed the complainant certain amount of money, that on a false representation being made to the complainant that the accused wanted to settle their account, the complainant was induced to produce his *bahi* and that when the *bahi* was opened for the inspection of the account, the accused tore away that part of the page of

the *bahi* which bore their thumb-impressions and decamped. The trial Magistrate acquitted Sardara but convicted Dhanna under s. 420, I. P. O. and sentenced him to three months' rigorous imprisonment and a fine of Rs. 50. On appeal, the Sessions Judge acquitted Dhanna, too. He, however, very rightly remarked towards the end of his judgment that the fact disclosed in the complaint constituted an offence under s. 477 and not under s. 420, I. P. O. Thereupon, Ram Pershad presented a petition to this Court urging that the acquittal of the accused was bad in law and that all proceedings taken before the trial Magistrate were void inasmuch as he had no jurisdiction to try the case. On going through the record I have come to the conclusion that the petitioner's objection must prevail. The trial Magistrate was not competent to exercise any jurisdiction in the matter. The offence of destroying any document which is a valuable security is punishable under s. 477, I. P. O. and this offence is under Sch. II to the Criminal P. O. triable by a Court of Sessions only. Section 530, Criminal P. O. enacts that if any Magistrate not being empowered by law in this behalf tries an offender, his proceedings shall be void. I have no option therefore but to declare the trial to be illegal.

Counsel for Dhanna argued that inasmuch as the Sessions Judge had come to a definite conclusion on the merits that no offence was committed by the accused, even if the original trial was held to be bad in law, no re-trial should be ordered. I agree so far as Sardara is concerned as even the complainant has made no such allegation against him as would connect him with the offence and his re-trial in these circumstances would cause him unnecessary trouble and harassment. The case of Dhanna, however, is distinguishable and in his case the normal course must be followed. His acquittal proceeds on the finding recorded by the Sessions Judge and inasmuch as the trial is being held illegal, the finding will *ipso facto* vanish.

Counsel has further urged that even if a re-trial is to be ordered, the complainant should not be allowed to produce fresh evidence in the case as this would defeat the ends of justice. In my view, the Counsel is on firm ground here. The object of the re-trial is, so to say, to legalize the proceedings that have already taken place and not to give further opportunity to the complainant to fill in the gaps. Under s. 561-A,

therefore, with a view to secure the ends of justice and to prevent abuse of the process of the Court, I direct that the complainant should not be allowed to lead any evidence in the case which had not been adduced before. I accordingly accept this petition, set aside the orders of the trial Magistrate and the Sessions Judge so far as Dhanna is concerned, and send the case to the Court of a Magistrate of the First Class with enhanced powers under s. 30, Criminal P. O. for disposal in accordance with law.

D. *Petition accepted.*

CALCUTTA HIGH COURT

Civil Rule No. 994 of 1939

August 3, 1939

HENDERSON, J.

Raja SARAT CHANDRA ROY

CHAUDHURY BAHADUR—PLAINTIFF—

PETITIONER

versus

ARJUN MANDAL—DEFENDENT—OPPOSITE PARTY

Bengal Tenancy Act (VIII of 1885), ss. 187, 145—Gomasta, if can conduct zemindari cases—Right conferred by s. 187, whether restricted

If a gomasta who is an authorized agent appears, the suit cannot be dismissed for default. But a recognized agent has no right of audience. There is nothing in the Ben. Ten. Act which lays down that agents have a right of audience or a right to plead. The word "appearance" in s. 187, Ben. Ten. Act is far too restricted for such a meaning to be attributed to it. All that s. 145 does is to give slightly wider powers to *naibs* and *gomastas* than are given to recognized agents under the Civil P. O. But they cannot plead and conduct cases. 28 Ind. Cas. 838 (1), followed.

The right conferred by s. 187 is not an unrestricted right, and it would always be open to the Court to direct the plaintiff's appearance in person.

O. Rule issued from the order of the First Court, Munsif of Maldab, dated June 1, 1939.

Dr. Radha Benode Pal and Bankim Chandra Banerji, for the Petitioner.

Messrs. Nagendra Nath Ghose and Shilendra Nath Mazumdar, for the *Amicus Curiae*.

Order.—This is a Rule calling on the opposite party to show cause why the order of the Munsif rejecting the petitioner's petition should not be set aside. As the opposite party has managed to get the suit stayed by an application to a Debt Settlement Board, he is no longer taking any interest in the matter and has not appeared. Mr. Ghosh, however, argued the case against the Rule as *amicus curiae* in order to put forward the point of view of the legal profession. The petitioner is a *zamindar* who has instituted several rent suits. His contention was that his *gomasta*,

who was an authorized agent within the meaning of s. 145, Ben. Ten. Act, was entitled to conduct his cases in Court. The reason he put forward was that he wished to minimize the costs of litigation, and he proposed to follow this procedure in his conduct of uncontested suits. The learned Munsif pointed out correctly, that it does not make the slightest difference whether the suit is contested or not. If he is entitled to conduct his case in this way in uncontested suits, he is equally entitled to do so in contested suits. Dr. Pal has appeared in support of the Rule, and puts forward the case, that there is something peculiar about rent suits which will entitle the parties, perhaps I had better say plaintiffs, to conduct their cases in what would otherwise be a highly irregular manner. I need not stress the disastrous effects which any such thing would have on the administration of justice.

The first section relied upon is s. 187, Ben. Ten. Act. Under that section any appearance in Court required or otherwise authorized by the Act to be made by a landlord, may be made by an agent empowered in a particular manner. This provision is obviously of no help to the petitioner. It is quite true that, if an authorized agent appears, the suit cannot be dismissed for default. It was, however, laid down in the clearest terms in *Harchand Ray Gobordhon Das v. B. N. Ry. Co.* (1) that a recognized agent has no right of audience. It is perfectly true that that decision is concerned with a case in a Small Cause Court. But there is nothing in the Ben. Ten. Act, which lays down that agents have a right of audience, or a right to plead. The word "appearance" is far too restricted for such a meaning to be attributed to it. I agree with the view taken by the learned Munsif on this point. This, however, would not be sufficient to dispose of the petitioner's claim. The right conferred by s. 187 is not an unrestricted right, and it would always be open to the Court to direct the plaintiff's appearance in person. The other section is s. 145. All that this section does is to give slightly wider powers to *naibs* and *gomastas* than are given to recognized agents under the Civil P. O. For example, they may verify pleadings without obtaining the permission of the Court. They certainly cannot plead and conduct cases. The Rule is discharged.

D.

Rule discharged.

MADRAS HIGH COURT

Special Bench

Civil Miscellaneous Petition No. 3207 of 1939

August 21, 1939

LEACH, C. J., MOCKETT AND KRISHNASWAMI
AYYANGAR, JJ.In re S., AN ADVOCATE STRUCK OFF THE
ROLLS—PETITIONER*Legal practitioner — Re admission — Name struck off from roll for misappropriation — When can be re-admitted.*

Before the Court can re-admit an Advocate who has been struck off the rolls for misappropriation, the Court must be fully satisfied that he has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion is not sufficient. The Court requires solid facts and cogent reasons, not merely the opinions expressed by gentlemen who had given him certificates. Re-admission does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that he has become worthy to act as an Advocate. In deciding such matters the Court has a duty to the public and where an Advocate has been guilty of misappropriation, it must be shown that there is no likelihood of such an offence being committed again.

[After considering all the facts, the Court thought it fit not to re-admit the Advocate.]

C. Misc. P. to re-consider orders of the High Court, dated October 21, 1938.

Leach, C. J.—The petitioner applies to be re-admitted as an Advocate of this Court. In August, 1930, he was suspended from practice for misappropriation of moneys belonging to a client. On February 9, 1931, his name was struck off the rolls as the result of further misappropriation of client's money. He was adjudicated an insolvent on October 29, 1925. His liabilities were Rs. 90,000 and he had no assets. On April 11, 1938, my learned brother, Mockett, J., granted him his discharge on the grounds that he would be condemned to insolvency for life if it were not granted. The petitioner had no prospects of being able to pay anything to his creditors and the discharge was unopposed. In 1933 the petitioner applied to the Court to review its order striking his name off the roll of Advocates, but the application was dismissed on September 29, 1933, by a Full Bench composed of Beasley, C. J. and Sundaram Chetti and Stone, JJ. In support of that application the petitioner filed three certificates of character, two of them being signed by individual members of the Bar and the third being a joint certificate signed by 46 members of the Bar. The Bench refused the petition for two reasons. The first was that the Court required before re-admitting a person to the

profession solid facts and cogent reasons, not merely the opinions expressed by gentlemen who had given the petitioner certificates. It was not enough to say that the petitioner was a fit and proper person for re-admission without stating the grounds on which the opinion was based. The second reason was that the petitioner was still an insolvent.

The petitioner has now obtained his discharge, but the first ground of the Full Bench for refusing to re-admit the petitioner still exists. The petitioner has filed three further certificates, but these do not carry the matter further. Since he was suspended from practice in 1930 the petitioner has had no employment. According to his statement in Court, he has throughout been supported by his daughter. Before the Court could re-admit an Advocate who has been struck off the rolls for misappropriation the Court must be fully satisfied that the petitioner has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion is not sufficient. Here there are no cogent reasons for the Court holding that the petitioner has become fitted to be re-admitted as an Advocate. He has not attempted to obtain any employment. In fact he has stated that he refused two offers of employment made to him. One offer was employment as manager of an estate and the other was employment in an insurance company. The re-admission of an Advocate who has been struck off the rolls for misappropriation does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that he has become worthy to act as an Advocate. In deciding such matters the Court has a duty to the public and where an Advocate has been guilty of misappropriation, it must be shown that there is no likelihood of such an offence being committed again. In view of the previous decision and the fact that the position is now the same as it was then except that the petitioner has obtained his discharge, I consider that the Court would not be justified in allowing this petition.

Mockett, J.—I agree.

Krishnaswami Ayyangar, J.—I agree.

N.D.

Petition dismissed

NAGPUR HIGH COURT

Civil Revision Application No. 301 of 1938

July 26, 1939

Niyogi, J.

PITAMBAR RAMCHANDRA PALIYE

—DEFENDANT—APPLICANT

221818

SAHEB CHAND HARAKCHAND

SHOP—OPPOSITE PARTY

O. P. Debt Conciliation Act (II of 1933), Rules under—Rr. 18, 47, s. 8—R. 18, if cures illegality occurring under r. 47—Due notice to minor creditor and guardian—Board and debtor failing to appoint proper guardian—Proceedings held null and void.

Rule 18 made under O. P. Debt Conciliation Act does not cure illegality occurring under r. 47 but deals with a notice sent in an irregular form.

Where after due notice to minor creditor and his guardian the Board and the debtor failed to have a proper guardian appointed, the proceedings are initially illegal and if this has resulted in failure to submit a statement of debt due to minor, the minor is gravely prejudiced. In such a case the minor is entitled to a declaration in Civil Court that the proceedings are null and void.

O. R. App. for revision of the decree of the Court of Small Causes, Nagpur, dated February 15, 1938.

Mr. T. B. Pendharkar, for the Applicant.

Mr. B. R. Mandlekar, for the Opposite Party.

Order.—This is an application to revise the judgment of the Judge of the Small Cause Court, Nagpur, in Civil Suit No. 125 of 1937, decided on February 15, 1938.

The non-applicant Saheb Chand Harakchand Shop represented by the proprietors Kasturchand and Kapurchand, both minors, filed the suit out of which this application arises to recover a debt due on an instalment bond, dated June 16, 1933, for Rs. 487 executed by the defendant in favour of the shop (Sahebchand Harakchand) then represented by the proprietor Premchand Punamchand, the father of the plaintiffs. Prior to the suit there were proceedings before the Debt Conciliation Board initiated by the defendant for settlement of his debt. The plaintiff was described there by the name of the shop Sahebchand Harakchand as being represented by the owner Kasturchand Premchand who was shown as a major. Notice was issued by the Board in the name of Sahebchand Harakchand, proprietor Kasturchand Premchand. Although Premchand had died and his sons Kasturchand and Kapurchand were minors, no guardian was appointed to represent the minors. The notice issued in the name of the shop as above was received by Hemkaran who was one of the agents

appointed under a power-of-attorney executed by the minors' mother. It is not known whether Hemkaran was present at the proceedings before the Board but from the fact that a note is made in the order sheet as to the presence of all the creditors, it may be presumed that somebody on behalf of the shop Sahebchand Harakchand was present at the proceedings. The plaintiff's mother died during the pendency of the proceedings. That was on November 2, 1936. That fact was apparently brought to the notice of the Debt Conciliation Board, but no attempt was made to appoint a guardian for the minors. It appears one Panmal became the natural guardian. No notice was sent to Panmal or to anybody else on behalf of the minors. According to s. 8(1) of the Debt Conciliation Act, statement of debt owed by the minors ought to have been submitted to the Board but that was not done with the result that the Board declared that the debt owed to the shop of Sahebchand Harakchand was discharged.

In view of that order the defendant contended that the suit was not maintainable. The lower Court overruled the contention on the ground that the minor had not been served in accordance with law and that the proceedings before the Board were null and void. It therefore passed a decree in plaintiff's favour.

On behalf of the applicant it is urged that although there has been irregularity, that was only technical and that it did not prejudice the minors' interest in any way. Reliance is placed on O. XXX, r. 10, Civil P. O., s. 99, Civil P. O. and r. 18 of the rules framed under the O. P. Debt Conciliation Act, 1933. It is true that the agents appointed by the minors' mother were fully aware of the proceedings before the Debt Conciliation Board as is clear from a telegram, Ex D-5, and the letter dated May 31, 1936. There was, however, an irregularity in not issuing notice to the minor Kasturchand whose name was mentioned as the proprietor of the shop Sahebchand Harakchand. He was there described as a major and his brother Kapurchand was not impleaded at all. Under r. 47 of the rules framed under the O. P. Debt Conciliation Act, 1933, the Board and the debtor were bound to follow the procedure laid down in O. XXXII, Civil P. O., 1908. They have ignored that rule altogether. Rule 18 of those rules only deals with a notice sent in an irregular

form but does not cure the illegality occurring under r. 47. Under O. XXXII, r. 3, it was incumbent on the debtor first to have a proper guardian appointed after due notice to the minor and to the guardian. The proceedings were initially illegal as this important step to secure the minors' representation in the proceedings was not taken. Even on the death of the minors' mother no step was taken to have a fresh guardian appointed. In short, the parties who were intended to be affected by the proceedings of the Debt Conciliation Board were not properly brought before the Board. The fact that Hemkaran appeared in the Court is *non squitur* as he happened also to be one of the creditors and had notice to appear before the Board. It is not clear from the record whether Hemkaran appeared on his own behalf or on behalf of the minors. Even if he had appeared in the latter capacity, it was imperative on him to submit a statement of debt due to the minors and his failure to do so has resulted in grave prejudice to the minors' interest in that the debt due to them was declared to be discharged. The proceedings before the Board were so irregular as to entitle the minors to a declaration in Civil Court that the proceedings were null and void and inoperative to affect their interest. Consequently the lower Court was right in holding that the order discharging the plaintiffs' debt made by the Debt Conciliation Board was void and of no avail. The Civil Court has under s. 8 (2) power to revive the debt which has been illegally declared by the Debt Conciliation Board to have been discharged.

I may add that this is particularly a case in which the Civil Court cannot overlook serious irregularities in the procedure of the Debt Conciliation Board on the ground that they were of a technical character. If the irregularity is condoned in this case, the minors' debt would be wiped off and that would result in great injustice to them. On the other hand to take serious notice of these irregularities and regard them as invalidating, the order of the Debt Conciliation Board would induce a sense of responsibility in the mind not only of the parties but also the Board when the minors are arrayed as parties before it. Rule 47 lays the responsibility of securing the due representation of minor parties on the Board as well. Weighing the considerations advanced on either side, there is no doubt that the interests of

justice would be served better by exacting a stricter standard of procedure before the Board as the lower Court has done than otherwise. This will not mean any injustice to the debtor as it is open to him even now to move the Board, if in existence, or to move its successor for settlement of the debt. The fact that a decree has been passed does not impair his right to have the debt settled.

The application is dismissed with costs. Counsel's fees Rs. 20.

D.

Application dismissed.

MADRAS HIGH COURT

Criminal Revision Case No. 228 and
Petition No. 209 of 1939

April 26, 1939

LAKSHMANA RAO, J.

PUBLIC PROSECUTOR, MADRAS—

PETITIONER

versus

M. S. MENOKI—ACCUSED

Criminal trial—Evidence—Privileged communication—Letters written by accused to another accused, in possession of latter's lawyer—Whether privileged communication under s. 126, Evidence Act (I of 1872)—Criminal Procedure Code (Act V of 1898), s. 94 (3)—Documents protected under s. 126, Evidence Act (I of 1872), whether exempted under s. 94 (3).

Letters written by accused to another accused alleged to be in possession of latter's lawyer are not *prima facie* privileged communications by accused to his lawyer under s. 126, Evi. Act.

Clause 3 of s. 94, Criminal P. C., does not exempt documents protected under s. 126, Evi. Act, and the production of such documents is incumbent under s. 162, Evi. Act, notwithstanding any objection which there may be to the production or admissibility. 159 Ind. Cas. 524 (1), relied on.

Or. R. Case and P. to revise the order of the Sub-Divisional Magistrate, Vizagapatam, dated February 10, 1939.

Mr. Kasturi Seshagiri Rao, for the Accused.

Order.—The application was for issue of summons to the lawyer for accused No. 6 under s. 94, Criminal P. C., to produce certain letters written by accused No. 1 to accused No. 6, alleged to be in his possession and *prima facie* those letters are not privileged communications by accused No. 6 to his lawyer under s. 126, Evi. Act. Further, as held in *Gangai Ram v. Habib Ullah* (1), cl. 3 of s. 94, Criminal P. C., does not exempt documents protected under s. 126, Evi. Act, and the production of such documents is incumbent under s. 162, Evi. Act, notwithstanding any objection

(1) 58 A 364; 159 Ind. Cas. 524; A I R 1936 All 212; (1936) Or. Cas. 233; 37 Or. L J 113; (1935) A L J 1176; 1935 A L R 1140 8 R A 458.

which there may be to the production or admissibility. The validity of the objection has to be decided by the Court after production and the dismissal of the application for issue of summons for production of the letters is unsustainable. The order of dismissal is therefore set aside and the Magistrate is directed to issue the summons under s. 84, Criminal P. C., for production of the letters and deal with the documents according to law when produced.

N.D.

*Order set aside.***ALLAHABAD HIGH COURT**

First Appeal No. 255 of 1938

August 9, 1938

BENNET AND VERMA, JJ.

Mst. JANAK DULARI—PLAINTIFF—**APPELLANT***versus***SRI GOPAL AND OTHERS—DEFENDANTS—****RESPONDENTS**

Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), ss. 317 (1), 321, Sch. IX—S. 317 (1) and Sch. IX provide that provisions of Part VI, Government of India Act 1919, (9 & 10 Geo. V, Ch. 101) should continue to have effect—Hindu Women's Right to Property Act (XVIII of 1937), is therefore valid—Enactment, when becomes an Act.

Section 317 (1) and Sch. IX, Govt. of India Act, 1935, provide that the provisions of Part VI, Govt. of India Act, 1919, in regard to the Indian Legislature should continue to have effect notwithstanding the repeal of that Act by the Govt. of India Act of 1935. Hence Hindu Women's Right to Property Act is perfectly a valid Act although passed by the Legislature before the Govt. of India Act came into force and assented to by the Governor-General after its coming into force.

According to the provisions of s. 68, Govt. of India Act of 1919, which appear continued in Sch. IX, Govt. of India Act, 1935, the enactment is a Bill when passed by the Indian Legislature but does not become an Act until the assent is given by the Governor-General.

F. A. from the decision of the Civil Judge, Bareilly, dated August 18, 1938.

Messrs. P. L. Banerji and S. N. Katju, for the Appellant.

Dr. S. N. Sen and Mr. G. S. Pathak, for the Respondents.

Bennet, J.—This is a first appeal by Mst. Janak Dulari, the plaintiff, whose suit has been dismissed on a preliminary issue of law. Musammat Janak Dulari claimed that she was entitled to one quarter share of the family property which had been held by her husband who died on July 26, 1937. She claimed this alternatively, either on the ground that her husband died possessed of this one quarter share as his separate property, or that, if the family was not proved

to have been divided, the plaintiff was under Act XVIII of 1937, entitled to have this one quarter share. The written statement pleaded that

"Act XVIII of 1937 was in no way valid and enforceable. It had not been validly passed by the Legislature. The Govt. or the Legislature had no power to enforce such an Act."

For some reason not stated no issue was framed on the question of whether the husband of the plaintiff died joint or separate. An issue was framed, No. 1:

"Whether the Act XVIII of 1937 was not validly passed by the Legislature and is unenforceable and not binding upon defendants Nos. 1, 2 and 4."

In the Court below the plaintiff apparently relied on s. 292, Govt. of India Act, 1935, as applying to this Act. The Hindu Women's Right to Property Act (Act XVIII of 1937). It was pointed out on behalf of the defendants that Act XVIII of 1937 was passed by the Indian Legislature before April 1, 1937, the date on which Part III, Govt. of India Act of 1935 came into force, and that the assent of the Governor-General was given to this Bill on April 14, 1937, after April 1, 1937. It was therefore argued for the defence that this Act was not a law in force immediately before the commencement of Part III, Govt. of India Act and therefore that s. 292 did not apply to Act XVIII of 1937. The Court below accepted this argument and held that Act XVIII of 1937 was not valid and therefore dismissed the suit of the plaintiff. In this first appeal Mr. Banerji for the appellant has not based his argument on s. 292, Govt. of India Act, 1935, but he has based it on the provisions of s. 317 of that Act and Sch. IX to that Act. There is only a brief mention in the judgment of the Court below; "Nor does s. 317 too of the Govt. of India Act, 1935, help her in any way," and there is no mention at all of Sch. IX of that Act. Therefore the point now raised has not been considered by the Court below. Under the Govt. of India Act, 1919, Part VI, s. 63 onwards dealt with Indian legislation and the powers of the Indian Legislature. It is for the defence to show that those powers have terminated and that the Legislature did not have power to pass this Act XVIII of 1937. It is true that s. 321, Govt. of India Act, 1935, states that the Govt. of India Act shall be repealed to the extent specified in col. 3 of Sch. X and that Sch. X does provide for the repeal of the Act including Part VI. But there is another section of the Govt. of India Act of 1935, s. 317, which provides of follows:

"(1) The provisions of the Govt. of India Act set out, with amendments, consequential on the provisions of this Act, in Sch. IX to this Act (being certain of the provisions of that Act relating to the Governor-General, the Commander-in-Chief, the Governor-General's Executive Council and the Indian Legislature and provisions supplemental to those provisions) shall, subject to those amendments, continue to have effect notwithstanding the repeal of that Act by this Act:

Provided that nothing in the said provisions shall affect the provisions of the last but one preceding section."

Schedule IX to which reference is made in s. 317 (1), sets out the provisions for the Indian Legislature contained in s. 63 onwards of the Govt. of India Act of 1919. Apparently, the section and Sch. IX provide that the provisions of Part VI, Govt. of India Act, 1919, in regard to the Indian Legislature should continue to have effect notwithstanding the repeal of that Act by the Govt. of India Act of 1935. We are unable to read any other meaning into these provisions. The language is particularly clear and not open to any doubt whatever in our opinion, and we cannot conceive that Parliament in enacting s. 317 and Sch. IX, Govt. of India Act of 1935, could have used language that could be more clear and definite. Dr. Sen for the respondents has, however, advanced the argument that the Act XVIII of 1937 was passed as a Bill by the Legislature before April 1, 1937, when the new Govt. of India Act, Part III came into force, and the assent of the Governor-General was given on April 14, 1937, after the new Govt. of India Act came into force. He argues therefore that s. 317 and Sch. IX cannot apply to Act XVIII of 1937. We asked him to explain what there was in the wording of s. 317 and Sch. IX which would not apply to the present case of Act XVIII of 1937 and he was quite unable to specify any wording in s. 317 or Sch. IX which would not apply. We may note that the provisions in regard to Federal Legislature, are contained in Part II, Govt. of India Act, 1935, and these provisions have not yet come into force as there has not yet been any proclamation bringing them into force under s. 320, sub-s. (1). Therefore no Federal legislation has as yet been brought into force as part of the law of India and under the provisions of the Govt. of India Act, s. 317 and Sch. IX the law in regard to the Indian Legislature contained in the Govt. of India Act, 1919, has all along continued to be the law for British India. It was natural that the framers of the Act should provide for such a course as it was not intended to bring

Part II of the Act into force until a proclamation was made under s. 320. It appears to us that the provisions made in s. 317 and Sch. IX are intended to continue the validity of the functions of the Indian Legislature. Dr. Sen has not been able to show that there is any defect in the wording of s. 317 or in Sch. IX which fails to carry out that obvious intention.

Some reference was made to the question of whether this enactment, Act XVIII of 1937, was an Act when passed by the Legislature and before assent. The provisions of s. 63, Govt. of India Act of 1919, which appear continued in Sch. IX, Govt. of India Act, 1935, are quite clear and the enactment is a Bill when passed by the Indian Legislature but does not become an Act until the assent is given by the Governor-General. For these reasons we hold that the Act XVIII of 1937 is a perfectly valid Act and that the plaintiff is entitled to rely on it in the present case as a perfectly valid Act. We therefore allow this first appeal and we reverse the finding of the Court below on Issue No. 1, and as the Court below has not disposed of the remaining issues, we remand this suit for disposal by the Court below, on the remaining issues. As this plea of invalidity was taken by defendants Nos. 1, 2 and 3, we direct that they shall pay the costs of this appeal to the plaintiff-appellant. Dr. Sen for the respondents asked that this Bench should certify that the case involved a substantial question of law as to the interpretation of the Govt. of India Act or orders in Council made thereunder in accordance with the provisions of s. 205 (1) for such certificates. As Dr. Sen has failed to show us any justification in s. 317 or Sch. IX for the argument which he put forward, we cannot say that this question was a substantial question of law and therefore we regret that we cannot grant the respondents the certificate under s. 205 (1).

s.

Appeal allowed.

MADRAS HIGH COURT

Civil Revision Petition No. 463 of 1937

July 29, 1938

BURN, J.

GOORU NARAYANA AND ANOTHER—

PETITIONERS

versus

VAIKUNTAM CHINNA LAKSHMAYYA—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. XIX, r. 1
—Affidavits—When can be acted upon.

Affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence.

O. R. P. to revise order of the District Court, Bellary, dated March 12, 1937.

Facts.—The petitioner filed an application in the lower Court for leave to sue *in forma pauperis* and the respondent contested the application and stated that the petitioner was not a pauper and in support of that contention filed affidavits from two villagers stating that the petitioner had raised crops in the previous years of considerable value. The petitioner wanted the villagers to be summoned and examined and objected to the affidavits being received as evidence. The District Judge overruled the contention of the petitioner and accepted the affidavits and dismissed the application for leave to sue *in forma pauperis*. Against this order the present application for revision was filed.

Mr. A. Gopalacharulu, for the Petitioners.

The Government Pleader and Mr. K. R. Gupta, for the Respondent.

Order.—The learned District Judge ought, I think, to have summoned the witnesses, since the petitioners objected to the statements of the Reddi and the *karnam*. Affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence. The order will be set aside and the petition restored to file for disposal according to law as provided for in O. XXXIII, Civil P. C. The costs of this petition will abide and follow the result.

N.D.

Order set aside.

LAHORE HIGH COURT

Second Appeal No. 1294 of 1938

April 14, 1939

BHIDE, J.

MANDIR GITA BHAWAN, SHIRI
KURUKHSETRA JIRAN UDDHAR,
KURUKHSETRA, THROUGH LALA
MANSA RAM—DEFENDANT—APPELLANT
versus

SADHU RAM, PLAINTIFF AND ANOTHER—
DEFENDANT—RESPONDENTS

Custom (Punjab)—Alienation—Widow—Reversioner, however distant, whether competent to challenge—Legal necessity—Pilgrimage to Gaya, if valid legal necessity—Punjab Pre-emption Act (I of 1913), s. 4—Agricultural land—Land not used for agricultural purposes for over 20 years—Land held not agricultural.

A reversioner, however, distant would be competent to challenge a widow's alienation. The exact degree of relationship is not material in a suit for declara-

tion by reversioner that a sale by a widow should not affect his reversionary rights.

According to Hindu ideas a pilgrimage to Gaya by a widow is for the spiritual benefit of the husband and would constitute valid necessity for an alienation by her. [p 473, col. 2.]

The expression "agricultural land" in the Punjab Pre-emption Act has a technical meaning in that Act—the definition of the expression being practically the same as in the Punjab Alienation of Land Act. According to that definition, the land must have been used for agricultural purposes or purposes subservient to agriculture. When the land was not so used for a period of nearly 20 years, but has been lying uncultivated except for one year, when there was a garden on a portion of it, it cannot be held to fall within the said definition. 78 Ind. Cas. 443 (1), referred to.

S. A. from the decree of the Senior Sub-Judge, Karnal, dated June 8, 1938.

Mr. Jaggan Nath Aggarwal, for the Appellant.

Messrs. V. N. Sethi and C. L. Aggarwal, for the Respondents.

Judgment.—The plaintiff sued in this case for a declaration that the sale of one-half share in 4 *bighas* 4 *biswas* of land in *mauza* Dara Kalan, Tehsil Thanesar, by Mst. Manohari, defendant No. 2 for Rs. 99 in favour of defendant No. 1 shall not affect his reversionary rights. In the alternative he also sued for pre-emption of the property. The trial Court dismissed the suit but on appeal the learned Senior Subordinate Judge has granted a decree for pre-emption only on payment of Rs. 99. From this decision a second appeal has been preferred by defendant No. 1 and cross-objections have been filed on behalf of the plaintiff. So far as the claim for pre-emption is concerned, the plaintiff alleged that the land in suit was "agricultural land" within the meaning of the Punjab Pre-emption Act and in the alternative also sued for pre-emption on the footing that the property was in any case "village immovable" or "urban immovable" property. Unfortunately no distinct issues were framed on these points the only issue on the claim for pre-emption which was framed being "Has the plaintiff a preferential right to pre-empt?" However, evidence appears to have been led with regard to the different bases for the right of pre-emption as stated above. The trial Court found that the land in dispute was not agricultural (according to the judgment it appears that this was admitted before the trial Judge) and he held further that the land was urban immovable property and no custom of pre-emption with respect to such property had been proved. On appeal the learned

Senior Subordinate Judge has held that it was admitted in the written statement that the land in dispute was "agricultural land" (*arazi zarai*) and therefore the plaintiff was entitled to succeed on that footing as he was a co-sharer along with defendant No. 2 in the said land according to the entries in the revenue records. He accordingly decreed the claim for pre-emption though he upheld the trial Court's dismissal of the claim as regards the declaration sought by the plaintiff on the ground that the sale was without necessity and consideration.

It will be convenient to deal first with plaintiff's claim for a declaration which has been dismissed by both the Courts, but with regard to which cross objections have been filed by the plaintiff. The learned Judges of the Courts below have held that the plaintiff had failed to prove that he was a reversioner of the vendor, *Mst. Manohari*. This is a finding of fact. But the learned Counsel for the plaintiff-respondent has urged that the learned Senior Subordinate Judge has failed to consider properly the legal effect of the admission of *Mst. Manohari* herself and the documentary evidence in support of it. *Musammam Manohari* who was produced as a witness for the plaintiff, has admitted that her deceased husband was related to the adoptive father of the plaintiff in 8th or 10th degree. She has further admitted that her property is also joint with him. These admissions of *Mst. Manohari* who is supporting the defendants are sufficient *prima facie* proof of the relationship to shift the burden to the other side. It is true that *Mst. Manohari* has not given a complete pedigree table but that is no ground for rejecting her statement as regards the alleged relationship of which she may be expected to have knowledge. Her statement in Court receives further corroboration from a previous statement made by her (which was admitted) as also by the mutation Ex. P-8. The learned Senior Subordinate Judge has not referred to this evidence. I am therefore unable to agree with the finding of the learned Senior Subordinate Judge as regards the relationship of the plaintiff to *Mst. Manohari* and hold it to be proved that he is her reversioner. The exact degree of relationship is not material. It was conceded that a reversioner, however distant, would be competent to challenge a widow's alienation. I am, however, unable to agree with the learned Senior Subordinate Judge's finding on the question

of necessity. *Musammam Manohari* deposed that she sold the land for Rs. 99 which sum was required for a pilgrimage to Gaya. Her statement is supported by the statements of D.W. No. 2 and D.W. No. 6. It appears from the evidence that she actually did go on pilgrimage to Gaya. Such a pilgrimage is, according to Hindu ideas, for the spiritual benefit of the husband and would constitute valid necessity for the alienation. The sum for which the land was sold was not unreasonable for the object in view. It was urged that it was not proved that *Mst. Manohari*'s income was insufficient for the purpose. But all that is brought out in evidence is that she has an income of Rs. 50 per year from other property. This cannot be sufficient even for her food, much less for other requirements. It was said that she gets a share of the *birt*, but this consists only of occasional small presents at the time of performance of religious ceremonies, etc. The widow herself cannot perform any priestly functions and there is nothing on the record to suggest that she has any substantial income from this source. I am therefore of opinion that necessity for the sale has been proved.

I shall now deal with the claim for pre-emption on the basis that the land in dispute was agricultural land. In para. 1 of the plaint, it was merely stated that the land in dispute was the property of the plaintiff and defendant No. 2 and this is what was admitted by defendant No. 1. It is true that the land was described as *arazi zarai* but this was a general description which was not used with reference to the provisions of the Punjab Pre-emption Act. The expression "agricultural land" has a technical meaning in that Act—the definition of the expression being practically the same as in the Punjab Alienation of Land Act. I do not think the reply of defendant No. 1 to para. 1 of the plaint be reasonably taken to be tantamount to an admission that the land in dispute was "agricultural land" in the same sense of the definition of that expression as given in the Punjab Pre-emption Act. In reply to the paragraph in the plaint in which the plaintiff claimed a right of pre-emption, defendant No. 1 denied the right and joined issue on the point. This shows clearly that defendant No. 1 did not intend to admit that the plaintiff had any right of pre-emption with respect to the property in suit on the ground of its being "agricultural land." Apart from the above so-called admission of defendant No. 1, there is no

other evidence worth the name on the record to prove that the property in dispute is agricultural land. The entries in the revenue records show that for nearly 20 years the land had been lying uncultivated except in the year 1925-26 when there was a garden on a small portion of it. In view of these entries in the revenue records, the oral evidence on the point cannot be believed. I am therefore of opinion that the land in dispute cannot be held to be agricultural land within the meaning of the Punjab Pre-emption Act; for, according to that definition, the land must have been used for agricultural purposes or purposes subservient to agriculture. When the land was not so used for a period of nearly 20 years, it cannot be held to fall within the said definition: cf. *Gopimal v. Muhammad Yasin* 78 Ind. Cas. 443 (1). The learned Senior Subordinate Judge has, however, given no finding on the other questions arising with reference to the claim for pre-emption, namely, whether the land was village immovable property or urban immovable property, and whether the plaintiff had proved that there was any custom of pre-emption in the locality where the land is situated in case the property was found to be urban immovable property. Similarly, Issues Nos. 6 and 7 with respect to the question of improvements and adverse possession, have been left undecided.

The case will, therefore, have to be remanded for re-decision after disposal of the following points, namely, 1. Is the land in dispute village immovable property and has plaintiff a superior right of pre-emption with respect to it? 2. If not, is it urban immovable property? 3. Does the custom of pre-emption obtain in the locality where the land in dispute is situated in case it is found to be urban immovable property? 4. What improvements have been made by defendant No. 1 and at what expense, and is he entitled to claim compensation for the same? It was alleged on behalf of the appellant that the land was already in possession of defendant No. 1 for over 12 years and the possession had been adverse. But there is no tangible evidence to prove this and the very fact that a formal sale was effected in 1936 is, I think, sufficient to show that defendant No. 1 had not acquired any valid title prior to the sale. I accordingly remand the case to the learned Senior Subordinate Judge for re-decision after disposing of

(1) 78 Ind. Cas. 443; A I R 1924 Lah. 657.

the above points. Costs will follow final decision. Parties are directed to appear before the learned Subordinate Judge on May 1, 1939.

D.

Case remanded.

CALCUTTA HIGH COURT

Civil Rule No. 1556 of 1938

March 17, 1939

EDGLAY, J.

BEPIN CHANDRA GORAIN—

PETITIONER

VERSUS

HEM CHANDRA MUKHERJEE

AND ANOTHER—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, r. 102—Transfers whether voluntary or otherwise, if covered—Transfer of Property Act (IV of 1882), s. 52.

The general doctrine of *lis pendens* under s. 52, T. P. Act, has been extended to involuntary alienations and the same principle should apply in the case of transfers which are covered by r. 102 of O. XXI, Civil P. C. The transfer of property belonging to the judgment-debtor, whether such transfer be voluntary or involuntary, nevertheless operates as a transfer by the judgment-debtor and, the language of r. 102 is sufficiently wide to cover both kinds of alienations by a judgment-debtor.

O. Rule issued from an order of the First Munsif, Asansol (Burdwan), dated July 27, 1938.

Mr. Asoke Nath Mukherjee, for the Petitioner.

Mr. Jagdish Chandra Ghose, for the Opposite Party.

Order.—This Rule is directed against the order of the First Munsif of Asansol, dated July 27, 1938, in which he allowed a petition filed by the opposite party under O. XXI, r. 100, Civil P. C. The facts with which we are concerned in this case are briefly as follows: The petitioner Bepin Chandra Gorain instituted a suit, Title Suit No. 1165 of 1928, in the Court of the First Munsif of Asansol for a declaration of his title and for possession of certain plots of land including plots Nos. 1044 and 1599 in Mouza Damra. The defendants in the petitioner's suit were: (1) Matilal Marwari, (2) the Maharaja of Cossimbazar and also a number of other people, Promothanath Chatteraj and others, who may be described conveniently as the Chatterajas. The petitioner obtained a decree in the trial Court in respect of plots Nos. 1044 and 1599 against Matilal Marwari and the Maharaja of Cossimbazar, but his suit was dismissed against the Chatterajas. There were subsequently

appeals with regard to this matter which culminated in an appeal to this Court, which was finally decided on July 5, 1935. In spite of all these appeals, however, the position as regards plots Nos. 1014 and 1599 remained unaltered. The position, therefore, was that, as far as these two plots were concerned, Bipin Chandra Gorain had obtained a decree only against Matifal Marwari and the Maharaja of Cossimbazar. In due course the petitioner put his decree into execution in Title Execution Case No. 20 of 1938 and obtained delivery of possession of the two above-mentioned plots on March 27, 1938. Thereupon, opposite party No. 1 Hem Chandra Mukherjee, filed a petition under O. XXI, r. 100, Civil P. C., asking that he might be restored to the possession of the two plots in question on the ground that he had purchased them in a certificate sale which had been held on December 21, 1935, at the instance of the Cossimbazar Raj Wards Estate. According to his sale certificate the tenants of the plots whose right, title and interest were purchased by him were some of the Chattoirajas who were defendants in the petitioner's Title Suit No. 1165 of 1928. He took possession of the said plots through the Court on March 24, 1936. The petition under O. XXI, r. 100, Civil P. C., was challenged by the petitioner on the ground that the transfer to the opposite party has taken place *pendente lite* and that this being the case, O. XXI, r. 102, must be regarded as a complete bar to such an application. The case was decided by the learned Munsif upon the footing that O. XXI, r. 102, Civil P. C., does not apply to involuntary alienations *pendente lite*.

It has been contended during the course of the arguments that this view is erroneous. The general provisions of the law with regard to the principle of *lis pendens* are contained in s. 52, T. P. Act. Having regard, however, to the terms of s. 2 (d), T. P. Act, the provisions of s. 52 would not directly apply as regards the matter with which we are now dealing. At the same time, as regards transfers in the course of execution proceedings, the rule of *lis pendens* is expressly recognized in O. XXI, r. 102, Civil P. C. The precise effect of this rule must, therefore, be considered. Rule 102 is as follows:

"Nothing in rr. 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which

the decree was passed or to the dispossession of any such person."

During the course of the argument there was some discussion on the question whether the rule was at all applicable in the present case. In order to ascertain the precise meaning of this rule some reference is necessary to some of the preceding rules of O. XXI. If there is resistance or obstruction to the execution of a decree for the possession of immovable property, the decree-holder may complain under r. 97. Rule 93 of O. XXI, provides that, when the resistance or obstruction was occasioned without any just cause, the decree-holder will be put into possession of the property. If, however, there is any just cause for the resistance or obstruction of the nature mentioned in r. 99 of O. XXI, the decree-holder's application is rejected. But, having regard to the provisions of r. 102, the person in possession cannot be said to have a right to be in possession if he has received the property on transfer from the judgment-debtor, after the institution of the suit in which the decree was passed. In such a case the decree-holder's application would be allowed under r. 93. The two succeeding rr. 100 and 101, relate to applications which may be made by the person (other than the judgment-debtor) in possession of the property which is the subject-matter of the execution proceedings. If any person in possession of such property other than the judgment-debtor is dispossessed, he may complain under r. 100 of O. XXI. If it is found that he was in possession on his own account, the Court will order him to be restored to possession, unless, in view of the provisions of r. 102, the judgment-debtor has transferred the property to him after the institution of the suit in which a decree was passed. The terms of r. 102 are therefore, such as to exclude from the benefit of r. 99 a transferee, *pendente lite* from the judgment-debtor who has resisted or obstructed the execution of the decree and from the benefit of r. 101 any such transferee who has been dispossessed of the transferred property.

It has been argued that the words "a person to whom the judgment-debtor has transferred the property" can only refer to a voluntary alienation on the part of a judgment-debtor and not to a transfer by a Court sale or a sale under the Public Demands Recovery Act. Admittedly, the general doctrine of *lis pendens* under s. 52, T. P. Act, had been extended by judicial

decision to involuntary alienations and I see no reason why the same principle should not apply in the case of transfers which are covered by r. 102. The transfer of property belonging to the judgment-debtor, whether such transfer be voluntary or involuntary, nevertheless operates as a transfer by the judgment-debtor and, in this view of the case, I think that the language of r. 102 is sufficiently wide to cover both kinds of alienations by a judgment-debtor. In the case with which we are now dealing, it appears that the transfer of the two plots took place after the institution of the petitioner's suit and before the satisfaction of the decree. If it can be shown that these plots were transferred *pendente lite* by Matilal Marwari in favour of the opposite party, the petitioner would be entitled to succeed. On the facts, however, which appear from the record it has not been shown that the transfer to the opposite party by reason of the certificate sale operated in any way as a transfer by either of the judgment-debtors in respect of these two plots with which we are concerned. As already stated the tenants whose right, title and interest were transferred to the opposite party under the certificate sale were members of the Chatteraja family. The petitioner's suit had been clearly dismissed against the Chatterajas and it cannot be said that these people were in any sense judgment-debtors within the meaning of r. 102 of O. XXI. It follows, therefore, that r. 102 of O. XXI, can have no application to the facts of this case and the opposite party is, therefore, entitled to be put into possession of the property under r. 101 of O. XXI. I arrive, therefore, at the same conclusion as the learned Munsif although I do not agree with the line of reasoning which has been adopted by him. The Rule is accordingly discharged with costs, the hearing fee being assessed at four gold mohurs.

D.

Rule discharged.

LAHORE HIGH COURT
Second Appeal No. 66 of 1939
May 4, 1939

BHIDE, J.

RAM RATTAN—DEFENDANT—APPELLANT

versus

GOBIND RAM—PLAINTIFF AND ANOTHER
—DEFENDANT—RESPONDENTS

*Transfer of Property Act (IV of 1882), s. 137—
Negotiable instrument, transfer of, otherwise than by*

endorsement—Oral assignment, validity of in Punjab.

Section 137, T. P. Act, is no bar to the transfer of a negotiable instrument otherwise than by endorsement. The T. P. Act not being in force in the Punjab an oral assignment is valid in this province.

[Case-law relied on.]

S. A. from the decree of the District Judge, Jullundur, dated October 20, 1938.

Mr. Mela Ram Aggarwal, for the Appellant.

Mr. Charanjiva Lal Aggarwal, for the Respondents.

Judgment.—The plaintiff sued in this case for recovery of Rs. 1,000 on the basis of a pro-note executed for defendant No. 1 in favour of defendant No. 2 which was alleged to have been orally assigned by the latter in favour of the plaintiff. The suit has been decreed by the Courts below and defendant No. 1 has preferred a second appeal. The appellant had resisted the suit on a number of grounds in the Courts below, but his learned Counsel has pressed only one point before me, *viz.*, that a negotiable instrument can only be transferred in favour of another person by endorsement as required by s. 48, Negotiable Instruments Act, and that an oral assignment thereof was invalid as a transferee without the requisite endorsement is not a "holder" within the meaning of s. 8 of the Act and he would not therefore be entitled to sue as he cannot give a valid discharge (*cf.* s. 78 of the Act). The learned Counsel relied in support of his argument chiefly on *Har Kishore Barua v. Gura Mia Chowdhury* (1) and contended that *Lacha Ram v. Hem Raj* (2), *Panna Lal Lachman Das v. Har Gopal Khubi Ram* (3) and certain other rulings which are followed therein do not lay down correct law as the effect of s. 137, T. P. Act, which exempted negotiable instruments from the operation of s. 130 of the same Act, has not been considered in those rulings.

The learned Counsel for the respondent has on the other hand referred to a recent Full Bench decision of the Patna High Court reported in *Ghanshyam Das v. Ragho Sahu* (4), in which the Case-law has been discussed and it has been held that s. 137, T. P. Act, is no bar to the transfer of a

(1) A I R 1931 Cal. 387; 131 Ind. Cas. 570; 58 C 752; 53 C L J 37; 35 C W N 53; Ind. Rul. (1931) Cal. 458.

(2) A I R 1932 Lah. 30; 134 Ind. Cas. 121; 33 P L R 120; Ind. Rul. (1931) Lah. 889.

(3) 29 P R 1919; 51 Ind. Cas. 250; A I R 1919 Lah. 85.

(4) A I R 1937 Pat. 100; 167 Ind. Cas. 57; 16 Pat. 74; 17 P L T 919; 9 R P 371; 3 B R 259 (F B).

negotiable instrument otherwise than by endorsement. The learned Counsel drew attention further to the wording of s. 118, cl. (a), Negotiable Instruments Act, which shows that the Act contemplates other modes of transfer of negotiable instruments besides endorsements. As regards the ruling relied on by the learned Counsel for the appellant, he pointed out that that ruling as well as certain other rulings referred to by the learned Counsel, [e.g., *Subba Narayana v. Ramaswami Iyer* (5), *Jaswant Singh v. Gobind Ram* (6), etc.] were cases of *benamidars* in which no question of the validity of any assignment arose and those cases were therefore distinguishable.

In my opinion, the contentions of the learned Counsel for the respondent are sound. The case reported in *Har Kishore Barua v. Gura Mia Chowdhury* (1), which was strongly relied on by the learned Counsel for the appellant, was one in which plaintiff sued on the basis of a negotiable instrument, alleging that the person in whose favour it was drawn was a *benamidar*. There was no question of assignment of the instrument in that case, whether oral or written, and the case was distinguished on this ground in a later Calcutta case reported in *Surath Chandra v. Kripanath Choudhury* (7), in which the conflict of rulings on this point was noted and explained. *Virappa v. Mahadeappa* (8), on which the learned Counsel for the appellant particularly relied was no doubt not a case of a *benamidar*, but it merely noted the conflict of authorities and followed the decision in *Har Kishore Barua v. Gura Mia Chowdhury* (1), without any independent decision of the point. Following the decision in *Ghanshyam Das v. Ragho Sahu* (4) and *Surath Chandra v. Kripanath Choudhury* (7), I hold that s. 137, is no bar to the transfer of a negotiable instrument otherwise than by endorsement. As pointed out in these rulings the incidents of a transfer by endorsement and those of a transfer by assignment are different, but there seems to be no good reason for holding that assignment of a negotiable instrument otherwise than by endorsement is not valid at all. The T. P. Act not being in

force in this province, there seems to be no reason why an oral assignment should not be valid in this province. This was the view taken in *Panna Lal Lachhman Das v. Har Gopal Khubi Ram* (3) and adopted in *Lacha Ram v. Hem Raj* (2). A similar view was taken in *Palawan v. B. Kanu* (9). In the present instance an oral assignment has been held to be proved and there is no valid ground for disturbing this finding of fact in second appeal. I accordingly affirm the decision of the learned District Judge and dismiss the appeal, but in view of the conflict of authorities, leave the parties to bear their costs.

D. Appeal dismissed.
(9) A I R 1921 L B 92; 66 Ind. Cas. 501; 11 L B R 174.

MADRAS HIGH COURT

Appeal No. 414 and Civil Revision

Petition No. 1235 of 1936

December 14, 1937

VENKATARAMANA RAO AND STODART, J.J.

R. D. K. OHINNA VENKATAPPA

NAYANIM BAHADUR VARU—

APPELLANT

versus

GUBBA SUNDARAJULU NAIDU

—RESPONDENT

Transfer of Property Act (IV of 1882), s. 11, Proviso—Maintenance decree creating charge on certain properties—Decree-holder transferring portion of arrears but stipulating that assignee shall not bring to sale charged properties—Restrictions held valid.

In a decree for maintenance there was a charge upon certain property for the payment of the amount. Upon certain arrears falling due, the decree-holder transferred a portion of such arrears, but in order to safeguard his rights in regard to the realization of the rest of the arrears the decree-holder while transferring a portion of the arrears clearly stipulated that the assignee, should not have the right to bring the charged property to sale:

Held, that even if s. 11, T. P. Act, were to apply, the restriction imposed upon the transferee would be covered by the Proviso to the section and would therefore be valid.

A. and C. R. P. against the order of the Sub-Judge, Chittoor, dated April 7, 1936.

Mr. T. Kumaraswamiiah, for the Appellant.

Mr. A. Sundaresan, for the Respondent.

Venkataramana Rao, J.—Both the civil miscellaneous appeal and the civil revision petition have been filed against the order of the learned Judge of Chittoor allowing the sale of certain villages in execution of a decree in O. S. No. 17 of 1910 at the instance of the respondent. The sale of the villages was objected to by the appellant who was the decree-holder in the case and who transferred

(5) 30 M 88; 16 M L J 508 (F B).

(6) 14 L 19; 140 Ind. Cas. 13; A I R 1932 Lah. 620; 33 P L R 937; Ind. Rul. (1932), Lah. 674.

(7) A I R 1934 Cal. 519; 150 Ind. Cas. 925; 61 C 425; 38 C W N 465; 7 R O 45.

(8) A I R 1934 Bom. 356; 153 Ind. Cas. 352; 36 Bom. L R 607; 7 R B 230.

a portion of the decree to the respondent's assignor. The decree itself was a decree for maintenance obtained by the appellant as one of the junior members of the Kalahasthi family against the estate of Kalahasthi. The decree provided for payment of Rs. 400 a month charging the whole estate of Kalahasthi for payment of the said amount. The maintenance was never paid regularly and it was always in arrears. On September 11, 1922, there was a large amount of arrears due and payable to the appellant. He transferred a portion of the said arrears by Ex. I in favour of one Radhakrishna Chetty who assigned his interest therein to the respondent. The question now turns upon the construction of the deed of transfer, Ex. I. The decree being a maintenance decree with a specific charge on a certain property, the decree-holder was entitled not only to bring the properties to sale in realization of the amount due to him but also to get a Receiver appointed over specific portions of the charged property and also to proceed against the judgment-debtors personally if the decree allowed it. On the date of this transfer the appellant was entitled to these remedial rights. As he was transferring a portion of the decree, he wanted to safeguard his rights in regard to the realization of the rest of the arrears which were still due to him and which he wanted to realize in execution of the decree. Therefore while transferring a portion of the arrears he clearly stipulated that the assignee, the said Radhakrishna Chetty, should not have the right to bring the village to sale. It was certainly competent to the decree-holder to impose the said restriction. The learned Subordinate Judge seems to have thought that as there was a transfer of the right to receive a portion of the amount due under Ex. I the stipulation that the transferee shall not bring the properties to sale operated as a restriction in regard to his absolute enjoyment of the property and was therefore forbidden by s. 10, T. P. Act.

It seems to us that s. 10 is obviously a slip. Apparently he wanted to rely on s. 11, which is the section which deals with restriction to the employment. Even if s. 11 were to apply, the restriction imposed would be covered by the Proviso to the section and would therefore be valid. In the result, we set aside the order of the learned Subordinate Judge directing sale and give leave to the petitioner to amend his execution petition by praying for the appointment of a Receiver of any

other relief which he thinks he is entitled to and which he is advised to pray for. Civil Miscellaneous Appeal is allowed with costs but there will be no order as to costs in Civil Revision Petition.

N.-D.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 385 of 1938

March 14, 1939

DAVIS, J. C. AND TYABJI, J.

EMPEROR—PROSECUTOR

versus

MIRO GHULAM HUSSAIN—

ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 439 (6), 562—Release under s. 562 on probation of good conduct—Order set aside and sentence in lieu thereof passed under s. 562 (3)—Whether amounts to enhancement of sentence—Penal Code (Act XLV of 1860), s. 379—Cattle theft—Proper punishment.

Under s. 562, Criminal P. C., when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore, when, under s. 562 (3) the High Court sets aside an order and passes a sentence in lieu thereof, it cannot be said that it enhances a sentence within the meaning of s. 439 (6), Criminal P. C. An enhancement of sentence pre-supposes that there is a sentence to be enhanced.

Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which, in many other cases, prompts a thief to steal, and it must be made plain to young men who steal cattle that if they are not going to prison, they will have at least to pay a heavy fine. The fine must be such as to make it clear that cattle lifting is not profitable. 142 Ind. Cas. 544 (1), relied on.

Or. Ref. made by the District Magistrate, Sukkur.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Mr. Rewachand V. Thadhani, for the Accused.

DAVIS, J. C.—This is a reference to us by the learned District Magistrate of Sukkur, in which he asks us to pass a sentence upon one Miro who has been convicted by the First Class Magistrate of Mirpur Mathelo of the theft of a bullock and released on probation of good conduct under s. 562, Criminal P. O. The learned District Magistrate states that cattle lifting is very common in his District and requires a deterrent sentence, and we might also refer him to the case of this Court in *Emperor v. Jhanaji* (1), at p. 35, in which (1) 27 S L R 34 at p. 35; 142 Ind. Cas. 544; A I R 1933 Sind 44; (1933) Or. Cas. 190; 3 Or. L J 420; Ind. Bul. (1933) Sind 113 (1).

two Judges of this Court set out good reasons why in cases of cattle thefts which are prevalent in a district sentences of imprisonment should be passed and why first offences of this nature should not ordinarily go unpunished. The learned Advocate who appeared for this Miro, who is a young man of, as the Magistrate says, about 25 years of age, claimed to be heard on the merits of the case, because he said that under s. 439 (6), Criminal P. O., he could show, in case of enhancement of a sentence, cause against the sentence itself. But we do not see how it can be said here that we are enhancing a sentence or acting under s. 439 (6) because the enhancement of a sentence presumes there is a sentence to be enhanced, but under s. 562, Criminal P. O., it is clear that what is done is done in lieu of sentence. It says;

"...if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond."

So it is clear to us that under s. 562, Criminal P. O., when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore, when, as under s. 562 (3) we are entitled to do, we set aside an order and pass a sentence in lieu thereof, it cannot be said that we enhance a sentence within the meaning of s. 439 (6), Criminal P. O., and however unfair this may appear to the learned Advocate, we are here to interpret the law and not to make it. Therefore we are not prepared to hear the learned Advocate upon the merits of the case, though we have heard him on all matters material to the question before us, that is the passing of a sentence of imprisonment in lieu of the order passed by the Magistrate under s. 562, Criminal P. O.

The learned Advocate pointed out to us that though in *Emperor v. Jhanaji* (1), at p. 35* the Court expressed its disapproval of leniency in cases of cattle lifting, nevertheless it did not interfere because of the time that had elapsed between the order of the Magistrate and the date on which the Court was hearing the reference. But apart from the question that the lapse of time in that case was far greater than the lapse of time in this, we do not think that we can allow offences of this nature to

pass upon an order of a Magistrate of release on probation of good conduct under s. 562, Criminal P. O. Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which in many other cases prompts a thief to steal, and we think it must be made plain to young men who steal cattle that if they are not going to prison they will have at least to pay a heavy fine: and we are willing in this case under the circumstances to give this method of a fine a trial, though if subsequent cases show that even this leniency is misunderstood, there may be no alternative for us but to follow in practice the reasoning and conclusions in *Emperor v. Jhanaji* (1), to which we have referred. We do not wish to impose a fine that is too heavy to be paid. On the other hand, the fine must be such as to make it clear that cattle lifting is not profitable. The learned Advocate says that the father of the accused is a poor *Mulla*, though he previously stated that the father had lands. But assuming that the father is poor, we do not think it will be beyond the capacity of the accused or those closely interested in him to pay a fine of Rs. 150 and we think therefore that we should set aside the order of the Magistrate under s. 562, Criminal P. O., and pass upon the accused in lieu of the order a fine of Rs. 150, or direct him in default, to undergo rigorous imprisonment for six months. The accused can be given a fortnight to pay the fine. The father should execute a bond for the payment of the fine or for the appearance of the accused in this Court on failure to pay the fine within the time allotted, so that sentence imposed in default of fine may be undergone. The fine may be paid in the trial Court.

D.

Order set aside.

BOMBAY HIGH COURT

Civil Appeal No. 81 of 1937

February 23, 1939

LOKUR, J.

GURAPPA BHIMANNA CHIDGUPPI

—DEBENDANT—APPELLANT

versus

MADWALAPPA RAMCHANDRAPPA

DUMANE AND ANOTHER—PLAINTIFFS

—RESPONDENTS

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 72—Suit falling under both cls. (w) and

(y) of s. 3—S. 72, if applies—Suit for sale of mortgaged property and for personal decree in case sale proceeds were insufficient—Relief for personal decree falls under cl. (w) of s. 3 and is governed by s. 72.

Section 72, Dekkhan Agriculturists' Relief Act, applies to a suit falling under both cls. (w) and (y) of s. 3 of the Act. A suit may include several reliefs, some of which may be in time and the others time-barred. The question whether a suit is in time or not, cannot be decided unless each relief claimed in the suit is separately considered. In a mortgage suit where the relief claimed by the mortgagee is the recovery of the mortgage money by the sale of the mortgaged property and a personal decree is claimed in case the sale proceeds are found insufficient, the claim to recover the mortgage debt by the sale of the mortgaged property is governed by the provisions of the Lim. Act. But the other relief for a personal decree falls under s. 3, cl. (w), Dekkhan Agriculturists' Relief Act, and the period of limitation is twelve years under s. 72 of the Act. 130 Ind. Cas. 590 (2), applied.

C. A. from the order passed by the Assistant Judge, Sholapur, in Appeal No. 346 of 1936.

Mr. M. G. Chitale, for the Appellant.

Mr. B. N. Gokhale, for the Respondents.

Judgment.—This second appeal is filed against a personal decree passed against the appellant for the recovery of the deficit, out of a mortgage decree passed against him, that remained due after the sale of the mortgaged property. The appellant mortgaged his property to the deceased father of the respondents for Rs. 2,500, on February 23, 1923, agreeing to re-pay that amount within one year. The respondents filed Suit No. 445 of 1931, on February 23, 1931, to recover the amount due under the mortgage-deed by the sale of the mortgaged property, and the deficit from the appellant in person. The usual mortgage-decree was passed on November 23, 1931, which reserved to the respondents liberty to apply for a personal decree if the sale proceeds from the mortgaged property be found insufficient, provided such claim for a personal decree was "legally admissible." In execution of that decree, the mortgaged property was duly sold and the sale proceeds fell short by Rs. 888-6-6. The respondents then made this application for a personal decree against the appellant to recover that amount. The appellant's contention with which we are concerned in this appeal was that when the suit was filed by the respondents against him, their claim for a personal decree was already time barred under Art. 116 of Sch. I, Lim. Act, 1908. The trial Court upheld this contention and rejected the respondents' application. In appeal it was held that the respondents' claim for a personal decree

was governed by s. 72. Dekkhan Agriculturists' Relief Act, and as the agreement was contained in a registered document, the period of limitation for a suit on that document was 12 years and not 6 years under Art. 116 of Sch. I, Lim. Act. The cause of action accrued one year after the date of the mortgage, i. e., on February 23, 1924, and as the suit was filed on February 23, 1931, the respondents' claim for a personal decree would be time-barred if the period of limitation was only six years. The question therefore is whether that claim is governed by s. 72, Dekkhan Agriculturists' Relief Act, which extends the period of limitation to 12 years. Section 72 says:

"In any suit of the description mentioned in s. 3, cl. (w), for the recovery of money from a person who at the time when the cause of action arose was an agriculturist in any of the Districts of Poona, Satara, Sholapur and Ahmednagar, ...

(a) when such suit is founded on a written instrument registered under this Act or any law in force at the date of the execution of such instrument, 12 years."

It is not disputed that the claim for a personal decree against the appellant is founded on an instrument registered under the Registration Act, nor is it disputed that when the cause of action arose the appellant was an agriculturist. But it is urged that s. 72, Dekkhan Agriculturists' Relief Act, would not be applicable since the suit in which a personal decree was claimed is not a suit of the description mentioned in s. 3, cl. (w), for the recovery of money from a person. The suit was primarily based on a mortgage-deed and the principal relief claimed by the respondents was the recovery of the mortgage debt by the sale of the mortgaged property, and a personal decree was claimed only in case the sale proceeds were found insufficient. It is true that a suit by a mortgagee to recover his mortgage dues falls under cl. (y) of s. 3, Dekkhan Agriculturists' Relief Act (*vide Gulamhussein v. Clara D'Souza* (1)) but it is possible that a suit may contain different reliefs and may therefore fall under different clauses of s. 3. This aspect was considered in *Essa Abdulla v. Khatijabai* (2) where a question arose whether the High Court had jurisdiction to try a suit on a mortgage against an agriculturist who was not residing in Bombay. In that case their Lordships had to construe s. 11, Dekkhan Agriculturists' Relief Act, which lays down:

(1) 53 B 819; 120 Ind. Cas. 834; A I R 1929 Bom. 471; 31 Fom. L R 988; Ind. Rul. (1930) Bom. 34.

(2) 55 B 533; 130 Ind. Cas. 590; A I R 1931 Bom. 161; 33 Bm. L R 13; Ind. Rul. (1931) Bom. 370.

"Every suit of the description mentioned in s. 3, cl. (w), may, if the defendant, or, when there are several defendants, one only of such defendants, is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides, and not elsewhere."

In that suit also, as in the present case, three distinct reliefs were claimed, viz., (a) recovery of the mortgage amount from the defendants, (b) in case of failure, recovery of that amount by the sale of the mortgaged property, and (c) if the proceeds of sale were insufficient, then liberty to apply for a personal decree for the balance. Discussing the nature of the suit with regard to these reliefs, the learned Chief Justice observed (p. 538*);

".....it seems to me clear that an ordinary action to enforce a mortgage may fall within cl. (w) and cl. (y). Where a mortgage contains a covenant for payment and a conveyance of property as security for the debt, an action to enforce the mortgage may involve a claim for a money judgment which would fall under cl. (w) and it may include a claim to enforce the mortgage by foreclosure or sale which would fall under cl. (y). But those two forms of relief are really quite distinct. In many cases you may have a mortgage without any covenant for payment, in which case your only relief is for foreclosure or sale or you may desire to enforce a mortgage by an originating summons, in which case you must confine your relief to foreclosure or sale, and you cannot ask for a money judgment. So that the two forms of relief which you can ask for in the action seem to me to be quite distinct."

On this ground it was held that the suit in that case consisted of two distinct parts, one falling under cl. (w) and the other under cl. (y). It was held that the part of the suit which fell under cl. (w) was beyond the jurisdiction of the High Court as under s. 11 it had to be filed within the jurisdiction of the Court where the agriculturists defendant lived; but it was held that the other part of the suit which fell under cl. (y) could be tried by the High Court. The same principle will also apply to the present case. Just as s. 11 was made expressly applicable only to a suit of the description mentioned in s. 3, cl. (w), so also s. 72 is made applicable only to suits of the description mentioned in s. 3, cl. (w). As in that case, here also the suit asked for two distinct reliefs, one falling under cl. (w) and the other under cl. (y); and as s. 11 was held applicable to that part of the suit which fell under cl. (w), so, too, in the present case that part of the suit which seeks the relief falling under s. 3, cl. (w), must be held to be governed by s. 72. A suit may include several reliefs, some of which may be in time and the others time-barred. The question whether a suit is in

time or not, cannot be decided unless each relief claimed in the suit is separately considered. So far as the respondents' claim to recover the mortgage debt by the sale of the mortgaged property is concerned, it is governed by the provisions of the Lim. Act. But as regards the other relief for a personal decree which falls under s. 3, cl. (w), Dekkhan Agriculturists' Relief Act, the period of limitation is twelve years under s. 72 of the Act. It is argued that the section does not apply to a suit which falls under both cls. (w) and (y) of s. 3 of the Act and that it must be confined only to those suits which fall only under s. 3, cl. (w), Dekkhan Agriculturists' Relief Act. This argument is inconsistent with the reasoning adopted in *Essa Abdulla v. Khatijabai* (2). There the different parts of the suit with regard to the different reliefs were considered to be distinct and were held to be governed by different considerations. Section 11 was held to apply only to that part which fell under s. 3, cl. (w), although the suit as a whole fell under both cls. (w) and (y). Following that reasoning, I agree with the view taken by the lower Appellate Court that, so far as the respondents' claim for a personal decree was concerned, the suit falls under s. 3, cl. (w), and is governed by s. 72, Dekkhan Agriculturists' Relief Act. That claim was therefore in time when the suit was filed. The appeal is, therefore, dismissed with costs.

s.

Appeal dismissed.

CALCUTTA HIGH COURT

December 19, 1938

AMBER ALI, J.

In the goods of NANI LAL DAS

Succession Act (XXXIX of 1925), ss. 291, 263 (d),—Surety to administration bond—Discharge—Default of administrator—Surety, if discharged—Administration completed—S. 263 (d), if applies.

A surety to an administration bond cannot discharge himself without an order of the Court. He is not a common law surety and cannot be regarded in the light of surety under the Contract Act, 98 Ind. Cas. 508 (3), relied on.

His liability is immediate and permanent and is only to disappear on the fulfilment of the obligations by the administrator. Default by the latter is no ground for discharging the bonds; it may be ground for revoking the grant or taking other steps to control the administration. [p. 433, col 2.]

Section 263 (d), Succession Act does not apply to cases where the administration has been completed.

Judgment.—In this matter I am much indebted to the assistance of Mr. Mitra

whom I asked to argue the matter and I will consider the judgment now given after further perusal of the note which he has handed in. This is an application by the administratrix for her own discharge and the discharge of her surety, the Alliance Assurance Co. from the bonds given to the Court. The administratrix filed her inventory and her account and the petition states that the estate has been duly administered. The practical difficulty involved is that the Assurance Co., like other companies doing suretyship work, continues to charge an annual premium until some order of Court is obtained.

I have repeatedly expressed a doubt whether such orders should or can be made by this Court and I asked the office in this case to report upon the practice. The office reported that orders of this kind have become the practice either in an unconditional form or without prejudice to anything done or undone by the administrator up to the date of the order. I have looked into the matter further and I am the more convinced subject as I say to a further perusal of Mr. Mitra's note that the practice is erroneous. The bonds are given under s. 256, now s. 291 (1) of the Succession Act, read with rr. 15 and 16 of Chap. XXXV. The forms of the bonds are given in Appendix M, Forms 6 and 8.

I have a printed form of the bond before me supplied by the office and this contains the words "the said administration account, the same being first examined and allowed by the said High Court." The first thing to note is that these words are wholly inappropriate to our practice. We have no procedure for examining or checking these accounts and we have never done it. The words have remained in the bond. So far as I am aware, they do not appear in the English bonds for administration.

Now, the questions dealt with by the Indian Courts relating to administration bonds are of two categories to which I have added a third: (1) Discharge from or vacating the bond at the instance and at the will of the surety; (2) Discharge from or vacating the bond by order of Court on the ground of default by the administrator; (3) Discharge from or vacating the bond by the Court because of the fulfilment of the obligations by some form of declaration or finding that the estate has been properly administered. The last category is the one with which I have especially to deal.

Dealing with class (1) the view taken by this Court in *Rajnarain Mookerjee v. Fulcoomari Bibi* (1), to the effect that the surety or giver of the second bond is to be regarded in the light of a surety under the Contract Act and that he may therefore discharge himself by notice (see s. 130, Contract Act) was differed from by the Madras High Court *Subroya Chetty v. Ragammal* (2), and has now been definitely disposed of by the Privy Council in *Mahomed Ali Mamooji v. Howeson Brothers* (3). It is now clear that the surety, using that word throughout this judgment in a neutral sense, cannot discharge himself without an order of Court. That ruling, however, did not indicate the circumstances under which the Court would or could make an order for discharge.

Class (2). The Court was applied to for such an order in the following cases, *Bai Somi v. Chokshi Ishvardas Mangaldas* (4), was the case of a surety for a guardian. The Court refused the order on the ground that default by the guardian was the very object of taking and retaining the security. In *Kanhaiya Lal v. Manki* (5), the surety for an administrator applied for cancellation of the bond without giving reasons. This was during the course of the administration. The Court held that it had no jurisdiction to make such an order. The matter was dealt with by this Court on the appellate side in *Rizdhika Nath v. Rati Kanta*, 16 Ind. Cas. 1009 (6). The Court did not decide on the question of jurisdiction but Sir Ashutosh Mukherji and Rankin, J. held in that particular case that charges of improper administration were not sufficient ground for the Court's order.

Class (3) dealing with the last category, discharge by reason of the fulfilment of the obligations, we have, I think, only two cases, *Arthur Gerald Norton Knight v. Emperor* (7), where notwithstanding evidence that the administration was complete, the Court refused to make an order on the ground of want of jurisdiction. The case in *In re Kanailal Khan* (8), is peculiar; evidence was given of the satisfactory com-

(1) 29 O G 68; 6 O W N 7.

(2) 28 M 161.

(3) 30 O W N 266; 98 Ind. Cas. 506; A I R 1926 P O 32; (1926) M W N 493 (P O).

(4) 19 B 245.

(5) 31 A 56; 1 Ind. Cas. 143; 6 A L J 19; A W N 1908, 288.

(6) 76 Ind. Cas. 1009; A I R 1925 Cal. 158.

(7) 33 M 373; 5 Ind. Cas. 311; 7 M L T 160.

(8) 18 O W N 320; 24 Ind. Cas. 417; A I R 1914 Cal 756.

pletion of the administration and of the acceptance of the accounts by the persons entitled to the estate. Nevertheless, after representations by the Registrar, the Court held that neither the administrator nor the sureties could be discharged. The order made was that the security given by the sureties could be released in the particular circumstances of the case.

The above cases lead me to the conclusion that the orders which have been very frequently made on these applications so far as they are applications for discharge, should not be made. To-day, I have had the benefit of Mr. Mitra's arguments and he has dealt mainly with the second category of cases, namely where the Court is applied to for discharge on the ground of mal-administration or similar grounds. He suggests, and it is a very ingenious suggestion, that the law and the rules of this Court can be reconciled by using as a key to the whole matter s. 263, Succession Act. Let me first quote r. 18-A of Chap. XXXVI of our rules. Rule 48 of Chap. XXXVIII may also be referred to but the rules in Chap. XXXVI are those which immediately apply :

"(18-A). The surety shall be entitled to bring to the notice of the Court any act, omission or neglect of duty cast on the administrator by law or any other circumstances which would entitle the surety to be discharged from the obligation created by the bond, and the Court may then make such order as it thinks fit."

Mr. Mitra has suggested that this means nothing more than an application lending to the revocation of the letters of administration; and it does not imply that the surety can be discharged or released from the obligation, but that read with s. 263, it is intended merely to bring about a cessation of the administration, which would have the practical result of protecting the surety. If that is the correct reading, I have nothing to say. But in my opinion, the language of the rules cannot be so limited. It is apparently assumed: (i) that there are a number of "circumstances which entitle the surety to be discharged from the obligation created by the bond;" (ii) among those circumstances is to be included "any omission or neglect of duty cast on the administrator by law;" (iii) that the Court may make an order for the discharge of surety.

It is quite true that the rule does not categorically state that the surety is entitled to be discharged by reason of the administrator's default, but this is clearly the implication. It is also true that it

leaves the order at the discretion of the Court. But again it implies that an order of discharge can be made. If this is the correct reading of the rules, it may be well argued that the rules, of themselves place the surety in the position of a surety under the Contract Act, and of themselves give jurisdiction to the Court to discharge the surety. In my opinion the wording of those rules requires re-consideration. It seems to me that when drawn it was erroneously assumed that the giver of the second bond is a Common Law surety and nothing else. This, in my opinion, he is not. In my opinion his liability is immediate and permanent and is only to disappear on the fulfilment of the obligations by the administrator. Default by the latter is no ground for discharging the bonds; it may be ground for revoking the grant or taking other steps to control the administration.

Mr. Mitra has also assisted me on the question of discharge when the administration is completed, and has suggested that the solution suggested by him can be applied to this case also by reason of cl. (d) of s. 263, i. e., revocation of the grant on the ground that "the grant has become useless and inoperative." Here we have no rule to help or to confuse us. In my opinion, this does not apply to cases where the administration has been completed. I do not think that in circumstances such as the present applications for revocation can be made. I am quite aware of the practical difficulty of the annual premium, and that it is felt that under the present system some limit should be put to the period during which the Insurance Co. should continue to take an interest in the matter and continue to charge their premium. But as a matter of law it seems to me that what is asked of the Court is not logically justified. The order asked for, either amounts to a discharge or it amounts to a declaration by the Court that the estate has been properly administered. Either it has been properly administered or it has not. If it has, the bond does not operate. If it has not, a default has taken place and is taking place and that is one of the very things in respect of which the bond is given.

It is suggested that there can be no harm in making an order for discharge "without prejudice to past acts or defaults." In my view there is harm in so doing because in the case of administration it is meaningless and may give a false sense of security. The Court is not able to declare the

administration complete. If it is complete, it is only for past acts, that the surety can be liable. If it is not complete, that is either past default, or not. In the latter case, the Court has no right to relieve the administrator or his surety of the consequences. It seems to me that the logic of the law must be followed and that a practical remedy must be found for a practical difficulty. I am aware the guardians and others under special provisions of law are able to get their accounts passed and consequently obtain in some form or other orders for discharge. The above judgment is given on the basis that, notwithstanding the phrase as to passing accounts in the bonds, there is no provision or machinery in our Courts for discharging or vacating the bond after enquiry.

D.

Order accordingly.

MADRAS HIGH COURT

Appeal No. 108 of 1934

April 7, 1938

VENKATARAMANA RAO, J.

AKELLA SURAYYA—APPELLANT

versus

THUMMALAPALLI KRISHNAMURTHI

AND OTHERS—RESPONDENTS

Mortgage—Suit on—Costs—Suit against mortgagors—Purchaser of mortgage property in execution of simple money decree made party—Suit not necessitated by any conduct on his part—His only defence being that he was not personally aware of mortgage—Whether can be made personally liable for costs of suit.

No doubt there is jurisdiction for the Court to award costs personally against a subsequent encumbrancer or a subsequent purchaser of the mortgaged property. But before the Court can do so, there must be a finding that the suit was necessitated by any improper conduct on their part as having repudiated the title of the mortgagee or as having raised frivolous defences in the suit thus enabling the plaintiff to incur more costs than were necessary.

In a suit against the mortgagors the purchaser of the mortgage property in a Court sale held in execution of a simple money decree was made a party. In the plaint the plaintiff alleged that before suit he called upon the purchaser to pay the debt due under the mortgage but he did not pay the same. The plaintiff prayed for a personal decree against the purchaser enabling him to recover the costs of the suit from him. The purchaser did not set up any defence in answer to the mortgage except stating that he was not personally aware of the mortgage and that he was obliged to add a plea that he was not personally liable for costs because the plaintiff claimed a personal decree against him. The Court awarded costs against him:

Held, that the suit was not necessitated by any conduct on the part of the purchaser and hence there was no justification for awarding costs against the purchaser. The mere fact that he did not comply

with the notice of demand made upon him was not a reason recognised by law for awarding costs against him.

A. against the decree of the Sub-Judge, Narasapur, in O. S. No. 51 of 1933.

Mr. P. Panini Rao, for the Appellant.

Mr. B. V. Ramanarasu, for the Respondents.

Judgment.—The question in this appeal is whether defendant No. 9 is personally liable to pay the costs of the suit. The suit is upon a mortgage executed by defendants Nos. 1 and 3 and their father in favour of the plaintiff. Defendants Nos. 2 and 4 are the sons of defendants Nos. 1 and 3, respectively. Defendant No. 5 is one of the subsequent mortgagees and defendant No. 6 is the son of defendant No. 5. Defendants Nos. 7 and 8 are the grandsons of defendant No. 5. Defendant No. 9 is impleaded as a party to the suit as being the purchaser of the mortgage property in a Court sale held in execution of a simple money decree in O. S. No. 87 of 1930 on the file of the District Munsif's Court of Bhimavaram. Defendants Nos. 10 and 11 are the sons of defendant No. 9. The rest of the defendants are persons who claim under defendant No. 9. In the plaint the plaintiff alleged that before suit he called upon defendant No. 9 to pay the debt due under the mortgage but he did not pay the same. In the actual prayer portion the plaintiff prayed for a personal decree against defendant No. 9 enabling him to recover the costs of the suit from him. Defendant No. 9 filed a written statement alleging that he was only a purchaser in execution of a simple money decree subject to the mortgage and that he was not personally aware of the mortgage and that there was no reason why he should be made liable personally for the costs of the suit. The reason assigned by the learned Subordinate Judge is that defendant No. 9 did not comply with the notice of demand made upon him. That is not a reason recognised by law for awarding costs against an alienee of the property. Defendant No. 9 is not personally liable for the debt. There is no privity of contract between him and the mortgagee. In this case there is also a puisne mortgagee, defendant No. 5. The plaintiff was anyhow obliged to file a suit against the mortgagors and defendant No. 5 and the suit was therefore not necessitated by any conduct on the part of defendant No. 9. No doubt there is jurisdiction for the Court to award costs per-

sonally against a subsequent encumbrancer or a subsequent purchaser of the mortgaged property. But before the Court could do so, there must be a finding that the suit was necessitated by any improper conduct on their part as having repudiated the title of the mortgagee or as having raised frivolous defences in the suit thus enabling the plaintiff to incur more costs than were necessary. It will be seen from the defence of defendant No. 9 that he has not set up any defence in answer to the mortgage except stating that he was not personally aware of the mortgage and that he was obliged to add a plea that he was not personally liable for costs because the plaintiff claimed a personal decree against him. In the circumstances of this case, there seems to be no justification for the learned Judge awarding costs against defendant No. 9. Mr. Ramanarasu urged before me that defendant No. 9 decided to be the guardian for his minor sons, defendants Nos. 10 and 11, and that a Court guardian was appointed and he raised certain defences as a result of which the litigation was protracted. It may have been open to the Court to award costs personally against the Court guardian for having raised frivolous defences; but that is not a ground for awarding costs against defendant No. 9 personally. I therefore set aside the order of the learned Judge and allow this appeal with costs. Vakil's fee Rs. 50. So far as the lower Court is concerned, each party will bear his own costs.

S.-N.

*Appeal allowed.***ALLAHABAD HIGH COURT**

Civil Revision No. 266 of 1938

September 8, 1939

MULLA, J.

SECRETARY OF STATE—APPLICANT*versus***SADHO LAL JAISWAL—OPPOSITE PARTY.***Railway—Risk-notes, Forms A and H—Case of non-delivery of consignments—Liability of Railway Company, if can be assumed—Onus.*

The language of risk-notes (Forms A and H) clearly shows that even in the case of the non-delivery of the consignment, it cannot be assumed that the Railway Co. is liable to pay damages to the consignor. It is true that the onus in a case of non-delivery of consignment lies on the Railway Co. in the first instance to disclose how the consignment was dealt with throughout the time it was in its possession or control and if it is found upon the evidence adduced by the Railway Co. that there was misconduct on the part of its servants, the Railway Co. would be liable to damages without any further evidence on behalf of the consignor. If it is found,

however, that the evidence produced on behalf of the Railway Co. does not fairly lead to the inference that there was misconduct on the part of its servants, the burden of proving such misconduct shall then shift on to the consignor. [p. 437, col. 1.]

O. R. against an order of the Small Cause Court Judge, Allahabad, dated April 25, 1938.

Mr. A. M. Khwaja, for the Applicant.

Mr. Ram Nama Prasad, for the Opposite Party.

Order.—(February 3, 1939).—This is an application in revision under s. 25, Small Cause Courts Act. The applicant is the Secretary of State for India in Council through the Collector of Allahabad who was the defendant in the suit. The suit was brought by the opposite party Sadho Lal Jaiswal to recover a sum of Rs. 300 by way of damages from the applicant in the following circumstances:

The opposite party is the proprietor of a firm at Allahabad. The firm has dealings in the ordinary course of business at Bombay through a firm of commission agents there. It appears that the agents made over to the G. I. P. Ry. at Bombay a consignment of 27 tins of cocoanut oil for being carried to Allahabad. The consignment was addressed to self, but it is admitted that the R/R was sent to the opposite party through a bank and that the opposite party proceeded to take delivery of the consignment at Allahabad on March 14, 1937. It may be mentioned here that the consignment in question was accepted by the Railway Co. at Bombay under risk-notes (Forms A and H). As the main point which arises for consideration in this case turns upon the correct interpretation of the provisions contained in these notes, it is necessary to point out that under risk-note Form H the Railway Co. accepts a consignment at a special reduced rate at the owner's risk and in consideration of this reduction in the rate, the consignor undertakes to hold the said Railway Administration harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of such consignments from any cause whatever except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the Railway Administration's servants. This is the general term of agreement between the consignor and the Railway Co. as embodied in the risk-note Form H, but there is a further provision for two particular cases. The

proviso runs as follows :

"Provided that in the following cases:

(a) Non-delivery of the whole of a consignment or of the whole of one or more packages forming part of a consignment packed in accordance with the instructions laid down in the tariff or where there are no such instructions, protected otherwise than by paper or other packing readily removable by hand and fully addressed, where such non-delivery is not due to accidents to train or to fire.

(b) Pilferage from a package or packages forming part of a consignment properly packed as in (a) when such pilferage is pointed out to the servants of the Railway Administration on or before delivery, the Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor."

Under risk-note Form A the consignor admits that the consignment which he delivers to the Railway Co. is in bad condition liable to leakage or waste in transit and agrees and undertakes to hold the said Railway Administration over whose railway the said goods may be carried in transit harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants.

As stated above, the consignment in question in the present case was accepted by the Railway Co. at Bombay under risk-notes (Forms A and H). The fact that the consignment was accepted under risk-note Form A undoubtedly raises a presumption that it was in bad condition and liable to damage, leakage or wastage at the time when it was delivered to the Railway Co. When the opposite party went to the Goods Shed at Allahabad to receive delivery of the consignment, he found that of the 27 tins offered to him, 20 had no oil left in them while the remaining 7 were also damaged to a certain extent. He found further that none of the tins bore any mark either of the Railway or of the consignor at Bombay to establish the identity of the consignment. He therefore refused to take delivery of the consignment in spite of being assured by the Railway Authorities that the consignment was in fact the same which had been delivered to the Railway Co. at Bombay by the consignor. From the evidence on the record it appears that the Railway Co. tried to satisfy the oppo-

site party by a reference to certain documents in their possession that there could be no doubt about the identity of the consignment but the opposite party refused to accept delivery. The opposite party then proceeded to file the suit for damages out of which the present application in revision arises.

When the suit was originally tried, the learned Small Cause Court Judge dismissed it on two grounds: *firstly* that the opposite party was not the owner of the consignment in question and was not, therefore, competent to maintain the suit: *secondly*, that the opposite party had taken delivery of the consignment and it was consequently a case of short delivery and as the evidence did not establish any misconduct on the part of the Railway Co.'s servants the opposite party was not entitled to any damages. The opposite party came up in revision to this Court. The learned Judge of this Court who heard the case came to the conclusion that the opposite party was the owner of the consignment in question and that he was justified in refusing to take delivery of the consignment on the ground that its identity had not been established, so that it was not a case of short delivery but that of non-delivery. Having arrived at these conclusions, the learned Judge proceeded to pass the following order:

"It is therefore ordered that the revision be allowed and as the issue about the price has not been decided, the case be remanded to the lower Court to admit it under its original number and to dispose of it according to law."

When the case went back to the lower Court, it appears that the applicant wanted to produce some evidence on the question of his liability for damages, but the learned Small Cause Court Judge held that under the order passed by this Court he was authorized to decide the amount of damages only upon the evidence which was already on the record. He interpreted the order passed by this Court as an order decreeing the suit subject to the finding on the question of the amount of damages to which the opposite party was entitled. Proceeding upon that assumption he has fully decreed the opposite party's claim, hence the present application in revision.

The question which arises for consideration in this case is whether upon the finding of this Court that it was a case of non-delivery of a consignment, it necessarily followed that the opposite party was entitled to a decree. Upon a very careful consideration of the judgment of a learned Judge of this Court, I do not find anything

in it to show that this question was really considered at that time. Apparently, it was assumed at the time that the necessary result of the non-delivery of the consignment in dispute was that the Railway Co. was liable to pay damages to the opposite party. A careful consideration of the language of risk-notes (Forms A and H) which I have set out above will show that this assumption is not correct. Proceeding upon the finding that it was a case of non-delivery of a consignment, the question still remains for consideration whether the Railway Co. is liable for damages. It is true that the onus in view of the above finding now lies on the Railway Co. in the first instance to disclose how the consignment was dealt with throughout the time it was in its possession or control and if it is found upon the evidence adduced by the Railway Co. that there was misconduct on the part of its servants, the Railway Co. would be liable to damages without any further evidence on behalf of the opposite party. If it is found, however, that the evidence produced on behalf of the Railway Co. does not fairly lead to the inference that there was misconduct on the part of its servants, the burden of proving such misconduct shall then shift on the opposite party. It appears from the record that the Railway Co. produced some evidence to show how it dealt with the consignment in question during the time it was in its possession and control and the learned Small Cause Court Judge who first dealt with the suit definitely found that misconduct on the part of the Railway Co's. servants had not been established. The learned Counsel for the opposite party has strenuously argued that it is necessarily implied in the finding arrived at by the learned Judge of this Court that the evidence adduced by the Railway Co. does not relate to the consignment which was delivered to the Co. by the opposite party's agent at Bombay but to some other consignment. The argument is no doubt ingenious but not very convincing. All that the learned Judge of this Court considered at the time was the question whether any marks of identification made by the Railway or by the consignor were present on the tins making up the consignment when they were offered to the opposite party at Allahabad, and it was found upon the evidence that there were no such marks and it was consequently held that the identity of the consignment had not been proved and hence

the opposite party was justified in refusing to take delivery of it. The question as to what is the legal effect of the non-delivery of a consignment does not appear to have been argued before the learned Judge on the previous occasion and does not appear to have been considered by him. In my judgment, it is a vital question upon which the liability of the Railway Co. depends and as the case has not been considered from that point of view by the lower Court, I consider it necessary to send it back to the lower Court with the direction that it shall proceed to decide the point in the light of the observations which I have made above regarding the interpretation of risk-notes (Forms A and H). The parties shall be at liberty to produce fresh evidence if they care to do so. The finding will be submitted to this Court within two months from this date. The parties will have the usual ten days' time for filing objection, if any.

[After receiving the finding arrived at by the lower Court, the Court continued as follows.]

Order.—(September 8, 1939).—In continuation of my order dated February 3, 1939, by which I remanded this case to the lower Court for its finding upon a particular issue, I need only state that the lower Court has now found that the identity of the consignment in dispute which was refused by the plaintiff at Allahabad with the consignment that was delivered to the Railway Co. at Bombay by the consignor has not been established and upon the evidence produced by the Railway Co. to disclose how the consignment was dealt with throughout the time it was in its possession or control. It may fairly be inferred that there was misconduct on the part of the Co's. servants. This finding has been challenged by the learned Counsel for the defendants on various grounds. I have heard the learned Counsel at considerable length and have myself perused the material portion of the evidence upon which the lower Court's finding is based. Having done so, I do not find much force in the learned Counsel's contention and am inclined to accept the finding of the Court below. It is true that the lower Court allowed its mind to be influenced by its own interpretation of the order passed by this Court in a previous revision; but the fact remains that it considered the evidence upon its merits and ultimately arrived at the finding referred to above. Upon that

finding which I accept, it is evident that the plaintiff's claim must be decreed. It was strenuously urged by the learned Counsel for the defendants that he should have been given a further opportunity by the Court below to produce evidence on the question of the amount of damages to which the plaintiff was entitled. I do not find much force in this contention. When the suit was first tried, there was a clear issue framed by the Court on the question of damages and it was open to the defendants to produce their evidence relating to that question. They failed to do so, and there was no sufficient reason why when the suit was remanded by this Court, the defendants should have been allowed a further opportunity of producing evidence which they could easily have adduced at the first stage. The Court below accepted the sworn testimony of the plaintiff of that point and passed a decree upon that basis. I see no sufficient reason for interference. The result therefore is that I dismiss this application in revision with costs.

e. Application dismissed.

CALCUTTA HIGH COURT

Civil Rules Nos. 633 and 679 of 1938

January 5, 1939

S. K. GHOSH AND B. K. MUKHERJEE, JJ.
COMMISSIONER OF WAQFS, BENGAL—
PETITIONER

versus

NARASINGH CHANDRA DAW & Co.
—DECREE-HOLDER—DEFENDANT AND OTHERS—
—OPPOSITE PARTY

Bengal Waqf Act (XIII of 1934), s. 70—Applicability outside Bengal—Government of India Act, 1919 (9 & 10 Geo. V, Ch. 101), s. 80-A (3)—Power of Local Government to Legislate to regulate central subject for good Government of territories outside province.

The special provisions of the Ben. Waqf Act, 1934, cannot be read as meaning that s. 70 of that Act will have operation in proceedings outside the Province of Bengal.

Section 80-A (3), Govt. of India Act, cannot be interpreted to mean that the local Legislature is authorized to make laws regulating a central subject for peace and good government of territories lying outside the province. 167 Ind. Cas. 615 (1), referred to.

C. Rules from the orders of Sub-Judge, Goalpara (Assam Valley District), dated January 28, 1938, and Munsif at Dhubri (Goalpara) (Assam Valley District), dated February 3, 1938, respectively.

Mr. Abul Quasam (No. 2), for the Petitioner.

Messrs. Atul Chandra Gupta, Rabindra Nath Choudhury and Provash Chandra Basu, for the Opposite Party.

S. K. Ghose, J.—Civil Revision Cases Nos. 633 of 1938 and 679 of 1938 have been brought up together. It has been pointed out to us that the former case has become infructuous by reason of the fact that the suit out of which the matter arose was withdrawn by the plaintiff even before the Rule was issued by this Court on May 6, 1938. That being so, the Rule must stand discharged. In the other Civil Revision Case No. 679 of 1938, the question that arises for decision is, whether s. 70, Ben. Waqf Act, 1934, has application outside the province of Bengal. The relevant facts are these. The opposite party is the *mutwali* of a *waqf* created by a resident of Dacca with respect to properties situated partly in Bengal and partly in Assam. The said *waqf* has been duly enrolled under s. 44, Ben. Waqf Act, 1934, in the Office of the Commissioner of the Waqfs who is the petitioner in this case. The *waqif* had a firm operating at Dhubri in Assam. The decree-holder opposite party obtained a decree against that firm and filed an execution case No. 281 of 1936 in the Court of the Munsif at Dhubri. Some properties were sold without notice being issued to the petitioner under s. 70, Ben. Waqf Act. On June 16, 1937, the petitioner applied to the Munsif under s. 70 (5) of the Act for a declaration that the aforesaid sale was void. The learned Munsif by his order dated February 3, 1938, dismissed the application holding, first that the Ben. Waqf Act does not apply to Assam; secondly, that in any case, the Act does not apply to the present execution case which was instituted before the Ben. Waqf Act came into force; and thirdly, that the application was time-barred.

It is stated in para. 5 of the petition before us that at the hearing, the parties confined their contention to the question of the petitioner's *locus standi* and that on that understanding the Pleader of the petitioner did not adduce any evidence on the merits or on the question that the application was made within one month of his coming to know of the sale. Mr. Gupta appearing for the auction-purchaser opposite party does not dispute this statement. The decision of this rule therefore turns upon the question whether s. 70, Ben. Waqf Act applies to proceedings in Assam. If we hold that the section does apply, then the matter will have to be

referred to the lower Court for further enquiry on other points. In support of his decision the learned Munsif has referred to the Preamble of the Act which states: "whereas it is expedient to make provision for the proper administration of *waqf* property in Bengal;" s. 1 (2) further provides that the Act extends to the whole of Bengal. The Advocate for the petitioner has placed strong reliance on s. 3, part of which runs as follows:—

"Save as herein otherwise specifically stated, this Act shall apply to all *waqfs*, whether created before or after the commencement of this Act, any part of the property of which is situated in Bengal."

His contention is that the Act operates *in personam* and in respect of the *waqf* as a whole and therefore all the provisions of the Act apply to all parts of the property of the *waqf* even if such parts are situated outside Bengal. Reliance has also been placed upon the fact that the Act has been passed with previous sanction of the Governor-General under sub-s. (3) of s. 80-A, Govt. of India Act. We have been referred to various provisions of the Waqf Act, such as, ss. 27, 38, 44, 45, 48, 55 and 59 for the purpose of showing that the Commissioner has been authorized to deal with the *waqf* as a whole which necessarily implies that he is to deal with the entire property even though part of it may be situated outside the province. Now, so far as s. 80-A, Govt. of India Act, is concerned, it may be relevant to point out that under sub-s. (1) of that section the local Legislature may make laws for the peace and good government of the territories for the time being constituting that province and this provision is made subject to the provisions of the Act. Under sub-s. (3), sub-cl. (e), the local Legislature may, with the previous sanction of the Governor-General, make laws regulating any central subject. This refers back to the provision in sub-s. (1) and it cannot be interpreted to mean that the local Legislature is authorized to make laws regulating a central subject for peace and good government of territories lying outside the province. No contrary interpretation was put upon the section by this Court in *Debendra Narain Roy v. Jogendra Narain Deb* (1). On the contrary, it was pointed out in that case that in the Bijni Succession Act, there was no definition of local extent and, having regard to the provisions of that Act, it was held that it applied to the status of

the holder of the *raij* wherever the properties appertaining to the *raij* might be situated, even though some of the properties might be outside the Province of Assam. The Advocate for the petitioner has contended that the definition of extent in s. 1 (2), Ben. Waqf Act, does not take the matter any further, because in any case the local Legislature cannot make laws to operate for the peace and good government of the territories outside the province. But this argument does not also advance the case of the petitioner any further. So far as the status of the Commissioner is concerned, it is conferred by the Bengal Act to operate even outside the province. Therefore the Commissioner may bring suits under s. 72 or s. 73, Bengal Act, in Courts outside the province. But s. 70 lies in a different category, because it imposes an obligation on the Court to issue notice to the Commissioner in certain circumstances.

Mr. Gupta has contended that it is not within the province of the local Legislature to make any law which will affect the jurisdiction of the Court situated outside the province. Section 70 (1) refers to a suit or proceeding in respect of any *waqf* property, etc., and if this *waqf* property is situated outside the province, so that the Court having jurisdiction over it is also outside the province, then the Act cannot operate beyond its extent, that is to say, outside the province of Bengal. Otherwise, as Mr. Gupta points out, conflict of jurisdiction is inevitable, since it is suggested that every province may have a Waqf Act of its own. Leaving aside the larger question as to the interpretation of s. 80-A, Govt. of India Act, it seems to me that the special provisions of the Ben. Waqf Act, 1934, cannot be read as meaning that s. 70 of that Act will have operation in proceedings outside the Province of Bengal. I think, therefore, that the view taken by the learned Munsif is right. The Rule must stand discharged. There will be no order as to costs.

B. K. Mukherjea, J.—I agree.

D.

Rule discharged.

(1) 64 O L J 212; 187 Ind. Cas. 615; A I R 1936 Cal. 593; 9 R O 726.

MADRAS HIGH COURTCriminal Revision Case No. 895
of 1938

and

Case Referred No. 27 of 1938

March 3, 1939

LAKSHMANA RAO, J.

In re PAIDI SUBBAYYA

—ACCUSED

Criminal trial—Case under s. 379, Penal Code (Act XLV of 1860)—Property seized—After investigation case referred as of civil nature—Property should be returned to persons from whom it was seized and not to complainant.

In a case under s. 379, I. P. C., against five persons in respect of articles used in cultivation, the Police seized the property and after investigation referred the case as one of civil nature. The Magistrate struck off the case from the Police file but on the recommendation of the station house officer ordered that the property be returned to the complainant:

Held, that the subsequent order was wrong and the property had to be returned to the persons from whom it was seized.

Cr. R. Case and Case referred by the District Magistrate, Guntur, dated November 17, 1938.

Mr. K. Kottaya, for the Accused.

The Public Prosecutor, for the Crown.

Facts.—On the complaint of one B. B. of Tangutur village, the station house officer registered a case under s. 379, I. P. C. against five persons in respect of articles used in cultivation. The Police seized the property and after investigation, referred the case as one of civil nature. The stationary Sub-Magistrate struck off the case from the Police file but on the recommendation of the station house officer, ordered that the property be returned to the complainant. Against this order the District Magistrate referred the case to the High Court on the ground that the order of the stationary Sub-Magistrate was wrong and that he has no power to reverse the order.

Order.—The property was seized from accused No. 5 and it has to be returned to him. The order of the Sub-Magistrate is therefore set aside and the property will be returned to accused No. 5.

N.-D.

Order set aside.

MADRAS HIGH COURT.Appeal No. 171 of 1935 and Civil
Miscellaneous Petition No. 5029 of 1938.
December 7, 1938.

PANDRANG ROW AND VENKATARAMANA

RAO, JJ.

KURELLA RAMAMURTI AND ANOTHER

—APPELLANTS

versus

NALAM SUBBARAO—RESPONDENT

Mortgage—Interest—Stipulation for payment of, in nature of penalty—Stipulation held in nature of penalty and not binding on mortgagor—Contract Act (IX of 1872), s. 74.

A mortgage deed provided that the sum of Rs. 2,000 which was borrowed thereunder should be re-paid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal as well as interest on the entire sum. The stipulation for payment of interest ran as follows: that in default of payment of sums due in any instalment, the sum remaining unpaid on that date shall be added to the principal and the entire amount become payable at once irrespective of future instalments, the entire sum carrying interest at 1 per cent. per mensem compound with yearly rests:

Held, that there was a clear penalty which the parties could not have intended to be enforced as damages for breach of the contract to pay annual instalments. The stipulation which required payment of compound interest at 12 per cent. per annum was therefore not binding on the mortgagor.

A. and C. Misc. P. against the decree of the District Court, East Godavari at Rajahmundry, in O. S. No. 46 of 1934.

Mr. D. Suryaprakasa Rao, for the Appellants.

Mr. P. V. Vallabhacharyulu, for the Respondent.

Pandrang Row, J.—The only point that arises in this case is whether the stipulation for payment of compound interest at the rate of 12 per cent. per annum found in the suit mortgage deed is in the nature of a penalty and ought to be relieved against. The mortgage deed provided that the sum of Rs. 2,000 which was borrowed thereunder should be re-paid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal as well as interest on the entire sum. The stipulation that is objected to runs as follows:

"And that in default of payment of sums due in any instalment, the sum remaining unpaid on that date shall be added to the principal and the entire amount become payable at once irrespective of future instalments, the entire sum carrying interest at 1 per cent. per mensem compound with yearly rests".

There was, as it were, a double penalty put upon any default in payment of the annual instalments, namely the entire sum will become immediately re-payable irres-

pective of future instalments, and secondly, interest had to be paid at 1 per cent. per mensem compound with yearly rests. The latter penalty is, in our opinion, a clear penalty which the parties could not have intended to be enforced as damages for breach of the contract to pay annual instalments. The stipulation in question which requires payment of compound interest at 12 per cent. per annum is, therefore, not binding on the defendants, the appellants, and we think the proper and reasonable provision to make as regards interest is 12 per cent. simple interest as is provided earlier in the document.

The decree of the Court below must be varied in accordance with this finding, namely by allowing the plaintiff only simple interest at 12 per cent. per annum and not compound interest as claimed in the plaint and allowed by the Court below. In view of the fact that the interest is fairly high and the security was quite good and also in view of the fact that over Rs. 4,000 has actually been paid by the mortgagees to the mortgagor, we are not prepared to award any compensation to the mortgagee except not to interfere with the award of costs in the Court below and not to compel him to pay the costs of the appeal in this Court. Beyond this, we are of opinion, the case does not require any award of compensation to the mortgagee. The appeal is allowed as indicated above and the parties will bear their own costs in this appeal. O. M. P. No. 5029 of 1938, an application filed by the appellants for scaling down the debt under ss. 8 and 9, Mad. Act IV of 1938, will be remitted to the Court below for disposal according to law and the decree in this appeal will be subject to the final orders on that application.

N.-S.

Order accordingly.

OUDH CHIEF COURT

First Civil Appeals Nos. 16 and 40 of 1936
November 15, 1939

THOMAS, C. J. AND BHUNETT, J.
Chaudhari BARQ RAZA DEAD, IN HIS
PLACE Ch. KAMALUDDIN AND
ANOTHER—DEFENDANTS—APPELLANTS
versus

Mst. AKBARI AND OTHERS—PLAINTIFFS
AND OTHERS—DEFENDANTS—RESPONDENTS
Custom—Essential requirements of, for legal recognition—Mere exclusion of names of daughters from khewat, if establishes their exclusion from share in father's inheritance by recognised custom—Inherit-

ance—Sheikhs of Mangalsi Pargana, District Fyzabad—Exclusion of daughters from inheritance—Registration Act (XVI of 1908), s. 33—Proper presentation—Deed held not invalid on account of defect in registration—Practice—Objection not raised in pleadings and no issue framed on the point—It cannot be raised after evidence in case has been recorded.

It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. 108 Ind. Cas. 413 (2), relied on [p. 449, col. 1.]

The mere exclusion of the names of the daughters from the *khewat* does not go very far to establish that they were by recognised custom excluded from any share in their father's inheritance. [p. 451, col. 2.]

The custom of exclusion of daughters from any share in their father's inheritance does not exist amongst all the Sheikhs of Pargana Mangalsi of Fyzabad District.

Where a *pardanashin* lady executes a sale deed and her husband hands it over to the Sub-Registrar, who then comes out of his office where the lady is on an *ekka* and there ascertains from her if she had executed it and had received its consideration and having satisfied himself goes back to his office and makes an endorsement on the back of the deed that the lady presented it for registration, the deed is not invalid on account of the defect in its registration. 58 Ind. Cas. 326 (7), relied on. [p. 452, col. 2.]

Where an objection on a certain point is not taken in the pleadings and consequently there is no issue on that point, the party is not entitled to raise it after the evidence in the case has been recorded. [p. 453 col. 1.]

F. O. As. against the decree of the Civil Judge, Fyzabad, dated January 13, 1936.

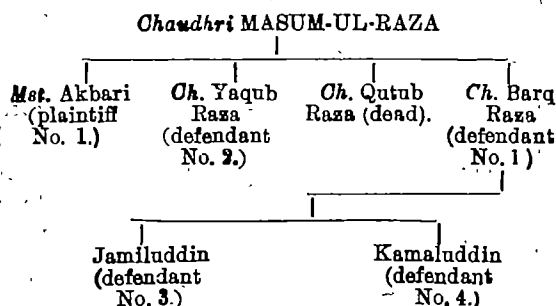
Messrs. M. Wasim, Faiyaz Ali and Ali Hasan, for Appellants Nos. 2 and 3.

Messrs. S. N. Srivastava and Naimullah, R. B. Ram Prasad Varma, for Respondents Nos. 1 to 3.

Judgment.—First Appeals Nos. 16 and 40 of 1936 were preferred by the defendants and plaintiffs, respectively, in a suit which was brought for possession of a fifth share in certain property specified in lists A, B. and C, attached to the plaint.

There were three plaintiffs, the first, Mst. Akbari, being the principal plaintiff and the other two being transferees from her of a half share in the property claimed by her. Mst. Akbari sued for her share in the property left by her father Chaudhri Masum-ul-Raza and also in the property left by her brother Chaudhri Qutub Raza, these shares being respectively 1-7 and 2-35, totalling one-fifth. Chaudhri Masum-ul-Raza died in 1924 and Chaudhri Qutub Raza in 1933. Mst. Akbari claimed that the family was a Syed family. The defendants were

the two brothers of *Mst. Akbari*, Chaudhri Barq Raza and Chaudhri Yaqub Raza, and her two nephews, Jamiluddin and Kamaluddin, the pedigree put forward by the plaintiffs being as below:—



Jamiluddin died during the pendency of the suit and his mother *Mst. Amjad-un-nisa* and his sister *Mst. Majid-un-nisa* were impleaded as his representatives.

The defendants did not admit the correctness of the pedigree. They claimed that *Mst. Amjad-un-nisa* was the wife of Chaudhri Qutub Raza and that Jamiluddin, Kamaluddin and *Mst. Majid-un-nisa* were their issues. They asked that *Mst. Amjad-un-nisa* and *Mst. Majid-un-nisa* be made parties to the suit.

Certain interrogatories were put by the plaintiffs and in reply thereto it was said on April 5, 1935, that *Mst. Amjad-un-nisa* had been originally married to Chaudhri Barq Raza. He had divorced her about 24 years before and Chaudhri Barq Raza had not remarried. A few days after the expiry of the period of *iddat nikah* of *Mst. Amjad-un-nisa* had been performed with Chaudhri Qutub Raza.

Apart from this denial of the pedigree the defendants (including *Mst. Amjad-un-nisa* and *Mst. Majid-un-nisa* who were impleaded later) set up a family custom that in the presence of male issue a daughter does not get a share in the assets of her father. Further by custom and right of inheritance Chaudhri Qutub Raza's sons would succeed to his property. They also said that even if it was found that Chaudhri Qutub Raza died issueless, his widow *Mst. Amjad-un-nisa* would succeed to his property, his sister not getting any share. In any case *Mst. Akbari* would not be entitled to a share in the presence of her brothers.

The defendants alleged that Chaudhri Masum-ul-Raza was a Sheikh belonging to the Hanafi School of the Sunni sect, as against the plaintiffs' contention that he was a Syed.

They further alleged that Chaudhri Qutub Raza executed a deed of *waqf* on July 30, 1930, by which he disposed of all his property with the exception of that given in list A.

The defendants denied the validity of the sale-deed executed by plaintiff No. 1 in favour of plaintiffs Nos. 2 and 3 on February 26, 1934, contending that it was fictitious and without consideration and that the transaction was champertous and contrary to law.

It is not in dispute that the family of Masum-ul-Raza has lived in the village and Pargana of Mangalsi in the Fyzabad District for a long time.

The only other member of the family who requires mention is another son of *Mst. Amjad-un-nisa* named Sirajuddin. He is not referred to in the pleadings as he died issueless before the institution of the suit, and we only mention him because his name appears in evidence to which we shall refer later in connection with the question of the paternity of *Mst. Amjad-un-nisa's* children.

The suit gave rise to the following issues:—

1. Did Masum-ul-Raza also leave properties shown in list C annexed to the plaint and did defendants Nos. 1, 2 and Qutub Raza take possession of them?

2. Did Qutub Raza die issueless and did the plaintiff No. 1 inherit 1-5 of 2-7 share as alleged in the plaint?

3. Are the plaintiffs Nos 2 and 3 transferees from the plaintiff No. 1 as is alleged by the plaintiffs?

4. Is the suit champertous as is alleged by the defendants? Its effect on the claim of the plaintiffs?

5. Is the suit bad for want of necessary parties?

6. Did Qutub Raza make a *waqf* of all his properties excepting those detailed in list A annexed to the written statement and cannot the plaintiffs therefore claim a share in what is the subject of the *waqf*?

7. Is the plaintiff No. 1 excluded from the inheritance of Masum-ul-Raza and Qutub Raza by local, tribal and family custom as is alleged by the defendants in paras. 19, 22, 23 and 24 of the written statement?

8. To what relief is the plaintiff entitled?

On the first issue the learned Subordinate (Civil) Judge of Fyzabad held that Chaudhri Masum-ul-Raza left the movables mentioned in the list O, and defendants Nos. 1,

2 and Qutub Raza took possession of them and that the plaintiffs had failed to prove that Qutub Raza also left the movables.

On the second issue the finding was that Qutub Raza died a bachelor leaving only two brothers, defendants Nos. 1 and 2 and a sister, plaintiff No 1, who was not excluded by any custom from claiming her legal-share in his inheritance.

The finding on the third issue was in the affirmative, the sale-deed, Ex. 1, being held to be valid.

Issue No. 4 was not pressed and the finding was in the plaintiffs' favour.

The fifth issue did not require determination as *Mst. Amjad-un-nisa* and *Mst. Majid-un-nisa* were added as defendants after the other defendants had pleaded that they were necessary parties.

The *waqf* (Ex. C-1) referred to in the sixth issue purports to have been executed by Qutub Raza in respect of a 1-3 share of his father's share in certain *mahals* this presumably being the share to which he considered himself entitled in these *mahals*. The Civil Judge held that he was entitled to 2-7 only (on the finding that *Mst. Amjad-un-nisa* was entitled to 1-7). He also held that it had not been proved that Qutub Raza left any of the property mentioned in list C.

On the seventh issue the Civil Judge held that the custom set up had not been proved, and on the eighth issue that the plaintiffs were entitled to a decree for possession of a 1-7 share in the properties shown in lists A, B and C, and of a 2-35 share in the properties shown in lists A and B after excluding those mentioned in the *waqf* deed, Ex. C-1.

The defendants' appeal contests principally the findings of the Court below that Qutub Raza died without issue and that the alleged family custom excluding daughters from inheritance was not proved. It has been pressed only on these two issues and on the issue relating to the title of plaintiffs Nos. 2 and 3. The defendant Barq Raza died during the pendency of the appeal.

The contention in the plaintiffs' appeal is that the finding in regard to the *waqf* is not justified and that there were clerical mistakes and mistakes of calculation in the decree.

The defendants' case is that Barq Raza married *Mst. Amjad-un-nisa* in 1909 and divorced her two years later as they did not get on well together. She was married again to his younger brother, Qutub Raza,

five or six months later, and all four children, Majid-un-nisa, Sirajuddin, Jamiluddin, and Kamaluddin, were the issue of this marriage.

The only documentary evidence produced by the defendants in support of their story was the deed of *waqf*, Ex. C-1, executed by Qutub Raza in 1930, in which he referred to *Mst. Amjad-un-nisa* as his wife and the four children as his children; and extracts from registers of the Government Intermediate College, Fyzabad, (Exs. C-24 and C-25) showing Qutub Raza as the "parent or guardian" of Jamiluddin and Kamaluddin, respectively. We shall consider later what value should be attached to these extracts, but it may be mentioned here that the periods to which they relate are from July 16, 1929, to July 10, 1934, in the case of Jamiluddin and from July 15, 1931, to July 10, 1934, in the case of Kamaluddin.

The principal witnesses to the alleged divorce and remarriage in 1911 were Barq Raza and *Mst. Amjad-un-nisa* themselves, both of whom were examined on commission. All that Barq Raza says about the reason for divorce is that their relations were strained: *Mst. Amjad-un-nisa* says nothing on the point. She says that her husband divorced her, but there was no desire on her part for divorce. There was no talk of her marriage to Qutub Raza prior to the divorce: her father-in-law suggested it a month or two afterwards, and she at once fell in with the suggestion. She did not inform her father or her brothers of the proposal, though she informed them after the divorce and second marriage had taken place. She did not visit her father between the divorce and her second marriage. Her father was displeased at not being informed about the divorce and second marriage (that is presumably before they took place) and did not visit Masum-ul-Raza afterwards in consequence.

(After examining the evidence of witnesses of both the parties their Lordships proceeded).

We are not at all impressed by either the plaintiffs' or the defendants' witnesses on this question and do not feel that we can place reliance on any of them. The motive given by Barq Raza for the alleged divorce of 1911 seems singularly inadequate, and indeed this has been conceded by the defendants' Counsel. On the other hand, the plaintiffs seem to have been reluctant to probe the matter deeply, judging by the

slight cross-examination of Barq Raza and *Mst. Amjad-un-nisa* on the point.

The plaintiffs have produced documentary evidence, the authenticity of which is not disputed, to prove that up till about 1929 the children were shown as the children of Barq Raza. There is evidence of defendants' witnesses that *Mst. Amjad-un-nisa* was born first, then Sirajuddin, then Jamiluddin, and lastly Kamaluddin (*vide* statements of Abdul Aziz (D. W. No. 14) and of *Mst. Amjad-un-nisa* herself).

Exhibit 66 is an extract from an official birth register and shows that Barq Raza was the father of a male child born on June 21, 1914.

Exhibits 133 to 135 are school leaving certificates of the three boys given by the head master of the Mangalsi School. In all of them Barq Raza is shown as the father, but in Ex. 135, relating to Kamaluddin, the name of Barq Raza has been struck out and the name of Qutub Raza substituted. The dates of birth are respectively September 14, 1915, September 14, 1917, and August 6, 1921, and the dates when they left this school are February 2, 1926, April 30, 1929, and April 2, 1931. There is nothing to show when Qutub Raza's name was substituted for that of Barq Raza in Ex. 135 but the certificate must have been given in 1931.

It will be observed that the date of Sirajuddin's birth given in Ex. 133 does not agree with the date given in the birth certificate. There is a difference of nearly 15 months. We do not attach much importance to this, since dates in school registers are notoriously unreliable. We find in Ex. C-25 that the date of Kamaluddin's birth is given as May 5, 1924, a difference of nearly three years. We must, however, note that Barq Raza admitted that he had connection with a prostitute for some time and that his wife made a general accusation against him of having connection with prostitutes. There was a mutation case in 1925 in which one Ahmad Raza claimed to be his son, the evidence of a *Patwari*, Ganesh Prasad (Ex. 73) showing that Ahmad Raza was the son of a prostitute. At the same time Ganesh Prasad said that he did not know the name of his father. We merely mention this to show that there is some doubt as to the identity of the child whose birth is recorded in Ex. 66.

The school-leaving certificates were issued by Sultan Husain Khan (P. W. No. 2), teacher at the Mangalsi school, and were

prepared from the original register which he brought to the Court. Objection has been taken to the defendants' certificates from the Fyzabad Intermediate College (Ex. C-24 and C-25) on the ground that they were not proved by similar evidence. We see no reason, however, to doubt their genuineness. Nor do we regard the entry showing Qutub Raza as 'the parent or guardian' of Jamiluddin and Kamaluddin as ambiguous. If Barq Raza was at that time still being held out as their father, there was no reason why Qutub Raza should be entered as their guardian. We cannot doubt that Qutub Raza was represented as their father from about the year 1929, as the deed of *waqf*, executed by him in 1930 indicates.

The next two documents, Exs. 64 and 65, are in our opinion very important and furnish a clue to the solution of the problem. They are extracts from sale registers of stamps and their genuineness is not disputed. Exhibit 64 shows that Barq Raza purchased a stamp (that is stamped paper) for the execution of a *talaqnama* or deed of divorce on September 8, 1928, and that *Mst. Amjad-un-nisa* (who is recorded as his wife) made a similar purchase on the same date for the execution of a deed relinquishing her dower.

The defendants suggest that these purchases were made with the intention of giving formal effect to the divorce of 1911. We find it difficult to accept this explanation. We do not think it at all likely, if there had been a divorce and second marriage as far back as 1911, that the parties concerned would have contemplated 17 years later executing formal deeds of divorce and relinquishment of dower.

The plaintiffs could not show what action, if any, was afterwards in connection with these purchases. They summoned the original documents from the defendants, but the defendants did not produce them. Their Counsel made statements to the Court denying that there was any deed of divorce or relinquishment of dower in existence.

Having regard to the fact that it was not long after this that Qutub Raza appears for the first time as the husband of *Mst. Amjad-un-nisa* and the father of the four children, we consider it by no means improbable that if *Mst. Amjad-un-nisa* was divorced by Barq Raza and married to Qutub Raza, this took place either towards the end of 1928 or in 1929 and not in 1911.

Some other points may also be considered

in this connection. Qutub Raza did not marry anyone else nor did Barq Raza. The explanation given by the plaintiffs for Qutub Raza's not marrying is that he was suffering from tuberculosis, but we doubt whether this explanation is sufficient, though the Court below has accepted it.

The age of Qutub Raza is given in the registration endorsement on the *waqf* deed as about 37, and if this is correct, he would be only about 18 years old in 1911.

In 1934 *Mst. Majid-un-nisa* in a document executed by her (Ex. 137) gave her age as 25 years. If this is correct, she was born in 1909 some time before the alleged divorce of 1911.

The *Patwari* Ganesh Prasad, who gave evidence in February 1925 (Ex. 72) and who stated that he had also been a teacher in the school at Mangalsi, deposed that Sirajuddin was then about 11 or 12 years old, which agrees rather with the entry in the birth register than with the entry in the school certificate. We do not, however, rely much on this.

We find it quite impossible to believe the story of the divorce and second marriage in 1911 on the evidence produced by the defendants. It is remarkable that to support this story, they could produce only witnesses of relatively low status. Defendants themselves belong to a respectable and apparently well-to-do family, and, had the facts been as alleged, it is difficult to believe that better evidence would not have been forthcoming; and if the story is true, there is no apparent reason why Barq Raza should have been recorded anywhere as the father of the children.

We are not concerned with the actual paternity of the children or the motive which induced the parties to contemplate a divorce in 1928. It is clear that all the facts have not come to light. We are faced with the position that Barq Raza abandoned apparently quite willingly, all claim to the children, that Qutub Raza as willingly assumed responsibility for them, and that *Mst. Amjad-un-nisa* has acknowledged that he is their father. We can only say that we see no reason to doubt that had the full facts been elicited, they would have explained why it was not until 1928 that a divorce was proposed. But whatever the explanation may be, we must hold on the finding that no divorce or second marriage prior to that year has been proved, that the children were born while the marriage of Barq Raza and *Mst. Amjad-un-nisa* still subsisted and that they are

therefore legally the sons of Barq Raza. We agree therefore with the Court below that Qutub Raza died issueless and that the plaintiff is entitled to a share in his property, so far as it has not been disposed of by the *waqf* deed. It is conceded by the learned Counsel for the defendants that on the finding that Qutub Raza died issueless he cannot dispute this.

We now turn to the more important and perhaps not less difficult question whether *Mst. Akbari* is excluded from the inheritance of her father Masum-ul-Raza by local, tribal and family custom. The issue on this point also raised the question of her exclusion by custom from the inheritance of her brother. The Court below answered this question in her favour and though this finding has been disputed by the defendants in the memorandum of appeal, their learned Counsel has not contested it.

It is necessary first of all to examine somewhat closely the allegations of the defendants with regard to the alleged custom. In para. 13 of the written statement of defendants Nos. 1 and 2 it was said that there had been a custom obtaining for a very long time among the Sheikhs of village Mangalsi, Pargana Mangalsi, District Fyzabad, in the family clan and brotherhood of Chaudhri Masum-ul-Raza that in the presence of male issue a daughter gets no share in her father's estate. Paragraphs 23 and 24 also make it quite clear that the custom is predicated for Sheikhs only, it being the defendants' contention that the family is a Sheikh and not a Syed family. This written statement was filed on January 15, 1935. In the proceedings of March 25, 1935, however, we find a statement by the defendants' Counsel that even if Chaudhri Masum-ul-Raza was not a Sheikh, the custom set up governed his family. On September 13, 1935, a further statement was made by another Counsel of the defendants, Mr. Faiyaz Ali, that the custom was a family custom and that it applied to the *biradars* of Chaudhri Masum-ul-Raza and also the Sheikhs and Syeds of village Mangalsi as well as *pargana* Mangalsi and to the Sheikhs and Syeds residing within the District of Fyzabad. We may observe here that in view of this statement it has been argued by the learned Counsel for the plaintiffs that the inquiry should be restricted to the custom obtaining in the family, instances of such custom obtaining in other families in this village or *pargana* being ruled out as irrelevant.

The proceedings of September 18, 1935,

also show that the defendants attempted further to explain the custom set up by stating that they meant to exclude full sisters and not step-sisters, and that they meant to exclude daughters in the presence of sons only if they had the same mother. The Civil Judge did not, however, allow them to depart from the position originally taken by them in their written statement.

Yet another statement was made by Mr. Faiyaz Ali during the examination of one of the defendants' witnesses. It was that the custom pleaded governed all the Sheikh Siddiqis irrespective of their place of residence.

Of some interest, too, are certain statements made by the defendant Chaudhri Barq Raza on the point. After explaining that he was a Sheikh Siddiqi on both his father's and his mother's side, he said that it was an old custom in his family and also in the families of other Sheikh in *pargana* Mangalsi that sons exclude daughters from inheritance. There were four kinds of Sheikhs, he said: (1) Siddiqi, (2) Qureshi, (3) Faruqi, and (4) Ansari. So far as he knew, the custom applied only to Sheikh Siddiqis. He further explained that by the word *biradari* he meant Sheikh Siddiqis who were on visiting terms with him. He did not include Syeds in his *biradari*.

It is clearly necessary to determine first of all whether the family is a Sheikh or a Syed family.

The chief difficulty in connection with this question arises from the fact that in the *khawat*, Ex. A-11, of the first settlement, the heads of two families of *zamindars*, Qazi Ladan and Qazi Ziauddin, are shown as Syeds, although a number of their descendants, including Qazi Ladan's son, are shown as Sheikhs. There is a very long pedigree of Qazi Ziauddin's family and we find both the prefix "Mir", which is a Syed prefix, as well as the prefix "Sheikh" among his descendants. Masum-ul-Raza was a descendant of Qazi Ziauddin, and appears in the pedigree under the name of Ghulam Qutubuddin. It is proved by the evidence of Barq Raza and also by the evidence of Masum-ul-Raza himself in a previous case in 1924 (Ex. A-24) that he had this *alias*.

Masum-ul-Raza was described, when he gave evidence in 1924, as a Sheikh, aged 64, *mukhia* of Mangalsi, and other members of the family, including the plaintiff *Mst.* Akbari in the plaint in the present

case have described themselves as Sheikhs.

The question came before a Bench of this Court in another case relating so it was alleged, to other members of the same family in 1927, *Mohammad Zafar v. Mst. Kaniz Saiyada and others* (A. I. R. 1927 Oudh, 598) (1). The judgment of this Court has been exhibited as Ex. 37. The suit in this case was brought by a brother against his sisters and mother for the inheritance of his father with the allegation that there was a special custom in his family by which females were excluded from inheritance in the presence of male issue. It was in this case that Masum-ul-Raza gave evidence in 1924. He then described Bahadur Husain, the grandfather of the plaintiff Mohammad Zafar as the first paternal cousin of his own maternal uncle. He also said that Mohammad Zafar was the descendant of Qazi Ladan, and that Qazi Ziauddin and Qazi Ladan were of the same family.

The pedigree of Qazi Ladan's family in Ex. A-11 is incomplete, the paper of the original having been torn, and although its condition may have been rather better at the time of the previous suit, this Court was unable to determine from it in 1927 that Bahadur Husain was the descendant of Qazi Ladan.

As regards the question of the castes of Muhammadans to which the plaintiff, Mohammad Zafar, belonged it was said:—

"The plaintiff was in great difficulty over the caste of Muhammadans to which he belongs. He wished to take advantage of Ex. 4, which, he asserted, shows the custom of his family as a Sheikh family, but at the same time was in the difficulty of claiming to be a descendant of Qazi Ladan who is described as a Syed, in order to obviate this difficulty it is now asserted that he is an Alwi, a descendant of Ali, but not a descendant of Ali through the lady Fatima, the daughter of the Prophet. He argues that in those circumstances he is either a Syed or a Sheikh. The point is not very important in the view which we take upon the general evidence."

The question was not therefore decided in 1927. In the present case the Civil Judge held that Chaudhri Masum-ul-Raza belonged to a Syed and not to a Sheikh family. He said:—

"Exhibit A-11 clearly gives the castes of Qazi Ladan and Qazi Ziauddin as Syed and it was prepared at the time of the first regular settlement and the customs governing the Syed will apply to them at least in so far as the *riwaj-i-am* prepared during the same Settlement are concerned. However, it is simply a technical matter because so far as the *riwaj-i-am*, Exs. A-3 and A-5 are concerned, they are practically the same. It has been conceded by the learned Counsel for the parties that a Syed cannot become a Sheikh and a Sheikh cannot become a Syed. The plaintiffs have led oral evi-

(1) A I R 1927 Oudh 598; 103 Ind. Cas. 23.

dence to prove that Chaudhri Masum-ul-Raza was a Syed and the defendants have examined witnesses to prove that he was a Sheikh. As the plaintiffs' contention is borne out by Ex. A-11, I decide that Chaudhri Masum-ul-Raza belonged to a Syed and not a Sheikh family."

We would merely observe here with reference to the remark that Exs. A-3 and A-5 are practically the same that there is one very important difference between them to which we shall recur later.

Apart from the fact that several persons are shown as Sheikhs in the pedigree of Qazi Ziauddin in Ex. A-11, there is other documentary evidence which supports the view that the family was a Sheikh family. Separate inquiries were made about Sheikh and Syed custom at the first regular settlement and lists of villages were prepared inhabited respectively by Sheikhs and Syeds. These are Exs. A-12 and A-13. Mangalsi appears in the list of Sheikh villages and it is further shown as a Sheikh Siddiqi village. There are only two villages which appear in both lists, these being Raunahi and Sheikhpur Jafar.

Questions relating to the customs obtaining in *pargana* Mangalsi were addressed separately to Sheikhs and Syeds in Exs. A-2 and A-4, the replies being given in Exs. A-3 and A-5, respectively. Exhibit A-3 purports to be signed by several *zamindars*, including three of Mangalsi, but for two of the latter Masum-ul-Raza actually signed. One of these was Khadim Ali, *lambardar* of Mangalsi, who was stated by Masum-ul-Raza in 1924 to be his cousin. He appears in the pedigree of Qazi Ziauddin. This is clearly very strong evidence in favour of the defendants' contention, since Ex. A-3 contains the replies of the Sheikhs.

The Fyzabad Settlement Report published in 1880 (p. 261) refers to the Sheikhs as holding Mangalsi, these being the only people, it is said, met with in the *pargana* who possessed documentary evidence of any great antiquity of family.

It is proved that various members of the family have described themselves as Sheikhs at various times. We have mentioned instances of Masum-ul-Raza and of the plaintiff *Mst.* Akbari herself, having done so. In his evidence in 1924 Masum-ul-Raza said:

"Only Saddiqis are Sheikhs and I am a Saddiqi Sheikh, as are all the Sheikhs of my village. The Syeds of my village are Alawi."

The registration endorsement on the sale-deed, Ex. 1, executed by *Mst.* Akbari in favour of the other plaintiffs describe her as a Sheikh.

Qutub Raza gave evidence in 1916 in the Court of the Munsif of Fyzabad in the case of *Hasrat-un-nissa v. Zaib-un-nissa* and was then described as a Sheikh. The *wagf* deed Ex. C-1 also describes him as a Sheikh.

In addition to this evidence, there is the evidence of a large number of defendants' witnesses that Masum-ul-Raza was a Sheikh Siddiqi. There is also the evidence of one of the plaintiffs' own witnesses, Wazir-ul-Hasan (P. W. No. 6), that he himself is a Sheikh Siddiqi, and that Masum-ul-Raza, who belonged to his family, was a Sheikh Siddiqi.

Only one witness was produced by the plaintiffs to give evidence to the contrary, this being Murtaza Husain (P. W. No. 1), the husband of *Mst.* Akbari. He said that he himself was a Sheikh, but that Masum-ul-Raza was a Syed, though he only found this out after his marriage.

In face of this overwhelming evidence to support the defendants' case on this point we cannot but hold that the family is a Sheikh family and that the entry in Ex. A-11, recording their ancestor as a Syed is incorrect. It was remarked by this Court in *Mohammad Zafar v. Kaniz Saiyada* (1) in 1927 that the *khevat* had been extraordinarily badly prepared, the same name appearing in different places. It was also said that when stress was laid upon the evidence afforded by the pedigree, the admitted carelessness in its preparation is of very great importance. In these circumstances we cannot agree with the Court below that the entry in it showing the family as a Syed family is conclusive on the point. On the contrary we must regard this evidence as relatively weak. Any presumption that it raises has been very clearly rebutted by other evidence.

Our finding on this point makes it unnecessary to consider whether the custom pleaded obtains among Syeds. Numerous instances relating to Syeds were given by both parties in support of their contention and this was natural, since they could not anticipate the finding of the Courts on the point, but on the finding at which we have without hesitation arrived, it is unnecessary to examine these witnesses.

There still remains, however, a difficulty in determining the scope of the inquiry, this being caused by the different statements which have been made about the custom 'by or on behalf of the defendants at different times. It has to be decided whether the inquiry should be restricted to

Sheikh Siddiqis or extended to Sheikhs generally, whether it should be restricted to members of this family and whether it should be restricted to residents of the village of Mangalsi or extended to residents of *pargana* Mangalsi. We think in view of the rather general allegations in the written statement that we must extend it to all Sheikhs of this *pargana*.

Learned Counsel for the defendants has made it unnecessary for us to consider the other custom put forward by them in their written statement, that *Mst. Akbari* was debarred by custom from claiming a share in the property of her brother Qutub Raza in the presence of other brothers. The finding on this point was against them, and they contested it in the first ground of their appeal, but their Counsel has not argued against this finding, and on the contrary, he has made it clear that his sole contention before this Court with regard to custom is that daughters are not entitled to any share in their fathers' property in the presence of sons. We may rule out therefore instances which indicate that custom was or was not followed in other circumstances as irrelevant.

The defendants' plea that daughters are debarred by custom from inheriting any share in their fathers' property in the presence of sons is based primarily on the Settlement *khewat* Ex. A-11 and on the *riwaj-i-am* of the Sheikhs, Ex. A-3, to which reference has already been made. The third paragraph of the *khewat* is called a statement as to the division of inheritance and the transfer of rights in the land and it is said that "customs obtaining in our family have been recorded in the *dastur-ul-amal riwaj-i-am*."

The defendants' contention was that Exs. A-2 and A-3, the inquiries addressed to and the answers given by the Sheikhs of *pargana* Mangalsi, constitute this *dastur-ul-amal riwaj-i-am*. It was said in reply to question No. 9 of Ex. A-2 that in the presence of male issue daughters do not get any share by inheritance and that in the absence of male issue daughters inherit the entire property. The Civil Judge thought it doubtful whether Exs. A-2 and A-3 constituted the *dastur-ul-amal riwaj-i-am*. In the previous case of *Mohammad Zafar v. Mst. Kaniz Saiyada* (1) referred to as the Isauli case, *Mohammad Zafar's* grandfather having gone to live at Isauli with his wife a copy of a *dastur-ul-amal* was filed and marked Ex. 5. This has not been filed in the present case. The Civil

Judge has laid some stress on this; but we do not think that it is material. As his judgment shows Ex. 5 of the previous case was merely an abstract of questions put to and answers given by different *lambardars* and *zamindars* of the *pargana*. We have referred to it and find no difference between it and Exs. A-2 and A-3 so far as Sheikhs are concerned. Exhibit 5 embodies their answers and also shows the answers given by other castes, Hindu and Muhammadan. We see no reason to doubt therefore that these documents constitute the *dastur-ul-amal riwaj-i-am*.

We have, however, to consider what value should be attached to the evidence of custom furnished by Ex. A-3. *Prima facie* it would appear to be somewhat strong evidence, for its signatories include three *zamindars* of village Mangalsi, two of these being *lambardars*. One of these *lambardars* is Khadim Ali, cousin of Masum-ul-Raza, and Masum-ul-Raza himself signed for Khadim Ali and another *zamindars*. It is true that these signatories note their objection to cl. 20, but this relates merely to the right of a man to transfer his property if he had a son or daughter, the answer being that he could transfer it for necessity. In Ex. A-5, the answers given by the Syeds, we find a dissentient note to the custom now under consideration, this being by Qazi Syed Mohammad Akbar, and to this extent the case for the existence of the custom among Syeds is weaker than the case for its existence among Sheikhs.

But although at first sight Ex. A-3 appears to afford strong evidence of the existence of the custom there are certain facts which suggest a contrary view. We may note in the first place that Masum-ul-Raza deposed in 1924 (Ex. A-24) that the custom had been existing for a year or two before the *riwaj-i-am* was recorded and he did not know if it existed before that, although Khadim Ali told him that it was an old custom. Masum-ul-Raza signed Ex. A-3 for Khadim Ali in 1883 and in 1924 his age was given as 64 years. He was therefore 23 years old in 1883 and, though young, might have been expected to possess more knowledge of the custom than he professed, if actually it was an ancient custom.

Secondly, the Settlement operations were completed in 1878, but signatures were not taken on Ex. A-3 till 1883. That is to say, though the document may have been prepared during Settlement operations, it

was not completed until several years afterwards, and the Civil Judge remarked that as it was not prepared during Settlement operations it ceased to have any evidentiary value as a Record of Rights prepared in due course by a Settlement Officer. This objection was not directly mentioned by this Court in the Isauli case, and possibly the date was not brought to its notice. It was, however, remarked that the inquiry into custom must have been taken up at a later stage. We think that the criticism of the Civil Judge is not without force, but as for other reasons, we are of opinion that we cannot infer from Ex. A-3 that the signatures did more than express their assent to the customs referred to therein, we need not consider this objection further.

The other objections regarding to this *riwaj-i-am* as strong presumptive evidence of a legal custom are given in the judgment of this Court in the Isauli case in 1927. Before citing the observations of this Court in that judgment we would refer to a pronouncement of their Lordships of the Privy Council on the essential requirements of a custom before legal recognition can be accorded to it. In *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar* (14 Moore's Indian Appeals, 570) (2) it was said :

"It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

This passage was cited in a later case decided by the Judicial Committee in 1922 *Muhammad Ibrahim Rowther v. Sheikh Ibrahim Rowther* (49 I. A. 119), (3) as a correct and authoritative pronouncement of the law.

In the Isauli case it was observed by this Court that Mangalsi village was one village out of a large number of villages—more than 100—in the Mangalsi *pargana*. The method of recording customs in this *pargana* was not the method generally in use in the North West Provinces and Oudh. The ordinary method of recording customs was to record them in a document known as the *wajib-ul-arz* which was

(2) 14 M I A 570; 17 W R 552; 2 Suth 603; 12 B L R 396 (P O).

(3) 49 I A 119; 67 Ind. Cas. 115; 3 M L T 85; 26 O W N 793; 45 M 308; 43 M L J 69; 36 O L J 64; (1922) M W N 470; 24 Bom. L R 944; A I R 1922 P O 59 (P O).

prepared separately for each village. In eight *parganas* of the Fyzabad district out of thirteen, however, a different procedure was adopted, this being known as the Punjab system. Under this system no *wajib-ul-arz* was prepared, only a record known as the *misl riwaj-i-am* or the record of general customs. The Settlement Report is silent as to the exact manner in which this *misl riwaj-i-am* was prepared. The report suggests that the rules for its preparation were not finally adopted until 18 years after the Settlement had been commenced, that is until the Settlement had been nearly completed, and there is no material available to show how orders for the preparation of this *misl riwaj-i-am* were issued.

We may observe here that the above suggests an explanation why the *riwaj-i-am* was not signed until 1883. The explanation suggested by the defendants' Counsel was that although the *riwaj-i-am* had been prepared during the course of Settlement operations, the officials concerned had by oversight omitted to take the signatures of the *zamindars* responsible for the answer. We feel some doubt whether this is correct. It rather looks as if the inquiry may not have been made until 1883 or shortly before. The report on the Settlement, we may mention, was submitted by the Settlement Officer in 1879.

In para. 1703 of the Settlement Report we find the following statement :—

"In the Punjab system, indeed, the substitutes for the *wajib-ul-arz* do not profess to be anything else than *ikrar malikan* (translated by this Court in 1927 as 'agreement of owners')."

It was added by this Court in 1927 that :

"the peculiarity of the system was that it attempted to lay down general rules for succession in respect of a whole *pargana* instead of for an individual village, and in these circumstances the prospect of the record giving an accurate account of the custom of an individual family in one of the villages in the Mangalsi *pargana* was less likely to be accurate."

Reference was also made by this Court in 1927 to the preamble to Ex. A 3 (Ex. 4 in the Isauli case). This has been translated in the present case as follows :—

"As the regular settlement of our villages has been made by the Govt. we have got all the rights of our clan which specially appertain to our *hagias* entered in the papers of our villages in detail, but with regard to the rights which are prevalent among our clan but have not been entered we stipulate as follows."

The concluding words *ikrar karte hain* were translated by this Court in 1927 as "we agree" and this translation has been disputed in the present case. Learned

Counsel for the defendants relies on a later ruling of this Court in *Tirathpati v. Ranjit Singh* (7 O. W. N. 1120) (4) where the words were translated by Bisheshwar Nath, J. "we declare". He expressly dissented from the contention put forward in that case that what was entered in the *riwaj-i-am* under consideration in that case was merely the record of an agreement and he regarded the evidence afforded by an entry in that *riwaj-i-am* as valuable evidence of the existence of the custom suggested by it.

No doubt the expression *ikrar karna* means "to declare as well as to agree", but in view of the statement which we have quoted from para. 1703 of the Fyzabad Settlement Report and of the manner of preparation of a *riwaj-i-am* under the Punjab system we are of opinion that the construction placed on the expression by this Court in 1927 was warranted. It is to be noted that the other learned Judge of this Court (Hasan, C. J.) who was a party to the decision in *Tirathpati v. Ranjit Singh* (4) observed that but for the absence of any evidence indicating that the custom set up had not been followed, he would have agreed with the view taken as to the evidential value of the *riwaj-i-am* generally in the case of *Muhammad Zafar v. Kaniz Saiyada* (1).

For these reasons we are of opinion that the answers given in Ex. A-3 do not do more than indicate the customs which some of the Sherks of Mangalsi accepted. They may possibly indicate what was a common practice, but we cannot presume that they disclose what was the fixed and invariable custom in force from time immemorial.

We come now to the instances which have been cited by the parties in support of their respective contentions, but before considering their effect, we think that the passage quoted by the Court below from the judgment in *Mirabivi and another v. Vellayanna and others*, (I. L. R. 8 Madras, 464) (5) should be borne in mind. It is in our opinion very opposite in this connection. It reads:—

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Muhammadan Law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is

(4) 7 O. W. N. 1120; 130 Ind. Cas. 124; A. I. R. 1931 Oudh 40; 14 R. D. 672; Ind. Rul. (1931) Oudh 140.

(5) 8 M. 464; 9 Ind. Jur. 267

governed by pure Muhammadan Law. Indeed, in many parts of the country it is unusual for Muhammadan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married, the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Muhammadan females are so much under the influence of their male relations, that the mere partition of the property among the males without reference to them cannot count for much. A single instance to the contrary would outweigh many such partition deeds when the existence of a binding custom is in question. Instances to the contrary have been established, and notably two quite in which women of the class in question have recovered their shares, and the custom now set up was not even pleaded against them. The District Munsif describes these instances as interruptions; but, in our opinion, they deprive of all force those partition deeds and other similar agreements in which voluntarily, or for some consideration, or under advice of mediators, the females may have simply abstained from pressing their claims."

We will deal first with cases which have come before the Courts in which copies of judgments have been filed, taking these in chronological order. Some of these cases are included in the list of instances subsequently given in the judgment of the Court below.

The earliest judgment on the record (of 1869 Ex. 60) as the Civil Judge observed, is not relevant, as it is a case of sisters obtaining a share in their brother's property. There is a decree certificate of 1871 (Ex. 71) which, the Civil Judge says, shows that one Amir Bakhsh sued for and obtained a share in the inheritance of his wife, presumably meaning that he successfully pressed his wife's claim to a share in her father's property. But the facts are by no means clear.

There is another case of 1871 (Ex. 43), but this again is of no help, as it is a case of a widow claiming a share in the property of her husband who was joint with his nephew, the latter contesting her claim. Reference was made in this case to the general statement of one Farzand Ali (Ex. 42) that a woman gets a share according to Muhammadan Law, but the judgment shows that the family had been recently converted to Islam and that the members had not fully grasped its tenets.

Exhibit 44 is a copy of a judgment of 1880, but it only shows that the parties came to an agreement: it does not indicate that any custom was set up.

There are judgments on the record of 1917 (Ex. 123), 1918 (Ex. 124) and 1923 (Ex. 34), but they relate to Syeds, and are consequently of no help.

The earliest case in which the question was raised by Sheikhs appears to be the Isauli case which was brought in 1923. That case was brought by Mohammad Zafar as a Syed (*vide* plaint Ex. 31), but the question whether he was a Syed or a Sheikh was left undetermined. It was said in the appellate judgment of this Court (Ex. 37) that there was nothing in the documentary evidence to justify the conclusion that the custom set up existed.

This ruling has been generally followed since and we have been asked both to dissent from this ruling and also to disregard the decisions in later cases as they were naturally influenced by it.

Coming now to the instances adduced by the parties, we will consider first the case of Sarfaraz Ali of Sheikhpur Jafar, this being one of the earliest instances cited and also one on which the plaintiffs strongly rely. According to the judgment of the Court below his property was inherited by his son Murad Ali and his three sisters, *Mst.* Rahim-un-nisa, Ummat-un-nisa and Najm-un-nisa. This is supported by Ex. 92 which is described as copy of register No. 3. The entry indicates that under orders of 1880 and 1882 the three daughters inherited a half share of their father's property.

The defendants cited the case of Murad Ali, son of Sarfaraz Ali, in support of their contention, alleging that Murad Ali, who died in 1915, left five sons and one daughter, the latter not getting a share in his property. They produced two witnesses to support this allegation, as well as some documentary evidence. The witnesses were Abdul Haq (D. W. No. 13) and Abdul Kadir (D. W. No. 26), the latter being husband of the daughter. Both these witnesses supported the allegation that Murad Ali's property was inherited by his sons only. Abdul Kadir was not born at the time of the death of Sarfaraz Ali and was not therefore in a position to depose to the succession to his property. Abdul Haq was cross-examined on this point for the plaintiffs and he admitted that on the death of Sarfaraz Ali mutation was effected in the name of the daughters only. He added that Murad Ali sued them and obtained a decree for one-half of the property. He also said that Murad Ali was born from one wife and the daughters from another wife.

It is said, however, that the family is a Syed, not a Sheikh family, and there is some doubt on the point. The village of

Sheikhpur Jafar contains both Sheikhs and Syeds. Exhibit 92 only shows that one of the daughters of Sarfaraz Ali was married to a Sheikh. Abdul Haq (D. W. No. 13) (who said that the custom obtained among both Sheikhs and Syeds) is described as a Syed. On the other hand Abdul Kadir (D. W. No. 26), who is married to Murad Ali's daughter, is described as a Sheikh and he is shown in the evidence as referring to "Sh." Murad Ali.

The litigation referred to must have taken place soon after 1880. The custom was apparently not set up: if it was, it was not upheld. This makes it doubtful whether it was generally followed at that time. The succession to Murad Ali's property suggests that if there can be said to be a custom at all, it is of relatively modern development. Few instances of it are forthcoming, prior to 1883 when it was set up in an official record for the first time. This is rather remarkable when we remember the statement in the Settlement Report that the Sheikhs of Mangalsi are the only people in the *pargana* who have documentary evidence of any great antiquity of family.

The defendants have, however, established that in a few cases dating back more than 50 years the claims of daughters were ignored.

Husain Bakhsh of Kola (a village near Mangalsi) is said to have died in 1842 leaving four sons and two daughters, the former only succeeding to his property (*vide* the evidence of Fazal Haq (D. W. No. 19) and the *khewat* Ex. A-29).

Fakir Ali is said to have died in 1887, also leaving four sons and two daughters, the former only succeeding to his property (*vide* the evidence of Altaf Husain (D. W. No. 22) and Ex. A-85).

A few other old instances have been cited, but the evidence to support them is generally vague, as shown in the previous judgment of this Court, Ex. 37, and the mere exclusion of the names of the daughters from the *khewat* does not, in our opinion, go very far to establish that they were, by recognised custom, excluded from any share in their father's inheritance.

The majority of the instances cited by the defendants are of recent date, that is of the present century. As regards those of about 1882 or not long afterwards we would observe that it is not improbable that instances should be forthcoming of about that time if it was about then that the custom was first set up. We can find no

is no clear indication that it was an ancient custom prevailing among all the Sheikhs of this *pargana* or among all the Sheikhs of this family. The question did not come before the Courts prior to the Isauli case. It was observed by this Court in that case that :

"There is not any instance of a pronouncement of a Court in favour of the existence of this custom...
...in the family of any *semindar* in the Mangalsi Pargana."

Subsequent decisions have followed the finding in that case. After giving full consideration to the arguments advanced by

on the point. The husband, it is said, did not hand the sale deed to the Sub-Registrar by way of presentation for registration, but merely to explain to him the position, namely that his wife, who is *pardanashin* was waiting outside in an *ekka* and wished to present the document for registration. Had the point been raised by the defendants in their pleadings and an issue struck on it, it is said, this could have been made

(6) 42 I A 22; 28 Ind. Cas. 422; 19 C W N 263; 13 A L J 129; 17 M L T 148; 21 O L J 218; 2 L W 277; 37 A 49; 28 M L J 577; 17 Bom. L R 413; (1915) M W N 592 (P O).

clear in Murtaza Hussain's evidence: this was not done as the point was not raised until arguments were heard by the Civil Judge. To support the explanation with regard to the procedure followed reference is made to the endorsement of the Sub-Registrar on the deed, showing that it was presented by *Mst. Akbari*.

We find that in para. 26 of their written statement defendants Nos. 1 and 2 denied the correctness and validity of the sale deed. If it was proved to have been executed, they said that it was fictitious and without consideration and the transaction champertous and illegal. The other defendants merely denied the correctness and validity of the deed.

There was therefore no issue on the question whether the registration was a valid registration and the plaintiffs could not have anticipated this objection. We are of opinion therefore that the defendants were not entitled to raise it after the evidence in the case had been recorded, the actual facts relating to presentation not having been fully examined.

Learned Counsel for the plaintiffs also relies on another and more recent pronouncement of their Lordships of the Privy Council in *Bharat Indu v. Hamid Ali Khan* (47 L. A. 177) (7). In this case the document was brought to the Registration Office by a servant Wazir Beg, stating that his Master Wilayat Ali Khan was ill and asking that the document might be registered. The Sub-Registrar went to the executor's house and read the document to him. He admitted execution and the Sub-Registrar registered the document. Their Lordships observed:—

"Now it appears from the endorsement that the Sub-Registrar when he reached the house, read the power-of-attorney through to Wilayat Ali Khan, who admitted the execution and completion of the instrument. The Sub-Registrar went there because Wilayat Ali Khan desired it to be registered; and he knew from the message by the servant and Wilayat Ali Khan knew that he knew that Wilayat Ali Khan desired it to be registered, and that he had been sent for and had come for the purpose of completing the registration."

Their Lordships also remarked that it was probably an irregularity on the part of the Sub-Registrar to accept the document as presented by Wazir Beg, but the presentation by Wazir Beg was inoperative and not injurious to the validity of the subsequent presentation. Wilayat Ali Khan was the real presenter, and was so treated by

(7) 47 I.A. 177; 58 Ind. Cas. 386; 18 A.L.J. 717; 39 M.L.J. 41; (1930) M.W.N. 413; 28 M.L.T. 98; 42 A. 487; 25 O.W.N. 73; 22 Bom. L.R. 1362; 13 L.W. 4; 2 U.P.L.R. (P.O.) 179 (P.O.).

the Sub-Registrar. Their Lordships concluded that this objection to the registration failed.

The case under consideration is very similar: there appear to be no essential distinguishing features, and we cannot therefore agree that the sale deed is invalid on account of a defect in its registration.

The plaintiffs put forward a large number of objections to the *waqf* deed in their appeal. They said *inter alia* that it was a fictitious document not intended to have any effect: that if it is held that Jamil-ud-din and Kamal-ud-din are not the sons of Qutub Raza the *waqf* deed which benefits them in this capacity has no legal effect: that the *waqf* was legally invalid because it disposed of a larger share in the property than was owned by the *waqif* and that the Court below was not justified in holding it valid in respect of his actual share: that on the findings a 2-35 share in list O should also have been decreed: and that many of the provisions of the *waqf* deed are against law and the Mussalman Waqf Validating Act.

Remarkably little attempt was made, however, to support these contentions in arguments before us. It was conceded that the *waqf* could not be held invalid by reason of the nature of its dispositions of the property. No authority was produced to support the contention that the *waqf* must fail because Jamil-ud-din and Kamal-ud-din were incorrectly described as the *waqif's* sons. It was contended that the *waqf* is invalid because the deed shows that the property is incumbered by two debts (of Rs. 1,500 and Rs. 500) and disposes of the profits remaining after payment of interest on these debts. The case of *Mst. Rahiman v. Mst. Baqridan* (1936 O.W.N. 165) (8), is cited in support of this contention, the argument being that as the taking of interest is opposed to the principles of Muhammadan Law, a *waqf* deed which provides for payment of interest must be held invalid. But in *Mst. Rahiman v. Mst. Baqridan* (8), the *waqf* was held invalid on the ground that mortgage rights were the subject of the *waqf*, that is the property disposed of by the *waqf* was the interest due on a mortgage. The two cases are clearly distinguishable. We are not therefore prepared to hold that the *waqf* in the present case is invalid either on this ground or on any of the other grounds put forward.

(8) 1936 O.W.N. 165, 160 Ind. Cas. 495; 1936 O.L.R. 81; 8 R.O. 261; A.I.R. 1936 Oudh. 213 (F.B.).

The last ground taken in the plaintiffs' appeal is that there are clerical mistakes and mistakes of calculation in the decree, four instances being given. The learned Counsel for the appellants was not, however, able to show us that there was any foundation for these assertions. He admitted that there was no mistake in the order passed in the judgment; he said that the mistakes are only in the decree. We find, however, that the judgment and decree are similarly worded and he was unable to show us in what way any mistake had occurred. He argued that the item of Rs. 534 on account of Pleader's fee should not have been included, in the memorandum of costs, as no certificate had been filed before arguments. It is true that it is not stated on the certificate that it was filed before arguments, but it is stated that it was filed before 10-30 A. M., and we consider that this justifies the presumption that it was filed before arguments. We find no force therefore in this ground of appeal.

In the result, both appeals fail and we dismiss them accordingly with costs.

S. Appeals dismissed.

CALCUTTA HIGH COURT

Appeals Nos. 1231 and 1232 of 1937

August 3, 1939

SEN, J.

SECRETARY OF STATE—DEFENDANT

—APPELLANT

versus

DISTRICT BOARD, RANGPUR—

PLAINTIFF—RESPONDENT

Bengal Tenancy Act (VIII of 1885), s. 106—Suit under—Plaintiff not admitting that he is out of possession—Whether can establish that possession of the other party is possession of his—Civil Procedure Code (Act V of 1908), s. 80—Notice under s. 80—Subsequent discovery that certain plot had been omitted—Another notice adding that plot—Suit more than two months after first notice, whether premature—Record of Rights—Preparation of—Duty of Revenue Officer—Must see nature of possession—Principle and agent—Admission by Eastern Bengal Railway is on behalf of Government—Evidence Act (I of 1872), s. 13—Scope and applicability—Bengal Local Self-Government Act (III of 1885), s. 73—Scope of—Title of District Board in land held under ss. 73 and 75, whether different.

The determination of a question of bare title is outside the scope of a suit under s. 106, Ben. Ten. Act. A suit under that section relates to the Record of Rights and to the correction of the entries therein. A suit for the determination of a bare question of title divorced from possession is not one which falls within the purview of s. 106. But this does not mean that the Assistant Settlement Officer is not under any circumstances to consider questions in-

volving the title of the rival parties. Where a plaintiff admits that he is out of possession and seeks to recover possession after a declaration of his title to the land, he cannot obtain these reliefs in a suit framed under s. 106, because such a suit would involve the determination of a question of bare title unaccompanied with possession. But where the plaintiff does not admit that he is out of possession of the land in suit, it is open to him to establish in a suit under s. 106, that the possession of the other party is really the possession of the plaintiff. [p. 457, col. 1.]

A notice under s. 80, Civil P. C., was served on the Secretary of State for India but when subsequently it was discovered that a certain plot was omitted from the notice, another notice adding that plot to the subject-matter of the suit was sent. The suit was brought more than two months after the first notice.

Held, that s. 80 was complied with and the suit could not be said to be premature so far as it related to the other plots mentioned in the first notice.

The duty of the Revenue Officer at the time of preparing the Record of Rights is not confined merely to ascertain who is in actual occupation of the land and to record the land in his *khatian*. The Revenue Officer has to ascertain and record very much more than that. He has to ascertain not merely who is in physical occupation of the land but he has to ascertain further whether such occupation amounts to possession and the nature of such possession. [ibid.]

Admissions by the Eastern Bengal Railway are admissions by the agents of the Govt. and are therefore binding on the latter.

Section 13, Evi. Act, consists of two parts. The first part deals with transactions and the second part with instances.

Section 73, Ben. Local Self-Government Act, merely transfers the control of roads hitherto under the control of certain authorities to the District Board. It does not say that the title of the District Board in the land held by it under ss. 73 and 75, respectively would be different.

As. from the appellate decrees of the Special Judge, Rangpur, dated March 23, 1937.

Mr. Ramaprasad Mookerjee and Dr. S. C. Basak, for the Appellant.

Messrs. Atul Chandra Gupta and Apurba Charan Mukherjee, for the Respondent.

Judgment.—The District Board of Rangpur instituted three suits being Suits Nos. 496, 497 and 498 of 1935, against the Secretary of State for India in Council. The suits were instituted under s. 106, Ben. Ten. Act, for correction of the Record of Rights. All the suits were heard together and partially decreed. No appeal has been filed against the decision in Suit No. 497, and therefore I am not concerned with the decision in that suit. The defendant, the Secretary of State for India in Council through the Agent of the Eastern Bengal Railway appealed against the decision of the Assistant Settlement Officer in the other two suits to the Special Judge; he upheld the decision of the trial Court with

a small modification in Suit No. 496. He held that so far as that suit was concerned, the plaintiff's case had failed with respect to one of the plots, namely plot No. 669. Against this decision, the Secretary of State for India-in-Council has filed two appeals to this Court and the plaintiff has filed a cross-objection relating to that part of the decision of the Special Judge which related to plot No. 669. The appeals have been heard together and this judgment will govern both the appeals. After the case of the appellant had been argued for some time, Mr. Gupta appearing on behalf of the respondent stated that he does not press the cross-objection. It is accordingly dismissed. The case of the plaintiff is as follows: O. S. plots Nos. 6077, 5328 and 4340 which form the subject-matter of Suit No. 495 and O. S. plot Nos. 144, 143, 141, 138, 669, 668, 129, 126 and 777 which form the subject-matter of Suit No. 496 are claimed by the plaintiff as forming part of roads belonging to the District Board; as I have stated before, the plaintiff has now given up its claim to plot No. 669. The plaintiff's case further is that these plots were in the permissive occupation of the Eastern Bengal Railway under an arrangement between the plaintiff and the railway. When the settlement record of the area was prepared, these plots were recorded in the *khatians* of the Eastern Bengal Railway as belonging to the railway and were omitted from the *khatians* of the plaintiff. The plaintiff accordingly brought these suits for the correction of the settlement record by inserting these plots in the plaintiff's *khatians*.

The position taken up by the defendant was that these plots have been properly recorded as belonging to the Eastern Bengal Railway. Another defence taken was that Suit No. 496 was barred by reason of the provisions of s. 80, Civil P. O. The contention on this point briefly is this: The suit being against the Secretary of State for India-in-Council, it is necessary under s. 80 that a notice should be served upon the Secretary of State for India in Council; the section also provides that the suit should not be brought until the expiry of two months next after the notice in writing has been served. The notice in this case was served on August 17, 1935. Thereafter, it was discovered by the District Board that plot No. 669 had been omitted from the notice. On August 23, 1935, another notice including this plot was served. The suit was filed on October 23, 1935.

The contention of the defendant is that the time must be computed from the date of the second notice and that as the suit has been filed one day before the expiry of the period of two months from that date the suit is premature. The other defences taken in the Courts below have now been abandoned. Both the Courts have held that suit No. 496 is not premature. They have also held that the land which forms the subject-matter of these appeals belongs to District Board and not to the railway. They have found that the railway is in possession of the land with the permission of the District Board for certain limited purposes. The final order passed by the lower Appellate Court is that the land which forms the subject-matter of these appeals shall be recorded in the *khatians* of the District Board and that in the remarks column of the *khatians* there should be a remark that the land is in the permissive possession of the Eastern Bengal Railway.

Against this decision, the defendant has appealed. The learned junior Govt. Pleader appearing on behalf of the appellant urged three points before me. First, he said that the suit is premature by one day inasmuch as it has been brought before the expiry of two months from the delivery of the notice which had to be served on the appellant by reason of the provisions of s. 80, Civil P. O. Secondly, he says that as the railway is admittedly in possession of the land which formed the subject-matter of both the suits, the Revenue Officer was bound to record it in the appellant's *khatians*. He argues that the settlement record is prepared with reference to actual possession only and not with reference to title and that therefore even if it be conceded that the title is in the District Board, nevertheless, the District Board can get no relief in a suit framed under s. 106, Ben. Ten. Act. The third point taken is that the plaintiff has failed to establish its title to the land of these two suits. In my opinion, there is no substance in the first point taken. The first notice with respect to Suit No. 496 was served on August 17, 1935, and the suit has been brought on October 23, 1935. If the first notice be considered as subsisting then the suit is not premature as it has been brought after the expiry of two months from the date of service of the notice. The contention of the learned junior Govt. Pleader is that the first notice has been annulled by the second one and that the suit must be considered as having been

whether the plaintiff or the defendant is in actual possession of the land and that when it was found that the railway was in actual possession, the matter was concluded and the Courts had no authority to embark upon an investigation into the question whether the plaintiff or the defendant had title to the land. In support of this contention, my attention was drawn to the cases in *Mohunt Padmalay Romanuja Das v. Lukmi Rani* (1), and *Brojo Mohan Pal v. Darasan Pal* (2). Mr Gupta on the other hand relied on the cases in *Asrafannessa Khatun v. Heramba Chandra* (3), *Chandi Charan Law v. Sreemati Lal Bewa* (4), and also in *Brojo Mohan Pal v. Darasan Pal* (2) which was cited by the learned junior Govt.

(1) 12 O W N 8.

(2) 49 O L J 294; 120 Ind. Cas. 155; A I R 1929 Cal. 308; 34 O W N 47; Ind. Rul. (1930) Cal. 11.

(3) 54 O L J 114; 100 Ind. Cas. 293; A I R 1927 Cal. 216; 44 O L J 467.

(4) 49 O L J 285; 120 Ind. Cas. 147; A I R 1929 Cal. 385; 33 O W N 623; Ind. Rul. (1930) Cal. 3.

the parties and that when the Revenue Officer proceeds to hear and decide the dispute, he is to determine not merely whether certain words shall or shall not remain unchanged in the record, but whether the facts described by those words are correct; if he is satisfied that the entry does not describe the facts correctly, he will, as a corollary, cause an alteration to be made."

In order to determine the nature of the possession of a party with respect to a particular piece of land, it may be necessary for the Assistant Settlement Officer in a suit under s. 106, Ben. Ten. Act, to enter incidentally into questions of title. I entirely agree that where a plaintiff admits that he is out of possession and seeks to recover possession after a declaration of his title to the land, he cannot obtain these reliefs in a suit framed under s. 106, Ben. Ten. Act, because such a suit would involve the determination of a question of bare title unaccompanied with possession. In the present case, the position

(5) 64 Ind. Cas. 689; A I R 1920 Cal. 900.

is entirely different. The District Board does not admit that it is out of possession of the land in suit. It claims that the land belongs to it and that the railway is in possession thereof with its permission. In other words, the District Board claims to be in possession of the land through the railway. It does not seek to recover possession on establishment of its title. The question involved therefore relates to the nature of the possession of the railway. If the argument of the learned junior Govt. Pleader were right, then it must be held that the duty of the Revenue Officer at the time of preparing the Record of Rights is confined merely to ascertain who is in actual occupation of the land and to record the land in his *khatian*; but that certainly is not so. The Revenue Officer has to ascertain and record very much more than that. He has to ascertain not merely who is in physical occupation of the land but he has to ascertain further whether such occupation amounts to possession and the nature of such possession. If I may say so with respect, the learned junior Govt. Pleader has given the word 'possession' too narrow an interpretation. He considers that the words "possession" and "occupation" are synonymous. The word 'possession' is not used in that narrow sense in the cases relied upon by him. A person may be in possession of land although he is not in physical occupation of it and mere occupation would not necessarily connote that kind of possession upon the basis of which entries in the Record of Rights are made. It is wrong to say therefore that once it is found that the Eastern Bengal Railway was in occupation of the land in these suits, it is not open to the District Board to establish in a suit under s. 106, Ben. Ten. Act, that the possession of the railway is really the possession of the District Board. I hold, therefore, that the learned junior Govt. Pleader has not been able to establish that the suit is misconceived or that the Court below has gone into questions which it was not empowered to do in a suit under s. 106, Ben. Ten. Act. The Court has considered the circumstances and the oral and documentary evidence and it has come to the conclusion that although the railway is in physical occupation of the land, the title to the land is in the District Board and the railway is in possession with the permission of the District Board. In my opinion, the Court was entitled to investigate these matters and to come to

these conclusions if the evidence establishes them.

This takes me to the next question, namely, whether the Court below was right in directing the record to be corrected by including the plots of land which form the subject-matter of these two appeals in the plaintiff's *khatian* with the remark in the remarks column that they are in the possession of the Eastern Bengal Railway with the permission of the District Board. There can be no manner of doubt whatsoever that before the railway got possession of the land in these two suits, it was in the possession of the District Board. There is also no doubt that the railway has not attempted to show that it ever acquired the land by any land acquisition proceedings and indeed it is not even suggested before me that the railway acquired the land by these means. In fact there is no evidence to show that the railway acquired title to the land. The evidence discloses that at one time there was a proposal that the railway would acquire the land from the District Board but that proposal fell through. The documentary evidence consists of a series of letters written to the District Board by the railway authorities, by the Collector of the District, by an Under-Secretary of the Govt. and various other Govt. Officials. In almost all these letters, it is either expressly stated or tacitly assumed that the land in these two suits belongs to the District Board and in these letters permission is asked from the District Board on behalf of the railway to do certain things on the land.

It has also been found by the Courts below that the lands in the two suits are portions of roads which admittedly belonged to the District Board. The land is at present used as road over which the public have a right of way. It is clear from the correspondence that the railway took charge of the land from the District Board for the purpose of metalling and maintaining it and that the railway always admitted that the land belonged to the District Board. The learned junior Govt. Pleader suggested that the correspondence containing these admissions could not bind the Govt. I cannot understand why they should not be binding on the Govt. The admissions are made by the agents of the Govt. I shall give a few instances of these admissions. Exhibit 1 is a letter from the Executive Engineer of the Eastern Bengal Railway to the Collector of Rangpur. He says in this letter "the road belongs to the District

Board and runs for nearly the whole of this length through railway land." He then asks for permission to metal the road. Exhibit 1 (e) is a letter from the Under Secretary to the Govt. of Bengal to the Commissioner, Rajshahi Division, wherein it is admitted that the road is a District Board road. Exhibit 1 (f) is a letter from the Collector, Rangpur, to the Chairman of the District Board also admitting that the road is a District Board road. Exhibit 1 (g), 1 (h) are similar letters in which it is admitted that the land in suit belonged to the District Board. These admissions are by the railway, by the Collector of the District and other officers of Govt. These documents clearly indicate that the admissions are made by the agents of the Govt. and, in my opinion, the Govt. is bound by these admissions.

Mr. Gupta on behalf of the District Board contended further that these letters were admissible in evidence not only as admissions made on behalf of the appellant but also as evidence of transactions and particular instances in which the right of the District Board with respect to the land was asserted and recognized. In other words, he says that these letters constitute evidence which is admissible under s. 13, Evi. Act. The learned junior Govt. Pleader contends that these letters cannot be considered as transactions and he says that s. 13, Evi. Act, has no application. I cannot agree with this view. Section 13, Evi. Act, consists of two parts. The first part deals with transactions and the second part with instances. I do not decide whether the correspondence between the District Board and the different officials would constitute a transaction but the letters certainly are instances in which the right of the District Board to the land which form the subject-matter of these suits was recognized. The correspondence establishes beyond doubt that the railway has no title to the land and that it is in occupation of it with the permission of the District Board to whom the land belongs.

My attention was drawn to the provisions of ss. 73 and 75, Local Self-Govt. Act (Act III of 1885) by the learned junior Govt. Pleader for the purpose of showing that although the District Board may be in control of certain lands used as roads, the property in the land would not necessarily vest in the District Board. He points out that s. 75 enacts that any road constructed by the District Board from the district fund shall be vested in the District Board by

which it was constructed and says that there is nothing to show that the roads which form the subject matter in these suits were constructed by the District Board. He argues that it is such roads and such roads only that vest in the District Board. In support of this view, he refers me to s. 73 of the aforesaid Act which is in the following terms:

"From and after the establishment of a District Board in any district, all roads, bridges, channels, buildings and other property, movable or immovable held by, or under the control and administration of, the District Road Committee or any Branch Committee in such district for the purposes of the Cess Act, 1880, shall, for the purposes of this Act, (but subject to the provisions of Chap. III of Part III thereof) be under the control and administration of such District Board."

He says that the other roads shall be merely under the control and administration of the District Board and will not vest in the District Board. In my opinion these two sections do not bear this interpretation. Section 73 merely transfers the control of roads hitherto under the control of certain authorities to the District Board. It does not say that the title of the District Board in the land held by it under ss. 73 and 75, respectively, would be different. The Explanation to s. 73 says that the roads, bridges, etc., referred to in the section shall include and shall be deemed to have always included the soil and sub-soil beneath those properties excluding the minerals therein. It is really unnecessary for this case to determine the exact rights of the District Board in the soil of the roads which belong to them. To do this would be to enter upon an investigation foreign to the subject-matter of a suit under s. 106, Ben. Ten. Act. What has to be determined is whether the District Board is the owner of the land in its own right and whether the railway is occupying the land with the permission of the District Board. The evidence establishes that the District Board is in possession of the land in its own right and that the railway is in occupation with the permission of the District Board. The learned lower Appellate Court was, therefore, perfectly correct in holding that the land should be recorded in the *khatian* of the District Board and not in the *khatian* of the railway and in directing a note to be made in the remarks column that the railway is in permissive occupation of the land. The appeals are accordingly dismissed with costs.

D.

Appeals dismissed.

MADRAS HIGH COURT

Second Appeal No. 430 of 1934

February 2, 1939

LEACH, C. J., AND SOMAYYA, J.

KAMAKSHI AYYAR AND ANOTHER—

APPELLANTS

versus

NAMBERUMAL AYYANGAR AND ANOTHER

—RESPONDENTS

Court Fees Act (VII of 1870), Art. 17-B, s. 7 (v) as amended by Madras Act V of 1922—Mortgagee of portion of house obtaining decree, purchasing that portion and obtaining symbolical possession thereof—Another mortgagee of whole house obtaining decree, purchasing whole house and refusing first mortgagee to enter into possession of his portion—Suit by first mortgagee for partition and possession held fell under s. 7 (v) and not under Art. 17-B.

A mortgagee obtained a mortgage decree in respect of a portion of a house and at the subsequent sale in execution became the purchaser thereof and obtained symbolical possession of that portion. Another decree-holder subsequently obtained a mortgage decree in respect of the whole house, and in execution thereof purchased the house and was in physical possession of the whole house and refused to allow the first mortgagee to enter into physical possession of his portion. The first mortgagee thereupon brought a suit for partition of the property and possession of his half share. In his plaint he averred that the second mortgagee was in wrongful possession and enjoyment of the whole house:

Held, that the suit was in truth and in fact a suit for possession against a person in wrongful possession of the property. The plaintiff was in possession of no portion of the property. In these circumstances s. 7 (v) of the Court Fees Act, applied, and not Art. 17-B.

S. A. against the decrees of Sub Judge, Ramnad at Madura, in A. S. No. 78 of 1931.

Mr. K. Balasubramania Ayyar for Mr. Watrap S. Subramania Ayyar, for the Appellants.

Mr. R. Gopalaswami Ayyangar for Mr. K. S. Champakesa Ayyangar, for the Respondents.

Mr. T. Krishna Rao, for the Government Pleader, for the Government.

Leach, C. J.—In O. S. No. 409 of 1905 of the Court of the District Munsif of Srivilliputhur, the appellant obtained a mortgage decree in respect of the western portion of a house and at the subsequent sale in execution became the purchaser thereof. The respondent in the appeal held a second mortgage over the whole house. On March 8, 1924, the appellant obtained symbolical possession of the western half. In 1914 the respondent obtained a mortgage-decree in respect of the whole house, and in execution thereof caused it to be sold. He was himself the purchaser, but his purchase was, of course, subject to the appellant's right and there-

fore was only effective with regard to the eastern half. The respondent was in physical possession of the whole of the property throughout and in spite of the fact that the appellant had been put in symbolical possession of his half of the property refused to allow him to enter into physical possession of his portion. The result was that the appellant brought Suit No. 255 of 1927 in the Court of the District Munsif for partition of the property and possession of his half share. In his plaint he averred that the respondent was in wrongful possession and enjoyment of the whole house. Notwithstanding the nature of the suit the appellant stamped his plaint with a stamp of the value of Rs. 15 under Art. 17-B, Court Fees Act, as amended by the Madras Act V of 1922. Article 17-B is a residuary Article. It states that the fee on a plaint or memorandum of appeal where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by the Act shall be Rs. 15 in a suit in a District Munsif's Court. The respondent raised the question of the stamping of the plaint contending that the suit should have been valued according to the market value of the house under the provisions of s. 7 (v) of the Act. The District Munsif decided the question in favour of the appellant and decreed the suit. The respondent appealed to the Subordinate Judge who, by an order dated December 8, 1931, held that the District Munsif was wrong and should have required the suit to have been stamped *ad valorem* on Rs. 2,500, the market value of the house.

On this valuation the proper court-fee was Rs. 224-15-0. The memorandum of appeal had only been stamped to the value of Rs. 15 and therefore there was a deficiency of Rs. 209-15-0. The Subordinate Judge gave the respondent a week's time in which to pay this deficiency and as he failed to comply with the order dismissed the appeal. The Subordinate Judge also took up the question of the stamping of the plaint and held that the District Munsif should have required the plaintiff to pay an *ad valorem* fee of Rs. 224-15-0. The Subordinate Judge called upon the appellant to pay the deficiency and gave him three days' time to comply with the order. As the appellant failed to comply, the Subordinate Judge dismissed the suit under the provisions of s. 12 (ii) read with s. 10 (ii), Court Fees Act. The present appeal is against that order.

The appeal first came before Venkata-

amana Rao, J. who considered that it raised a question of some importance and consequently it has been placed before a Bench. We have no doubt that the Subordinate Judge was right in holding that the plaint should have been stamped under the provisions of s. 7 (v). The suit was in truth and in fact a suit for possession against a person in wrongful possession of the property. Not only was possession sought, but a decree for mesne profits was also asked for by the appellant, who expressly averred in his plaint that his claim to be put in possession of his half of the house had been wrongfully refused. The appellant was in possession of no portion of the property. In these circumstances s. 7 (v) of the Act applied, and not Art. 17-B.

The learned Advocate for the appellant has asked us to give him a further opportunity of paying the deficiency in the stamping of the plaint. The learned Advocate for the respondent has made a similar request with regard to his appeal to the Subordinate Judge. He asks that he may be given an opportunity of paying the deficiency and having his appeal heard on the merits. We consider that justice will be done if we accede to both these requests. The appellant will be given a fortnight's time in which to pay the court-fee of Rs. 209-15-0 being the difference between the proper court-fee of Rs. 224-15-0 and Rs. 15 which was actually paid on the plaint. If the amount is paid within the time, the respondent will be given a further three days in which to pay the deficiency on his memorandum of appeal, namely Rs. 209-15-0. If he does so, his appeal will be restored to the list and heard on its merits. The appellant has stamped his appeal to this Court with a fee of Rs. 15. The proper court-fee should have been Rs. 2-9-0. There is, therefore, here a deficiency of Rs. 8-2-0. The learned Advocate for the appellant has undertaken to pay this amount. This must be paid within one week. Failure to pay this amount within the time will mean that the second appeal will stand dismissed. Each party will pay his own costs.

S.-N.

Order accordingly.

RANGOON HIGH COURT
Civil Revision Application No. 222 of 1938
January 5, 1939
BAGULEY, J.
MUNICIPAL CORPORATION OF
RANGOON—APPLICANT

versus

RAM BEHARI AND ANOTHER—RESPONDENTS
Civil Procedure Code (Act V of 1908), ss. 60, 35, O. XXI, r. 46—Exemptions from attachment are cumulative—Emoluments, if salary—Attachment of subscription to provident fund by garnishee order—Costs—Costs in test cases.

Exemptions from attachment running from sub-heads (a) to (p) of s. 60, Civil P. C., are cumulative and any man is entitled to all the benefits if he is qualified to do so.

The emoluments of the judgment-debtor known as his pay must be regarded as 'salary' for the purposes of this section as defined by the explanation.

Before the time of the payment of subscription by a judgment-debtor to a provident fund, the money does not belong to the judgment-debtor and at the time of the payment it becomes a compulsory deposit and is exempted from attachment under s. 60 (k). There is no intervening period between which a subscription by the judgment-debtor to a provident fund can be attached by a garnishee order to the Corporation in which judgment-debtor is an employee.

In test cases, no order for costs should be passed.

O. R. App. from an order of the Court of the Small Causes, Rangoon, in C. M. No. 235 of 1938.

Mr. Rafi, for the Applicant.

Mr. Dangali, for Respondent No. 1.

Order.—This is an application to revise an order passed by the Chief Judge of the Court of Small Causes in an application for a garnishee order. The judgment-debtor is an employee of the Rangoon Corporation. His salary is Rs. 120 a month. Out of this there is a compulsory deduction of Rs. 10 a month towards his provident fund. The question to be determined is how much of his salary can be attached in execution of the decree. Under s. 60, Civil P. C., certain property is exempt from attachment. After first saying what is attachable in sub-s. (1) the proviso reads: "the following particulars shall not be liable to such attachment or sale, namely" and we then get sub-heads running alphabetically from (a) to (p). The first question for consideration is whether these exemptions are cumulative or whether the judgment-debtor is confined to one only as was strongly urged. All are apparently on the same footing: (a) refers to the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-

debtor, etc.; (b) refers to tools of artisan, and where the judgment-debtor is an agriculturist, his implements of husbandry, cattle, seed-grain, etc.; and (c) refers to houses and other building belonging to an agriculturist and so on. I can see no reason whatever why an agriculturist who is exempted under this proviso should not claim exemption for his house, cattle, seed-grain, implements of husbandry, wearing-apparel, cooking vessels and so on; so, as all the sub-heads are on the same footing. I can see no reason for supposing that these exemptions are not cumulative and any man is entitled to all the benefits if he is qualified to do so.

The section has been amended by Act IX of 1937 and now sub-s. (i) of the proviso exempts

"the salary of any Public Officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary."

and an Explanation has been added: "salary" means the total monthly emoluments, excluding certain matters which are not germane to the present question. The emoluments of the judgment-debtor in the present case appear to me to be Rs. 120 a month; that is what is known as his pay and I think it must be regarded as 'salary' for the purposes of this section as defined by the explanation. This being the case, under sub-s. (i) Rs. 110 of his salary is exempt from attachment. Proceeding further down the proviso we find sub-s. (k) which exempts

"all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act for the time being applies, in so far as they are declared by the said Act not to be liable to attachment."

The Provident Funds Act now in force is dated 1925 and in this Act compulsory deposit is defined:

"Compulsory deposit" means a subscription to or deposit in, a provident fund which under the rules of the fund, is not, until the happening of some specified contingency, repayable on demand otherwise than

It is claimed that under this section the judgment-debtor is entitled to have exempted from attachment a further Rs. 10. For the decree-holder it is urged that until this money has been actually deposited in the fund, it is not a compulsory deposit so as to be free from attachment. A reference to the Provident Funds Rules at p. 130 of the Rangoon Municipal Manual shows that Provident Fund Rule 7 says:

"The Corporation shall, at the time of payment, deduct from the pay of every subscriber the amount of the subscription due from such subscriber to the pro-

vident fund and shall pay such amount into the provident fund to the credit of such subscriber."

Once this Rs. 10 has been paid into the provident fund, it is beyond the reach of the creditor and exempt from attachment. The question is whether it can be intercepted *en route*, so to say, between the disbursing officer and the fund. In my opinion, it cannot and for this I rely on the actual wording of the definition in s. 2 of the Act. It will be noticed that what are exempted from attachment under sub-s. (k) are "compulsory deposits" and there being a reference to the Provident Funds Act I think the definition of "compulsory deposit" in that Act must apply, and compulsory deposit means "a subscription to, or deposit in." This Rs. 10 never gets into the hands of the judgment-debtor. The Corporation or the disbursing officer deducts it. He deducts the amount of the subscription from the judgment-debtor's pay bill at the time of payment. Before the time of payment, the money is not the judgment-debtor's. At the time of payment the Rs. 10 becomes a subscription to the fund and a subscription to the fund is a compulsory deposit and therefore exempted. There seems to me no intervening moment when it is susceptible of attachment. In consequence, I hold that under sub-s. (k) the judgment-debtor is entitled to claim exemption for another Rs. 10 making his total exemption Rs. 120; that is equal to his total salary and there is no balance left available for attachment. I therefore set aside the order passed by the Chief Judge of the Court of Small Causes directing the Corporation to pay into Court Rs. 10 a month from the judgment-debtor's salary. I am given to understand that this is a test case. I think, therefore, that there should be no order for costs.

D.

Order set aside.

PRIVY COUNCIL

Appeal from the Court of Criminal
Appeal for Trinidad and Tobago
May 12, 1939

LORD RUSSELL OF KILLOWEN, LORD
ROMBE AND SIR GEORGE RANKIN
TUBAL URIAH BUTLER—
APPELLANT

versus

THE KING—RESPONDENT

Criminal Appeal Ordinance of Trinidad and Tobago (1931)—Court of Criminal Appeal established under—Whether branch of Supreme Court

—Person appointed as acting Judge under s. 7 (1) of Judicature Ordinance of Trinidad and Tobago (1880) as amended in 1938, if can act as member of Court of Criminal Appeal—Court of Criminal Appeal composed of Chief Justice and two Acting Judges held not properly constituted—Interpretation Ordinance (XIX of 1933), ss. 17, 20—Applicability—Constitution of Court.

The Court of Criminal Appeal established under Criminal Appeal Ordinance, 1931, of Trinidad and Tobago, is not established as a branch of the existing Supreme Court; but as a separate Court of Record, the Judges of which are stated to be the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago. The Criminal Appeal Ordinance contains no power to appoint a person to act as a Judge of the Court of Criminal Appeal. [p. 463, col. 2.]

A person appointed under s. 7 (3) of the Judicature Ordinance of Trinidad and Tobago (1880), is not a Puisne Judge of Trinidad and Tobago, nor is he under that provision invested with any powers beyond such as are necessary to enable him to act effectively as a Judge of the Supreme Court. Such person cannot, therefore sit as a member of Court of Criminal Appeal. [p. 464, col. 2.]

Sections 17 and 20 of the Interpretation Ordinance, 1933, deal with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him. [*ibid*]

An acting Judge is not a Puisne Judge of the Colony, for the number of Puisne Judges is fixed and cannot be exceeded. Moreover, they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting Judges. [p. 465, col. 1.]

Where, therefore, an appeal from conviction of the accused is heard by the Court of Criminal Appeal composed of the Chief Justice of the Colony and two acting Judges of the Supreme Court appointed under s. 7 (3) of the Judicature Ordinance, the Court is not properly constituted and its judgment is void and of no effect.

Sir Stafford Cripps, K. C. and Mr. G. Gramville Slack, for the Appellant.

The Attorney-General, Kenneth Preedy, for the Respondent.

Lord Russell of Killowen.—The appellant was indicted on a charge of sedition, before Mr. Justice Robinson and a jury, in the Supreme Court of Trinidad and Tobago. He was found guilty and was on December 16, 1937, sentenced to two years' imprisonment with hard labour. He appealed from the conviction to the Court of Criminal Appeal of that Colony. The appeal was heard and dismissed on January 28, 1938.

The appellant then petitioned His Majesty in Council for special leave to appeal *in forma pauperis* alleging, amongst other grounds, that the Court which had heard and dismissed his appeal was not a duly constituted Court; and by Order in Council dated July 28, 1938, leave was granted to him to appeal against the judgment of January 28, 1938. "the appeal

to be limited to the sole question whether the said Court was duly constituted according to the provisions of the Criminal Appeal Ordinance, 1931 (No. 31 of 1931), of Trinidad and Tobago having regard to the fact that the Court included two acting Judges."

Their Lordships are accordingly in no way concerned with the merits of the appellant's appeal from his conviction. They have only to consider whether the appeal was heard by a Tribunal capable of adjudicating upon it.

The Court which heard and dismissed the appeal was composed of the Chief Justice of the Colony, acting Justice Hobson, K. O. and acting Justice Boland. The question for determination is whether the two last-named gentlemen were members of or entitled to sit in the Criminal Appeal. The solution of this question depends upon the true construction of certain ordinances.

The Judicature Ordinance, Chapter 35, is dated March 20, 1880, and (as amended by some subsequent Ordinances) provides as follows:—

"3. There shall be one Supreme Court in the Colony, which shall be a Superior Court of Record, and such Court shall be called the Supreme Court of Trinidad and Tobago.

4—(1) The Supreme Court shall consist of not more than three and not less than two Judges, of whom one shall be called the Chief Justice of Trinidad and Tobago and shall be the President of the Court, and the other or others shall be called the Puisne Judge or Puisne Judges of Trinidad and Tobago, and shall, if more than one, be called the First and Second Puisne Judges according to the terms of their respective appointments. (Substituted by 23 of 1914, s. 3.)

(2) The Court shall be deemed to be duly constituted notwithstanding any vacancy in the office of any Judge.

5. Every Judge of the Court shall be appointed by Letters Patent under the Public Seal of Colony by the Governor, in accordance with such instructions as he may receive through one of His Majesty's Principal Secretaries of State, and shall hold his office during His Majesty's pleasure, subject to any conditions contained in any regulations made by or under the authority of His Majesty for His Majesty's Colonial Service, and shall receive such salary as the Governor, with the sanction of the Legislative Council, may appoint. The acceptance by any Judge of the Court of any other office or place of profit or emolument not authorized by law shall be and be deemed *de facto* an avoidance of his office of Judge, and his salary as Judge shall cease accordingly from the time of his acceptance of such other office or place.

(6) Any act required or authorized to be done by, before, or in the name of the Chief Justice may be done by, before, or in the name of a Puisne Judge of the Court in case of the absence on leave or otherwise, indisposition, or inability to attend of the Chief Justice.

7.—(1) Whenever the office of any Judge of the Court is vacant, or whenever any Judge is absent from the Colony, or is, by reason of illness, interest in any cause or matter, or for any other reason, incapable of acting, or whenever in the opinion of the Governor the due administration of justice so requires, the Governor may, in the name of His Majesty, by Letters Patent under the Public Seal of the Colony, appoint some person, being a Barrister-at-Law of five years' standing at least to act as Judge of the Court.

(2) Every such appointment shall be for such time, or for the trial or hearing of such causes or matters, or otherwise, as may be specified in the instrument of appointment.

(3) Every person so appointed and acting under such appointment shall, so far as may be necessary for the purposes of his appointment, have all the powers of a Judge of the Court, and all acts done within the scope of his appointment by any person so appointed and acting as aforesaid shall be as valid as if done by a Judge, whether in Court or Chambers or otherwise."

By the Judicature (Amendment) Ordinance, 1936, the following sections were substituted for the 4th and 5th sections above set out, viz.:

"4.—(1) The Supreme Court shall consist of four Judges, one of whom shall be designated the Chief Justice of Trinidad and Tobago and the others the Puisne Judges of Trinidad and Tobago.

The Chief Justice shall be the President of the said Court. The Puisne Judges shall be called the First, Second and Third Puisne Judges according to the terms of their respective appointments.

(2) The Court shall be deemed to be duly constituted notwithstanding any vacancy in the office of any Judge.

5. Every Judge of the Court shall be appointed by Letters Patent under the Public Seal of the Colony by the Governor, in accordance with such instructions as he may receive through one of His Majesty's Principal Secretaries of State, and shall hold his office during His Majesty's pleasure, subject to any conditions contained in any regulations made by or under the authority of His Majesty for His Majesty's Colonial Service, and shall receive such salary as the Governor, with the sanction of the Legislative Council, may appoint. No Judge shall accept or perform any other office or place of profit or emolument not authorized by law without the consent of the Governor: Provided that this restriction shall not apply to a Judge temporarily appointed to act as such under s. 7 of this Ordinance."

The Supreme Court of the Colony accordingly now consists of four Judges, viz., the Chief Justice and the First, Second and Third Puisne Judges.

In the year 1931, there was enacted an Ordinance to establish in the Colony a Court of Criminal Appeal, viz., the Criminal Appeal Ordinance, 1931. That Ordinance contained the following provisions:—

"3.—(1) There shall be a Court of Criminal Appeal in the Colony; and the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago shall be Judges of that Court.

(2) For the purpose of hearing and determining appeals under this Ordinance, and for the purpose

of any other proceedings under this Ordinance, the Court of Criminal Appeal shall be summoned in accordance with directions given by the Chief Justice, and the Court shall be duly constituted if it consists of three Judges.

The Court shall sit in Port of Spain except in cases where the Chief Justice gives special directions that it shall sit at some other place.

(3) The Chief Justice, if present, and in his absence the senior member of the Court, shall be President of the Court.

(4) A Judge of the Court of Criminal Appeal shall not sit as a Judge on the hearing of any appeal, or on the hearing of any application for leave to appeal, against a verdict given or sentence passed at a trial at which he presided, or on the consideration of any point reserved by him under the provisions of the Criminal Procedure Ordinance, Chap. 5.

(5) The determination of any question before the Court of Criminal Appeal shall be according to the opinion of the majority of the members of the Court hearing the case.

(6) Unless the Court direct to the contrary in cases where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the President of the Court or such other member of the Court hearing the case as the President of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

(7) The Court of Criminal Appeal shall be a superior Court of Record, and shall, for the purposes of, and subject to, the provisions of this Ordinance, have full power to determine, in accordance with this Ordinance, any questions necessary to be determined for the purpose of doing justice in the case before the Court.

(8) Any direction which may be given by the Chief Justice under this section may, in the event of any vacancy in that office or in the event of the incapacity of the Chief Justice to act from any reason, be given by the senior Judge of the Court of Criminal Appeal."

It is to be observed that the Court so established is not established as a branch of the existing Supreme Court; but as a separate Court of Record, the Judges of which are stated to be "the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago." It is further to be observed that the Criminal Appeal Ordinance contains no power to appoint a person to act as a Judge of the Court of Criminal Appeal.

The critical point now becomes apparent. Is a person who has been appointed under s. 7 of the Judicature Ordinance "to act as Judge of the Supreme Court" a member of the Court of Criminal Appeal or capable of acting as such?

The Letters Patent appointing Mr. Hobson to be acting Justice ran thus:—

"Whereas by s. 7 of the Judicature Ordinance, Chap. XXXV, it is among other things provided that whenever in the opinion of the Governor the due administration of justice so requires the

Governor may, in the name of His Majesty, by Letters Patent under the Public Seal of the Colony, appoint some person, being a Barrister-at-Law of five years' standing at least to act as Judge of the Supreme Court;

And whereas it is expedient to appoint some person to act as a Judge of the Supreme Court for the purpose of hearing and determining the appeal of Tubal Uriah Buz Butler to the Court of Criminal Appeal in the case of *The King v. Tubal Uriah Buz Butler* for sedition;

Know ye therefore by these presents that we being well-satisfied of the loyalty, integrity and ability of John Davidson Hobson, Esquire, B. A., K. C., do hereby appoint the said John Davidson Hobson to act as Judge of the Supreme Court and of the Court of Criminal Appeal of the said Colony as from January 24, 1938, for the purpose of hearing and determining the said appeal of the said Tubal Uriah Buz Butler, and for that purpose to have, hold, exercise and enjoy the said office and place, together with all rights, privileges and advantages thereunto belonging or appertaining."

The letters patent appointing Mr. Boland were in identical language.

It seems plain to their Lordships that if the acting Judges were members of the Court of Criminal Appeal or were capable of sitting therein, that result can have flowed only from their having been appointed to act as Judges of the Supreme Court, for no power existed to appoint them to act simply as Judges of the Court of Criminal Appeal, or to appoint them for the hearing of a specified matter in that Court.

It is said on behalf of the respondent that the result does flow from their appointment to act as Judges of the Supreme Court, because under s. 7 (3) of the Judicature Ordinance, every person so appointed is given all the powers of a Judge of the Supreme Court, and that one of the powers thus given is the power of a Judge of the Supreme Court to sit and adjudicate in the Court of Criminal Appeal.

Their Lordships are unable to accept this contention. The powers conferred by s. 7 (3) are the powers exercisable by a Judge of the Supreme Court when he is acting in that capacity. Those are the powers which are to be exercisable by the appointee when he is acting in the same capacity. They are only conferred upon him "so far as may be necessary for the purpose of his appointment", i. e., his appointment to act as a Judge of the Supreme Court; and it is the acts done by a person "acting as aforesaid" which are to be as valid as if done by a Judge. Nor is it true to say that one of the powers of a Judge of the Supreme Court is the power to sit and adjudicate in the Court of Criminal Appeal. That power is deriv-

ed only from the fact that the constituent members of that Court are, by enactment, the individuals who are the Chief Justice and the Puisne Judges of Trinidad and Tobago. A person appointed under s. 7 (3) of the Judicature Ordinance is not a Puisne Judge of Trinidad and Tobago, nor is he under that provision invested with any powers beyond such as are necessary to enable him to act effectively as a Judge of the Supreme Court.

Two further contentions were advanced on behalf of the respondent, based upon ss 17 and 20 of the Interpretation Ordinance, 1933 (No. 19 of 1933). Those sections provide as follows:—

"Section 17. Where by or under any law, any powers are conferred or any duties are imposed upon a public officer, the Governor may direct that if during any period owing to absence or inability to act from illness or any other cause such public officer shall be unable to exercise the powers or perform the duties of his office in any place under his jurisdiction or control, such powers shall be had and may be exercised and such duties shall be performed in such place by the person named by or by the public officer holding the office designated by the Governor; and thereupon such person or public officer, during any period as aforesaid, shall have and may exercise the powers and shall perform the duties aforesaid, subject to such conditions, exceptions and qualifications as the Governor may direct—

Section 20.—Where any law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where any law confers a power or imposes a duty on the holder of an office, as such, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder of the office for the time being or by a person duly appointed to act for him."

It was said that the case was covered by one or other of these sections: but quite plainly neither section can apply. Each section deals with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him. In the present case neither Mr. Hobson nor Mr. Boland was appointed to take any one's place or to act as a substitute for any individual.

Nor can the respondent derive any help from the decision of their Lordships' Board which was cited, *viz.*, *Ex parte Marais*, (1) which at most might be an authority to establish that a person appointed to act as a Judge of the Supreme Court is a Judge of the Supreme Court. But it falls far short of establishing the proposition that a person appointed so to act is a member of or entitled to

in a Court, the Judges of which, it is enacted, shall be the Chief Justice and the Puisne Judges of the Colony. An acting Judge is not a Puisne Judge of the Colony, for the number of Puisne Judges is fixed and cannot be exceeded. Moreover, they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting Judges.

For the reasons indicated, their Lordships are of opinion, that the Court which purported to adjudicate upon the appellant's appeal from his conviction was not properly constituted as the Court of Criminal Appeal in the Colony. It had no jurisdiction to deal with the matter. The appeal from the conviction has accordingly never been heard. This appeal should therefore be allowed and the judgment of the Chief Justice and the two acting Judges of January 28, 1938, should be declared to be void and of no effect. Their Lordships will humbly advise His Majesty accordingly.

B.

Appeal allowed.

Solicitors for the Appellant: Messrs. Hy. S. L. Polak & Co.

Solicitors for the Respondent: Messrs. Burchells.

MADRAS HIGH COURT

Special Bench

O. P. No. 146 of 1938

March 7, 1939

LEACH, C. J., GENTLE AND SOMAYYA, JJ.

COMMISSIONER OF INCOME-TAX,

MADRAS—APPLICANT

versus

VOORA SREERAMULU CHETTY

—RESPONDENT

Income Tax Act (XI of 1922), s. 66-A (2)—Commissioner refusing to state case on question arising under s. 25 (3)—Assessee applying to High Court under s. 66 (3)—Case referred to Full Bench—On receipt of answer, Bench dealing with application under s. 66 (3) directing Commissioner to state case on point of law—High Court, if can grant certificate under s. 66-A (2) or under cl. 40, Letters Patent (Mad.)

Assessee applied to the Commissioner of Income-tax to state a case on a question arising under s. 25 (3), Income Tax Act. The Commissioner refused to state a case on the ground that the order was not prejudicial within the meaning of s. 66 (2) read with s. 33. The assessee then applied to the High Court under s. 66 (3). The High Court made a reference to a Full Bench of five Judges and the answer given to the reference was that an order refusing to interfere with a prejudicial order was itself prejudicial. On receipt of the answer given by the Full Bench to the question referred, the Bench dealing with the petition directed the Commissioner of Income-tax to state a case on the point of law involved.

Held, that the High Court had no jurisdiction to grant a certificate under s. 66-A (2), in the matter of permitting an appeal to His Majesty in Council:

Held, also that the direction which was given to the Commissioner of Income-tax to state a case was an interlocutory order in a matter in which the Court was required to act in an advisory capacity and consequently the High Court had no authority to grant a certificate permitting an appeal to His Majesty in Council under cl. 40 of the Letters Patent (Mad.) 74 Ind. Cas. 469 (2) and 127 Ind. Cas. 473 (3), relied on.

O. P. for leave to appeal to His Majesty in Council from the judgment, reported in 184 Ind. Cas. 268.

Mr. M. Patanjali Sastri, for the Applicant.

Mr. K. Bhimasankaram, for the Respondent.

Leach, C. J.—This is an application for a certificate permitting an appeal to His Majesty in Council from an order of this Court in an income-tax matter. The respondent has taken the preliminary objection that this Court has no power to grant a certificate in this case. The respondent applied to the Commissioner of Income-tax to state a case on a question arising under s. 25 (3), Income Tax Act. The Commissioner relying on the decision of this Court in *Venkatachalam Chettiar v. Commissioner of Income-tax, Madras* (1) refused to state a case on the ground that the order was not prejudicial within the meaning of s. 66 (2) read with s. 33. In *Venkatachalam Chettiar v. Commissioner of Income-tax, Madras* (1) an application was filed in the office of the Income-tax Officer for a refund of income-tax under the provisions of s. 48 of the Act. The application was rejected and the Commissioner refused to interfere by an order under s. 33. The applicant then applied to this Court under s. 66 (3). As the order of the Commissioner was not one enhancing the assessment and as it was considered that it was not "prejudicial" to the petitioner, the Court held that the application by him to the Commissioner under s. 66 (2) was incompetent. As some doubt was felt as to the correctness of this decision when the case out of which the present application arises came before the Court, a reference was made to a Full Bench of five Judges and the answer given to the reference was that an order refusing to interfere with a prejudicial order was itself prejudicial. Consequently, it was held that *Venkatachalam Chettiar v. Commissioner of* (1) 58 M 367; 156 Ind. Cas. 64; 68 M L J 227; 41 L W 329; A I R 1935 Mad. 379; (1935) M W N 576; 7 R M 624 (F B).

Income tax, Madras (1) had been wrongly decided. On receipt of the answer given by the Full Bench to the question referred, the Bench dealing with the petition directed the Commissioner of Income-tax to state a case on the point of law involved. The Commissioner of Income-tax desires to challenge the correctness of the decision of the Full Bench in an appeal to His Majesty in Council.

Section 66-A (2) provides that an appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under s. 66 in a case which the High Court certifies to be a fit one for appeal. Mr. Patanjali Sastri, on behalf of the Commissioner of Income-tax, concedes that the Court has no jurisdiction to grant a certificate under s. 66-A (2), but says that it has power to do so under cl. 40, Letters Patent. Clause 40 has to be read in conjunction with cl. 39. Clause 39 gives a right of appeal to the Privy Council in a matter not being of criminal jurisdiction, from a final judgment, decree or order made on appeal and from a final judgment, decree or order made in the exercise of original jurisdiction by Judges of the High Court or of a Division Court from which an appeal does not lie to the High Court under cl. 15, Letters Patent. Then follows a proviso to the same effect as the provisions of ss. 109 and 110, Civil P. O. Clause 40 provides that the Court, at its discretion may grant leave to appeal from a preliminary or interlocutory judgment, decree, or order, in a proceeding contemplated by cl. 39, subject to the same rules, regulations and limitations which apply to appeals from final judgments, decrees or orders.

In *Tata Iron and Steel Co., Ltd. v. Chief Revenue Authority of Bombay* (2) the Judicial Committee held that an appeal did not lie under cl. 39, Letters Patent of the Bombay High Court (which corresponds to cl. 39, Letters Patent of this Court) from a decision of the High Court upon a case stated and referred to the Court by the Income Tax Act, 1918, since the decision was merely advisory and therefore was not a final judgment, decree, or order within the meaning of the clause. In that case it was not argued that the decision was an interlocutory judgment, order or decree within the meaning of cl. 40, but the argument is advanced here. It is said that the

judgment of this Court in the Full Bench reference constitutes an interlocutory judgment within the meaning of that clause and that the order directing the Commissioner of Income-tax to state a case based on the judgment of the Full Bench is also within the clause. In my opinion, these contentions cannot be maintained. If there is no appeal from a final order in an income-tax matter, apart, of course, from the appeal now given under s. 66-A (2), it is difficult to understand how there can be an appeal from an interlocutory order in such a matter. I regard the direction which was given to the Commissioner of Income-tax to state a case as being an interlocutory order in a matter in which the Court was required to act in an advisory capacity and the reference to the Full Bench formed part of the interlocutory proceedings. The *Tata case* (2) is final on the question whether there is an appeal when the Court is acting merely in an advisory capacity under the Income Tax Act, and it covers the present case.

The opinion which I have expressed receives support from the decisions in *E. M. Chettiar Firm v. Commissioner of Income-tax* (3) and *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi* (4) and Mr. Patanjali Sastri admits that this Court has followed the decision in *E. M. Chettiar Firm v. Commissioner of Income-tax* (3) in an unreported case. There is a decision of the Lahore High Court *Feroze Shah v. Commissioner of Income-tax, Punjab* (5) which conflicts with the decisions I have just mentioned, but it is not necessary to discuss it because we are bound by the decision of this Court. For these reasons I would hold that the objection taken by the respondent is well founded and that as the case now stands this Court has no jurisdiction to grant a certificate. The respondent is entitled to the usual costs, Rs. 100.

Gentle, J.—I agree and wish to add a few words. It is conceded that under s. 66-A (2), Income Tax Act, there is no authority for this Court to grant a certificate in this matter permitting an appeal to His Majesty in Council and the application is really

(3) 8 R 435; 137 Ind. Cas. 473; A I R 1930 Rang. 274; Ind. Rul. (1930) Rang. 377.

(4) 2 I T R 439; 106 Ind. Cas. 156; A I R 1927 P C 242; 54 I A 421; 9 L 284; 4 O W N 1053, 8 P L T 791; 25 A L J 974; 53 M L J 819; 47 O L J 1; 30 Bom. L R 60; I L T 40 Lah 1; 32 O W N 237; 29 P L R 37; (1928) M W N 95; 27 L W 179 (P O).

(5) 12 L 166; 132 Ind. Cas. 704; A I R 1931 Lah. 138; 32 P L R 234; Ind. Rul. (1931) Lah. 672.

(2) 50 I A 212; 74 Ind. Cas. 469; A I R 1923 P C 148; 47 B 724; 21 A L J 675; 25 Bom. L R 908; (1923) M W N 603; 45 M L J 295; 18 L W 372; 9 O & A L R 743; 53 M L T 301; 28 O W N 307; 39 O L J 16 (P O).

based upon the provisions of cl. 40, Letters Patent. This clause does provide an appeal from a preliminary or interlocutory decision "as aforesaid." "As aforesaid," it is conceded by Mr. Patanjali Sastri, refers to the proceedings contemplated by cl. 39, Letters Patent. In my opinion this matter is not a final judgment, decree or order within the contemplation of cl. 39. Since it has been held by their Lordships of the Judicial Committee in *Tata Iron and Steel Co., Ltd. v. Chief Revenue Authority of Bombay* (2) that there is no appeal under cl. 39, Letters Patent, from a decision of the High Court in an income-tax matter it must follow that there can be no appeal and no authority for this Court to grant a certificate permitting an appeal to His Majesty in Council under the provisions of cl. 40, Letters Patent. For these reasons I agree with the views expressed by my Lord, the Chief Justice that this application should be dismissed.

Somayya, J.—I agree.

N.D.

Application dismissed.

OUDH CHIEF COURT

Second Civil Appeal No. 221 of 1936

November 20, 1939

THOMAS, C. J. AND ZIA-UL HASAN, J.

B. KANHAIYA LAL AND OTHERS—

DEFENDANTS—APPELLANTS

versus

HAMID ALI—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 24—Distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction, if can be made—Suits Valuation Act (VII of 1887), s. 11—Objection to jurisdiction not raised in lower Courts—Cannot be raised in second appeal—Fact that appeal had to be brought in Subordinate Court instead of in High Court, whether prejudicially affects its disposal—Wajib-ul-arz—If binds riyayas not parties to it—U. P. Municipalities Act (11 of 1916), s. 337—Declaration that certain locality is notified area—Proprietors, if divested of their proprietary rights—Landlord and tenant—Abandonment—Land given for residential purpose to riyaya—Its dedication to idol and allowing Thakardwara to be built on it amounts to abandonment—S. 62 (f), Easements Act (V of 1882), also applies to such case—Estoppel—Acquiescence—Act of building not bona fide—Plea, if available.

So far as s. 24, Civil P. C. is concerned, there is no reason to make a distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction in a Court trying a suit. [p. 472, col. 1] [Case-law referred to.]

Where objection to jurisdiction is not raised either in the trial Court or in the Appellate Court, it cannot be allowed to be raised in second appeal.

The mere fact that an appeal had to be brought in a Subordinate Court instead of the High Court cannot be held to have prejudicially affected the disposal of the appeal on the merits. [p. 473, col. 1.] [Case-law relied on.]

The fact that the riyayas in the abadi were not parties to the *wajib-ul-arz* is no ground for rejecting the *wajib-ul-arz*. It is binding on the riyayas. 181 Ind. Cas. 70 (17), relied on.

There is absolutely no authority for the contention that the declaration that a certain locality is a notified area divests the proprietors of the land of their proprietary rights Section 337 of the U. P. Municipalities Act is not at all an authority for this proposition. [p. 474, col. 2.]

Where a land is given to a riyaya for residential purpose, the execution of a deed of *waqf* in respect of the land in favour of a deity, by the riyaya and his allowing others to build a Thakurdwara on it amounts to an abandonment and the landlord has a right of re-entry. The case also clearly falls under s. 62 (f) of the Easements Act which lays down that a license is deemed to be revoked where the licence is granted for a specific purpose and the purpose is attained or abandoned or becomes impracticable. [p. 475, col. 1.]

Where an act of a person of building upon the land is not *bona fide*, he cannot avail himself of the plea of estoppel by acquiescence.

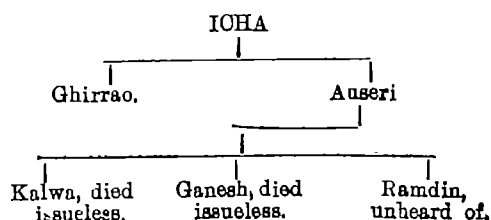
S. O. A. against the decree of the District Judge, Lucknow, dated January 18, 1936.

Messrs. S. C. Das, S. N. Srivastava and R. B. Lal, for the Appellants.

Messrs. H. Husain and Nazir-ud-din, for the Respondent.

Judgment.—This is a second appeal against a decree of the learned District Judge of Lucknow who concurred with the learned Civil Judge in decreeing the plaintiff-respondent's suit for possession of a piece of *abadi* land in village Pihani, District Hardoi.

The case has a long history. The suit was originally filed by the plaintiff on December 12, 1927, in the Court of the Munsif, Shahabad against Babu Kanhaiya Lal and Babu Debi Dayal, defendants Nos. 1 and 2 only. He claimed to be the sole proprietor of the land in dispute as *zemindar* of village Pihani Khurd and alleged that the plot was originally occupied by the thatched house of Icha Kori who lived as a riyaya of the plaintiff's ancestors and died about forty years before the suit. The following pedigree of Icha was set up.



It was stated that after Icha's death, his sons Ghirrao and Auseri continued to live in the thatched house in the same capacity as their father, Auseri was succeeded by Ram Din, Ganesh and Kalwa, that some twenty years before the suit Ganesh-Kalwa died issueless and ten years later Ram Din gave up his residence in the house and had not been heard of since. On Ghirrao dying issueless in 1920 the house became dilapidated and according to the custom of the village reverted with the site to the *zemindar* who took possession of it. It was further stated that the plaintiff's grandfather Mir Mohsin Ali, the sole *zemindar* of the land died in 1923 leaving the plaintiff's father Mohammad Abbas as his only heir but Mohammad Abbas also died a few months later leaving the plaintiff aged six years as his heir. The plaintiff's property was looked after by his grandmother, *Mst. Zakiya Begam*, widow of Mohsin Ali, who was an old *pardanashin* lady. In September 1927, she came to know that the defendants were constructing a *pucca* house on the land in suit and though she tried through her servants to dissuade them, the defendants paid no heed to their remonstrance. It was stated in the plaint that the defendants claimed to have obtained some sort of deed in respect of the land from the *rayats* of the house but that it was void and ineffectual as against the plaintiff *zemindar*. It was stated that the house and the site came into the possession of Mir Mohsin Ali according to the custom of the village on the house being abandoned. On these allegations the following reliefs were claimed by the plaintiff—

- (a) that a decree for actual proprietary possession over the land—compound No. 1453 and House No. 834 (recent settlement)/1214 (old settlement) be passed in favour of the plaintiff,
- (b) that defendants be directed to remove the materials of the building from the plot of land within the time to be fixed by the Court, and in case of their failing to do so, possession may be awarded along with the materials,
- (c) A perpetual injunction be issued to the defendants so that they may refrain from raising any construction on the land in dispute.

The suit was contested by the defendants who denied that the plaintiff was the sole proprietor of Mohalla Murid Khani in which the land in suit was situated.

They admitted that Icha was a *riyaya* of the *zemindar* but alleged that Ram Din's son was still alive and that Ghirrao died only two years before suit. They set up a possessory mortgage in favour of defendant No. 1 by Ghirrao and Ram Din and stated that they were in possession as such mortgagees. They further stated that in 1924 they started the present building for installing Thakurji in it and had actually installed the idol there. They also denied the custom set up by the plaintiff and further pleaded that if such a custom did exist, it was unenforceable as Pibani was a big town.

This was the gist of the defence set up by the defendants. In oral pleadings, however, on behalf of the plaintiff it was denied that any descendant of Icha was living and it was pleaded that the plaintiff had got the right of re-entry by reason of the licence granted to Icha having determined. It was further said that in any case the house was abandoned and gave the right of re-entry to the plaintiff. On behalf of the defendants it was stated that Ram Din's son Bihari was living and as the defendants denied that the plaintiff was the sole proprietor of the Mohalla a question arose as to whether the female members of Mir Mohsin Ali's family were excluded from inheritance by a custom which was set up by the plaintiff.

The following issues were framed in the case by the learned Munsif—

1. Is the plaintiff exclusive owner of the land in dispute? If not, what is its effect?
2. Is there any tribal or family custom obtaining in the Shia community or the plaintiff's family according to which the daughters and the widows are excluded from inheritance?
3. Does the land of the building in dispute escheat to the plaintiff as alleged?
4. Were the rights of Ghirrao, Ram Din and his brothers in the house over the land in dispute non-transferable, according to the custom set up by the plaintiff? If not, what is its effect?
5. Is the suit within limitation?
6. Is the suit barred by acquiescence as alleged by the defendants?
7. Is the plaintiff's suit for re-entry not maintainable as alleged?
8. To what relief is the plaintiff entitled?
9. Did Behari execute any deed of *waqf* in favour of Sri Thakurji on Janu.

ary 13, 1928, as alleged? If so, what is its effect?

10. Had the defendants no right to construct the Thakurdwara in place of a residential house without the plaintiff's permission?

The last two issues require some explanation. It appears that a few days before the issues were settled in the case. Behari, the alleged son of Ram Din, executed a deed of *waqf* in favour of Sri Thakurji, and appointed one Shiam Sundar as trustee. This deed was registered on January 13, 1928, and the issues were framed on January 24, 1928. On April 10 the plaintiff applied that Sri Thakurji be added as a party to the suit but this application was disallowed on April 11. On the same day the plaintiff applied for some additional pleas, based on the execution of the deed of *waqf* by Behari and on the question of the construction of the Thakurdwara, being allowed to be added. This application was granted and it was in consequence of this that Issues Nos. 9 and 10 were added.

In the course of the trial the defendants were allowed to produce evidence on some points which had never been raised before by them, namely, that the building in question was not a Thakurdwara but only a residential house, that the land in suit stood in Mohalla Katra Bazar and not in Murid Khani and that Ram Din left besides Behari, another son named Kali.

The findings of the learned Munsif were that the custom of the exclusion of daughters and widows from inheritance in Mohsin Ali's family was not established, that the plaintiff was not the sole owner of the land in suit, that Behari and Kali were sons of Ram Din, that the plaintiff had no right of re-entry, that Pihani being a town, Ghirrao and Ram Din had transferable rights and therefore the mortgage in favour of the defendant No. 1 was valid, that the defendants had a right to remain in possession of the house so long as the mortgage subsisted, that the *waqf* was inoperative as Kali was not a party to it and as it was not proved that the donee accepted the gift. He also held that the suit was barred not only by acquiescence on the part of the plaintiff but also on the ground that *rayats* could transfer their houses in Pihani and the transferees could construct buildings on the land without the permission of the *zemindar*. As a result of these findings, the suit was dismissed.

Against this decree the plaintiff appeal-

ed and the learned District Judge reversed the findings of the trial Court and decreed the plaintiff's suit. His findings were that Kali was not the son of Ram Din, that the plaintiff could eject the defendants even as one of the co-sharers of the land, that the defendants had no right to remain in occupation of the land as mortgagees, Behari, the only son of Ram Din having given up his interest in the land to Sri Thakurji by means of the *waqf* and that by the execution of the deed of *waqf* Behari abandoned the land and the plaintiff became entitled to re-entry. He also held that the construction of a religious building in place of a residential dwelling also entitled the landlord to re-entry upon the land.

The defendants filed a second appeal in this Court and a Bench of this Court remanded the case to the District Judge for findings on questions of acquiescence and the custom of transferability prevailing in Pihani. On findings on these issues being submitted by the lower Court, the defendants' appeal was dismissed and it was held that the deed of *waqf* amounted to abandonment by Behari and gave a right of re-entry to the plaintiff. The defendants went upto the Privy Council and their Lordships set aside the decisions of the Courts in India on a preliminary question and remanded the case for re-trial. The material portion of their Lordships' order is as follows:—

"(3) That the case ought to be remitted to the said Chief Court for that Court to give directions for a new trial to be held with reference to the effect of the *waqf* dated January 11, 1928, made in favour of Sri Thakurji Maharaj in which new trial the said Thakurji Maharaj or his representative or other appropriate parties ought to be added.

(3) That the costs which have already been incurred in the Courts below ought to be left to the discretion of the said Chief Court to deal with after the new trial has been concluded whether or not there be an appeal after such trial to the said Chief Court."

In compliance with this order the case was sent by this Court for re-trial to the late Mr. Abdul Azim Siddiqi, a Civil Judge. The learned Civil Judge impleaded Thakurji Maharaj as a party to the case. Kali and Behari also applied to be made parties. The learned Civil Judge allowed Kali to be made a party but rejected the application of Behari. The newly added defendants, namely, Sri Thakurji and Kali filed written statements and defendants Nos. 1 and 2 were also allowed to put in further written statements in view of the amendments made to the plaint. On

November 7, 1933, Sri Takurji, defendant, filed a written statement supporting the case of defendants Nos. 1 and 2 in every particular. It was admitted that the defendant No. 3 was in possession of the building since 1924, that Behari executed a deed of *waqf* in favour of the idol in 1928, and that the building belonged to the idol and the plaintiff had no cause of action. On November 28, 1933, however, statements of parties' Counsel were taken and the Counsel for defendant No. 3 stated as follows:—

"I disclaim all proprietary title in the land in suit or in the building either under the *waqf* or by virtue of dedication. Kanhaiya Lal, defendant No. 1 and defendant No. 2 have, however, installed the idol in the building which is not a public temple and so long as Kanhaiya Lal and defendant No. 2 are there, the idol will remain there. The position of Sri Takurji is that of a permissive occupant or a licensee on behalf of Kanhaiya Lal, defendant No. 1 and defendant No. 2. Defendant No. 3 claims no more title than that."

Counsel for defendants Nos. 1 and 2 also made a statement which was in some respects at variance with the said defendants' case as put in the written statement. He stated:—

"The building is not a public temple. It is a residential house. No part of it is a public temple. In a portion of the building the defendants Nos. 1 and 2 have placed their family idols for their private worship. There has been no dedication of any portion of the building. The position is the same as in all Hindu houses. People place their family gods in a room for private worship. I claim no sanctity for any portion of the building. The entire building including the portion where the family gods are placed is a common residential house. My clients claim no more rights in the building than of a mortgagee in possession. On redemption the house will be made over to the redeemer as it stands."

Kali, defendant No. 4, denied the title of the plaintiff and alleged that Icha and his descendants were proprietors of the land as well as the house. He stated that he was the posthumous son of Ram Din born of *Mst.* Itwara and he denied the deed of *waqf* which he said did not affect his rights in the house at all. He also pleaded the bar of acquiescence and limitation.

The learned Civil Judge framed the following issues after taking into consideration all the pleas raised by the parties.—

1. Has this Court got no jurisdiction to try this case?

2. What is the valuation of this suit for the purposes of jurisdiction?

3 (a) Is the plaintiff a sole owner or part owner of the plot in suit and entitled to maintain this suit?

(b) Were Icha and his successors full owners of the land in suit as alleged? If not, what was their status?

4. Are Behari and Kali, the legitimate sons of Ram Din?

5 (a) Did the descendants of Ram Din abandon Pihani in or about 1916?

(b) If so, did the plaintiff take possession over the ruined house of Icha in or about 1922, as alleged? If so, its effect?

(c) If not, is the plaintiff entitled to re-entry under the right of escheat as alleged?

6. Whether *ryots* in Pihani have got transferable or non-transferable rights in their houses in Pihani?

7 (a) Is the building in suit a residential house of the defendants Nos. 1 and 2?

(b) Or is it a public or private temple? If so, its effect?

8 (a) Did Behari execute the deed of *waqf* on January 11, 1928, as alleged?

(b) What is the effect of the execution of the aforesaid deed of *waqf*?

9. Is the plaint not properly signed? If so, its effect?

10. Is the plaintiff estopped by virtue of the acquiescence pleaded by the defendants?

11. Is the claim barred by time as alleged?

12. To what relief is the plaintiff entitled and against which of the defendants?

Issues Nos. 1 and 2 were tried first. On the first issue the learned Civil Judge held that he had jurisdiction to try the suit and on the second he overruled, the plea of the defence that as a building of the value of Rs. 40,000 was indirectly effected in the suit, the valuation should be Rs. 40,000, and held that the valuation put on the plaint was proper. On Issue No. 3 the learned Civil Judge held that the plaintiff was the sole owner of the plot in suit and could maintain the suit and that Icha and his successors were not owners of the land but were only *ryots* or licensees. On Issue No. 4 his finding was that Behari is the son of Ram Din but that Kali is not. Issue No. 5 (a) and (b) was decided against the plaintiff and it was held that neither did the descendants of Icha abandon Pihani in or about 1916 nor did the plaintiff's predecessor take possession as alleged. Issue No. 5 (c) was also decided against the plaintiff. On issue No. 6 it was held that Icha and his descendant had non-transferable rights in the house in suit. On Issue No. 7 (a) the learned Judge held that the defendants Nos. 1 and 2 had utterly failed to prove that the building in suit is their private residential house and on Issue No. 7 (b) it was held that for the purposes of the case it was immaterial whether the building was

a public or private temple and that the purpose of the license terminated when the temple, either a public or private one, was erected. On Issue No. 8 it was held that the execution of the deed of *waqf* by Behari was proved and that the *waqf* amounted to abandonment of the license as well as of the purpose of the license. Issue No. 9 was decided against the defendants and on Issue No. 10 it was held that the plaintiff was not estopped by acquiescence. The question of limitation was also decided in favour of the plaintiff and the suit was ultimately decreed with costs.

Against this decree the defendants appealed to the District Judge and the learned Judge after considering all the points raised before him in an elaborate judgment, dismissed the appeal.

The present appeal was filed in this Court jointly on behalf of all the four defendants but it has been argued separately before us on behalf of defendants Nos. 1 and 2 on the one hand and defendant No. 4 on the other. We shall first take up the points raised on behalf of the defendants Nos. 1 and 2.

The point that was most stressed on behalf of defendants Nos. 1 and 2 was that the trial Courts had no jurisdiction to try the suit. The plea is based on relief (b) of the plaint as originally filed which ran as follows:—

"That the defendants be directed to remove the materials of the building from the plot of land within the time fixed by the Court, otherwise possession thereof as well be granted to the plaintiff."

The argument is that as it is admitted that the building standing on the land in suit is of the value of about Rs. 40,000, the suit was much beyond the pecuniary jurisdiction of the Munsif in whose Court it was filed and further that as the suit was filed in a Court which had no jurisdiction to try it, it could not be validly transferred to the Court of the Civil Judge who tried it subsequently. The learned Counsel for the appellants relies on the following cases—

(1) *Amir Chand v. Buti Shah* (A. I. R. 1930 Lahore, 195) (1). (2) *C. Singara Mudaliar v. M. Govindaswami Chetty* (A. I. R. 1928 Madras, 400) (2) (3) *Bhupendra Kumar Chakravarti v. Purna Chandra Bose* (24 Ind. Cas. 232) (3) (4) *Ledgard v. Bull* (L. R. 13 I. A. 134) (4).

(1) A I R 1930 Lah. 195; 125 Ind. Cas. 334; 31 P. L. R. 309; Ind. Rul. (1930) Lah. 606.

(2) A I R 1928 Mad. 400; 108 Ind. Cas. 413; 54 M. L. J. 145; I. L. T. 40 Mad. 41; 27 L. W. 609.

(3) 24 Ind. Cas. 232; A I R 1914 Cal. 858.

(4) 13 I. A. 134; 9 A. 191; 4 Sar. 741; 10 Ind. Jur. 71 (P. O.).

In (1) it was held that s. 24 Civil P. C. only contemplates a transfer of a suit from one competent Court to another and that where the original Court finds that it has no jurisdiction to hear a suit, the District Judge has no jurisdiction to transfer the suit to some other Court. In the second case also it was held that a transfer cannot be made from one Court to another unless the suit has in the first instance been brought in a Court having jurisdiction and that such order, if made, is void. Similarly in (3) the Calcutta High Court held that the institution of a proceeding in a Court which has no jurisdiction to entertain it is not a valid institution of a proceeding which may thereafter be continued on transfer in a Court of competent jurisdiction. In (4) their Lordships of the Judicial Committee also held that under s. 25 Civil P. C. (corresponding to present s. 21) the superior Court cannot make an order of transfer of a case unless the Court from which transfer is sought to be made has jurisdiction to try it. On the strength of these cases it is argued that all proceedings held in the suit are null and void because the suit was originally instituted in a Court which had no jurisdiction and reliance is also placed on the case of *Rajlakshmi Dasee v. Katyayani Dasee* (I. L. R. 38 Cal., 639) (5) in which in a suit which was intentionally under-valued it was held that if a Court has no jurisdiction over the subject-matter of the litigation, its judgment and orders are mere nullities and not only voidable.

The learned Counsel for the the plaintiff-repondent replies that the principle relied on on behalf of the appellants is applicable only to those cases in which there is lack of inherent jurisdiction in the Court and not to those in which there is merely a lack of pecuniary or territorial jurisdiction. He relies on the cases of *Ram Narain v. Suraj Narain* (1934 O. W. N., 169) (6) and *Sheo Behari Lal v. Makrand Singh* (1935 O. W. N., 651) (7). In these cases no doubt a distinction was made between lack of inherent jurisdiction and lack of pecuniary or territorial jurisdiction; but this distinction was made only as regards the power of the Court executing a decree to disregard the decree. The question in both the cases was whether a Court while executing a decree can go

(5) 38 O. 639; 12 Ind. Cas. 454.

(6) 1934 O. W. N. 169; 147 Ind. Cas. 1209; A I R 1934 Oudh 75; 6 R. O. 368 (F. B.).

(7) 1935 O. W. N. 654; 155 Ind. Cas. 759; A I R 1935 Oudh 358; 7 R. O. 619 (F. B.).

behind the decree and it was held that it cannot unless the decree is passed by a Court which had no inherent jurisdiction to pass it. Moreover, in *Amir Chand v Buti Shah* (A. I R. 1930 Lahore, (1) there was want of pecuniary jurisdiction only and yet it was held that the order of transfer was bad.

We are therefore of opinion that so far as s. 24 Civil P. O. is concerned, there is no reason to make a distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction in a Court trying a suit. We, however, consider that the plea of want of jurisdiction in the trial Courts in this case cannot be accepted for more reasons than one.

In the first place, so far as Sri Thakurji, defendant No. 3 is concerned, he disclaimed all connection with the land in suit. The Counsel for defendant No. 3 made the following statement before the learned Civil Judge.

"I disclaim all proprietary title in the land in suit or in the building either under the *wagf* or by virtue of dedication. Kanhaiya Lal defendant No. 1 and defendant No. 2, however, have installed the idol in the building which is not a public temple, and so long as Kanhaiya Lal and defendant No. 2 are there, the idol will remain there. The position of Sri Thakurji is that of a permissive occupant or a licensee on behalf of Kanhaiya Lal defendant No. 1 and defendant No. 2. Defendant No. 3 claims no more title than that."

In para. 24 of his written statement also defendant No. 3 denied and repudiated the *wagf* alleged to have been made by Behari. Nor have any arguments been addressed to us on his behalf though he has been joined with the other appellants in the appeal. So far as Kali defendant No. 4 is concerned, he has been found by both the Courts below to have no connection with Icha's family. Defendants Nos. 3 and 4 have therefore no *locus standi* to put up the plea of want of jurisdiction in this appeal. As for defendants Nos. 1 and 2, they, too, cannot in our opinion be allowed to raise the plea of jurisdiction as they never raised it before either of the two trial Courts. Not only this but in para. 14 of their written statement they clearly said.—

"In para. 14 of the plaint the jurisdiction and court-fee are not disputed;" and in para. 14 of the plaint it was said that the valuation of the suit for purpose of jurisdiction is Rs. 110 that is, the valuation of land is Rs. 100 and the valuation of the injunction sought Rs. 10. Defendants Nos. 1 and 2 not only did not raise any plea of jurisdiction in the trial Court

but the judgment of the District Judge in appeal dated April 29, 1929, shows that no such plea was raised by them in arguments in the appeal against the Munsif's decree. In fact, no plea of jurisdiction was taken by them in any Court including the Privy Council. According to s. 11 of the Suits Valuation Act an objection that by reason of over-valuation or under-valuation of a suit or appeal a Court of first instance or lower Appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an Appellate Court unless (a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower Appellate Court in the memorandum of appeal to that Court, or (b) the Appellate Court is satisfied for reasons to be recorded by it in writing that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits. Now, it is clear that the requirements of cl. (a) above were not fulfilled in this case as the objection was never raised in the Court of first instance and it only remains to be seen whether the conditions requisite to make cl. (b) applicable are present, namely, whether the suit was under-valued and whether that under-valuation had prejudicially affected the disposal of the suit on its merits. On the first point we are clearly of opinion that the suit was not under-valued as the main relief sought was possession of land which was of the value of Rs. 100. The plaintiff could not have laid claim to the building constructed on the land by defendants Nos. 1 and 2 and it was only by way of precaution that in relief (b) it was prayed that if the defendants fail to remove the materials, possession of the land be awarded to the plaintiff along with those materials. The very fact that no plea of under-valuation of the claim was put forward by the defendants, but on the contrary they admitted the valuation put by the plaintiffs on the suit, shows that the defendants themselves were cognizant of the fact that the real relief sought by the plaintiff was possession of the land and not of the building. This being so, it is impossible to hold that there was under valuation in this case. Thus one of the two ingredients of cl. (b) is absent and it is not necessary to see whether or not the defendants have been

prejudicially affected by the disposal of the suit on its merits; but as the learned Counsel for the appellants has argued this point also, we may briefly express our opinion on it. Reliance is placed on *Sheoraj Singh v. Phulbasu Kuar* (A. I. R. 1925 Oudh, 561) (8) in which a Bench of the learned Judicial Commissioners held that the disposal of a suit on its merits is prejudicially affected within s. 11 of the Suits Valuation Act when that disposal is made by a District Judge while it ought to have been made by a Bench of two Judges of the Court of highest jurisdiction in a province. The learned Counsel for the respondent on the other hand relies on *Narsimham v. Subramaniam* (A. I. R. 1927 Mad. 201) (9) in which following the Full Bench decision of *Kelu Achan v. Pravathi Nethiyar* (I. L. R. 46 Mad., 631) (10) it was held that the mere fact that a party was deprived of the right of appeal on facts before the High Court cannot be held to prejudicially affect the disposal of the appeal on its merits within the terms of s. 11 of the Suits Valuation Act. We have considered these three decisions and agree with the view taken by the Madras High Court which appears to us in view of the expression "on the merits" to be more in consonance with the spirit of cl. (b) of s. 11 (1). We may note that almost all the other High Courts in India agree with the Madras High Court in holding that the mere fact that an appeal had to be brought in a Subordinate Court instead of the High Court cannot be held to have prejudicially affected the disposal of the appeal on the merits, [vide *Moolchand Motilal v. Ram Krishan* (I. L. R. 55 All., 315 F. B. (11), *Musa Imran v. Bhagwan Das* (A. I. R. 1927 All., 359), (12) *Allah Baksh v. Sheoji Maharaj* (A. I. R. 1939 Lahore, 451), (13), *Raghunath Charan Singh v. Shamo Koeri* (I. L. R. 31 Cal. 314 (14) and *Nana v. Mulchand* 21 Ind. Cas., 918 Nagpur) (15) It is thus clear that it does not lie in the mouth of defendants Nos. 1 and 2 to raise the plea of jurisdiction.

(8) A I R 1925 Oudh 561; 85 Ind. Cas. 445; 28 O C 203.

(9) A I R 1927 Mad. 201; 98 Ind. Cas. 446.

(10) 46 M 631; 73 Ind. Cas. 87; 18 L W 1; 45 M L J 135; (1923) M W N 489; A I R 1924 Mad. 6; 33 M L T 5.

(11) 55 A 315; 143 Ind. Cas. 275; (1933) A L J 222; A I R 1933 All. 249; Ind. Rul. (1933) All 215 (F B).

(12) A I R 1927 All. 359; 100 Ind. Cas. 516.

(13) A I R 1939 Lah. 451; 184 Ind. Cas 810; 41 P; L R 386; 12 R L 254.

(14) 31 O 344.

(15) 21 Ind. Cas. 918; 9 N L R 161.

Another reason why the plea raised on behalf of the appellant cannot be accepted is that the order sending the suit for trial to Mr. Abdul Azim Siddiqi was not in our opinion made under s. 24 Civil P. O. Under s. 24 (1) (b) a suit or appeal pending in any Court subordinate to the High Court or District Court may be withdrawn and transferred for trial or disposal to any other subordinate Court competent to try or dispose of the same, but in the present case, the suit when sent to Mr. Siddiqi was not "pending" in the Court of the Munsif, Shahabad. Therefore the provisions of s. 24 did not strictly apply to the transfer. The case was entrusted to Mr. Siddiqi in compliance with the order of the Privy Council and it is well-known that their Lordships of the Privy Council are not bound by the provisions of the Civil P. O. Mr. Siddiqi therefore had perfect jurisdiction to try the suit even though if it be supposed for a moment that the Munsif of Shahabad had not.

Lastly, it may be noted that the defect of under-valuation of the suit, if any, was removed by the amendment of the plaint by which the prayer for possession of the materials was deleted from relief (b). The amendment was applied for on October 16, 1933, and was allowed on October 30, 1933. We therefore overrule the plea of the appellants that the trial Courts had no jurisdiction to try the suit.

The next question argued before us was whether or not the plaintiff-respondent was the sole proprietor of the land in suit so as to have the right to bring the suit. It was argued that as the land originally belonged to the plaintiff's grandfather Mohsin Ali, the plaintiff's mother, father's brother and father's mother were in any case entitled to a share in the land along with the plaintiff. The plaintiff's case, however, was that according to the custom of his family, females were excluded from inheritance. This plea was accepted by the trial Court which held that the custom of exclusion of females was proved and this finding was confirmed by the lower Appellate Court. The finding that the plaintiff is the sole proprietor of the land in question is a finding of fact and is binding on this Court. Further, while the present appeal is incompetent on behalf of defendants Nos. 3 and 4, defendant No. 3 having disclaimed all concern with the subject-matter of the suit in the trial Court and defendant No. 4 having been held to be a bogus person, defendants Nos. 1 and 2

cannot be allowed to go back on their pleadings in the Courts below and question the lower Court's findings on the point of plaintiff's ownership of the land. The learned Munsif of Shahabad says in his judgment:—

"It is common ground that the plaintiff's suit cannot be dismissed on the ground that he is not the sole owner of the plot in suit, if the defendants are proved to be trespassers and have no right to remain in possession."

When the case went in appeal to the District Judge, the same position was taken up by Counsel for defendants Nos. 1 and 2. The learned District Judge in his judgment remarked as follows :

"The learned Counsel for the defendants-respondents has admitted that the decision of the question against the plaintiff would not operate to disentitle him to a decree if the findings on other questions in the case are in his favour... I do not propose to enter into a discussion of the question in view of the admission of the defendants' learned Counsel and my own opinion that the plaintiff being admitted to be one of the owners, is entitled to maintain the suit."

These findings were not challenged by the defendants Nos. 1 and 2 in their appeal to this Court. They cannot now be heard to say that the plaintiff has no right to bring the suit.

It was further contended that even if the plaintiff be held to be entitled to maintain the suit, he was not entitled to a decree for possession as Pihani being a town the terms of the *wajib-ul-arz* relied on by the plaintiff did not apply to it. This plea was raised on behalf of the defendants Nos. 1 and 2 before this Court in the previous appeal also but it was decided against them (*vide Kanhaiya Lal v. Hamid Ali*, 7 O. W. N. 271) (16). At p. 280 it was remarked :

"Sir Tej Bahadur Sapru who represented the defendants-appellants before us, has argued that the *wajib-ul-arz* has no effect because Pihani is a town. We find against this view. A *wajib-ul-arz* is as effective in a town as it is in a village. This particular *wajib-ul-arz* is not, according to our view so much a record of custom as a proof of the conditions governing the grant of residential sites in Pihani, and as such, is effective to establish that Icha had no right of transfer in the land and that when the land was vacated, the family had not even the right to sell the thatch of which, on the finding of fact, their house was composed."

Further on the learned Judges say :

"The *wajib-ul-arz* lays down the conditions on which these sites were granted. The fact that the grantors in the past permitted infringements of the grants would in no way affect the validity of the conditions. Sir Tej Bahadur Sapru did not lay great stress on the evidence as to custom. His case was rather that as Pihani is a town, it was for the plaintiff-respondent to prove the custom of non-

transferability. We find that it was for the plaintiff-respondent to prove that under the conditions under which Icha received the land, he had no power of transfer, but as we have already stated, we find that the plaintiff-respondent has succeeded in proving that Icha and his successors had no power of transfer."

Even if the *wajib-ul-arz* be regarded as a record of custom in the present case, it shows that Icha and his descendants whose house has been found by the lower Courts to have been *Khasposh* had no power to transfer the house.

It was also contended that the *wajib-ul-arz* does not bind the *riyayas* who were no parties to it but that to our minds is no ground for rejecting the *wajib-ul-arz*. In *Ram Din v. Balbhadar Singh* (1939 O. W. N. 372) (17) it was held that where the *wajib-ul-arz* of a village records a custom not allowing grove-holders to transfer their groves, the fact that there is no evidence that the terms of the *wajib-ul-arz* were agreed to by the grove-holders of the village or that they were since acted upon, is not a valid ground in law to reject the evidence afforded by the *wajib-ul-arz*, and there is in our view no distinction in principle between the rights of grove-holders and of *riyayas* in the *abadi*.

Reliance was further placed on s. 337 of the United Provinces Municipalities Act. It was argued that as by a notification published in the *Gazette* of July 14, 1917, Pihani was declared a notified area the *zamindars* of the village ceased to be proprietors of the *abadi* lands. We cannot accept this argument for a moment. There is absolutely no authority for the contention that the declaration that a certain locality is a notified area divests the proprietors of the land of their proprietary rights. Section 337 of the Municipalities Act is not at all an authority for this proposition and only shows that a notification under that section is intended to make administrative provision for matters described in ss. 7 and 8 of the Act, namely, matters relating to public health and convenience. It further provides that the decision of the Local Govt. that a notified area is not an agricultural village shall be final and conclusive. It is because of an area being notified under s. 337 that permission of the Notified Area Committee become necessary to make any constructions within that area and the argument of the learned Counsel for the appellants that because

(16) 7 O W N 271 at p. 280; 122 Ind. Cas. 774 Ind. Rul. (1930) Oudh 134; 14 R D 119; A I R 1930 Oudh 235.

(17) 1939 O W N 372; 181 Ind. Cas. 70; 1939 O L R 235; 11 R O 280; 1939 R D 250; A I R 1939 Oudh 210; 14 Luck. 515.

they obtained the permission of the Notified Area Committee for building the construction in question, the plaintiff has no right to get it demolished, is rebutted by s. 184 of the Municipalities Act which lays down that a sanction given shall not be beyond exempting the person to whom the sanction is given from any penalty or consequence to which he would otherwise be liable under the Municipalities Act.

"confer or extinguish any right or disability or operate as an estoppel or admission or affect any title to property or have any other legal effect whatsoever."

There is thus no force in our opinion in the argument that because Pihani has been declared to be a notified area, the plaintiff has lost his rights in the land in suit.

We now take up the plea that the plaintiff is not entitled to possession of the land as Behari, a descendant of Icha, is alive. We see no force in this argument also and agree with the Courts below that the land must be deemed to have been abandoned by Behari not only when he executed the deed of *waqf* in favour of defendant No. 3 but also by his allowing defendants Nos. 1 and 2 to build a Thakurdwara on the land. It is because defendants Nos. 1 and 2 discovered that it was a mistake to have caused Behari to execute the *waqf* deed as it would amount to abandonment of the land that they later on persuaded defendant No. 3 or his manager to disclaim every connection with the land in suit and attempts were made before us to show by various arguments that the deed of *waqf* executed by Behari was invalid. The fact, however, remains that by the execution of that deed Behari severed whatever connection he had left with the land in suit. The case also clearly falls under s. 62 (f) of the Easements Act which lays down that a license is deemed to be revoked where the licence is granted for a specific purpose and the purpose is attained or abandoned or becomes impracticable. By allowing defendants Nos. 1 and 2 to build a Thakurdwara on land, Behari has abandoned the residential purpose for which the land was given to his ancestors. The fact therefore that Behari is living does not affect the plaintiff's right of re-entry with regard to the land in suit.

Lastly, it was argued that as the plaintiff raised no objection while the building was under construction from 1924 to 1927, he is estopped by acquiescence from claiming possession now. This point also must, we consider, be decided against the appel-

lant. We have already referred to the fact that in 1923 both the father and grandfather of the plaintiff died leaving him a child of about six years of age. He was under the guardianship of his grandmother a *pardanashin* lady who was out of India in 1924 when the construction of the temple began and returned only in April, 1925. The present suit was brought in 1927. In these circumstances we cannot hold that the plaintiff's claim is barred by estoppel by acquiescence. In *Nandamani Ananga Bhima Deo Kesari Gajapatti v. Suseela Mala Patta Mahadevi* (10 O. W. N., 59) (18) it was held by their Lordships of the Privy Council that a minor is not bound by any acquiescence on the part of his guardian and in the present case we have not been referred to anything showing even that there was acquiescence on the part of the plaintiff's grandmother. We may also point out that defendants Nos. 1 and 2 were never in doubt as to the plaintiff's proprietary rights in the land in question and could not have been in doubt as to Behari's rights also. They in fact admitted the plaintiff's proprietary right in the trial Court. In these circumstances they cannot avail themselves of the plea of estoppel by acquiescence as their own act of building upon the land was not *bona fide*. The plea of acquiescence was repelled by this Court in the previous appeal also (*vide Kanhaiya Lal v. Hamid Ali*, 7 O. W. N., 271 at 287) (16).

This finishes all the points raised on behalf of defendants Nos. 1 and 2 and we are of opinion that none of them has any force. The decrees of the lower Courts for demolition of the defendant's constructions must be upheld. We are conscious of the hardship that the decree will cause to the defendants and regret it. It was for this reason that we suggested that it would be better if the parties should come to a settlement but though the plaintiff-respondent was willing to let the defendants remain in possession of the land on certain conditions which in our opinion were not unreasonable, the appellants did not choose to accept those terms.

It only remains now to consider the plea of defendant No. 4 that in determining his status, the trial Court has wrongly relied on evidence recorded before he was made a party. This plea has not been substantiated by reference to any concrete

(18) 10 O. W. N. 89; 141 Ind. Cas. 1; Ind. Rul. (1933) P. O. 7; 64 M. L. J. 1; 37 L. W. 57; A. I. R. 1933 P. O. 20; 56 O. L. J. 522; 37 Q. W. N. 237 (P. O.).

instance of the material used by the lower Courts in coming to the conclusion that defendant No. 4 is not the son of Ram Din but an imposter and since the issue about defendant No. 4's parentage was struck only after the remand of the case by their Lordships of the Privy Council, and evidence on the point was adduced after the remand it cannot be held that the decision of the Courts below as to defendant No. 4's status rests on any evidence that was recorded before he was made a party. The learned Judge of the trial Court has only referred to the pleadings of the parties as they stood before remand of the case but his decision is based on the evidence recorded after the remand.

The appeal is, therefore, dismissed and the lower Court's decree confirmed. Defendants Nos. 1 and 2 being responsible for this litigation we order that they shall pay the plaintiff-respondent's costs from the date of the suit up to this date.

s. *Appeal dismissed.*

MADRAS HIGH COURT

Appeal No. 71 of 1936

November 7, 1938

LEACH, C. J. AND MADHAVAN NAIR, J.
C. N. MADURANAYAKAM PILLAI—

APPELLANT

versus

SECRETARY OF STATE—

RESPONDENT

Basement—Right of water—Irrigation—Such right acquired by raiyat — Government, if can diminish supply for economy for other purposes of greater importance

In the Madras Presidency the *raiya*t is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Govt. or anyone else. The Govt. cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage the only obligation of the Govt. is to make an equitable distribution of water. But the *raiya*t has a claim against the Govt. when it withholds from him the water which he has a right to demand taking into consideration the supply available.

[Case-law discussed.]

It is of course manifest that the needs of the city of Madras are of every great importance and in the absence of rights in others, no one could reasonably complain of the policy of the Govt. in giving this large City a preference in the supply of water, but when others have acquired rights, the law requires that they shall be respected. The Govt. is not entitled to economize water in seasons or months of shortage in order that a perennial supply may be available for the use of Madras if this economy means that the *raiya*t in the old ayacut will have their customary supply diminished.

A. from the judgment of Mr. Justice Wadsworth, in C. S. No. 371 of 1929, dated September 15, 1936.

Messrs. Srinivasaraghavan and Thyagarajan, for the Appellant.

The Govt. Solicitor, for the Respondent.

Leach, C. J.—This appeal raises a question of great public importance. The Court is called upon to decide what are the powers of the Govt. with regard to the distribution of water in two reservoirs or tanks as they are usually called in India from which the City of Madras receives its water supply. One tank is known as the Oholavaram tank, and the other as the Red Hills tank. They lie close to one another, some fifteen miles from the City of Madras. Before 1870 when the Govt. undertook a scheme to increase the storage capacity of these tanks with the primary object of supplying water to Madras, the water in the tanks was used merely for the purpose of irrigating lands in the vicinity. Near to the tanks in the river Cortelliar, but before the scheme was carried out, there was no connection between the river and the tanks and the level of the water in them depended on the rain which fell in the catchment area. The evidence, however, discloses that the water in the Red Hills tank was sufficient in a normal year for the cultivation of one crop at least in an ayacut of over 5,000 acres. The scheme provided for the damming of the Cortelliar river, the diversion of water impounded by this dam into a channel in the Oholavaram tank and the construction of another channel connecting the Oholavaram tank with the Red Hills tank. The scheme was a costly one but as it contemplated the storage of sufficient water to bring under cultivation a further area as well as supplying the old ayacut and Madras, the Govt. anticipated meeting the cost out of the increase in land revenue which would follow from an extension of the irrigated area. The scheme was completed in 1872 and an additional area was brought under cultivation as the result of the increased water supply. The Govt. has, however, always regarded the scheme as being in the first instance for the benefit of Madras, and the question which falls for decision is whether the Govt. is entitled to supply Madras with water without regard to the rights of the cultivators in the old ayacut as they existed in 1870.

The suit out of which the appeal arises was filed on the Original Side of this Court

by the appellant against the Secretary of State for India in Council. The appellant is the owner of some 43.44 acres of lands in the old ayacut. The fact that the lands fell within the old ayacut was denied, but it was held that they did and this finding has not been challenged before us. The appellant asserted that he was entitled to have sufficient water each year for the cultivation of two crops on his lands and this without regard to the needs of Madras. He complained that in *Faslis* 1336 and 1337 (1926-27 and 1927-28) the crops on his lands were damaged as the result of the Govt. withholding from him the water to which he was entitled. He assessed the total damage at Rs. 5,523-7-6 and asked for a decree for this amount. He also asked for a declaration of his rights. In the written statement filed on behalf of the Secretary of State it was denied that the appellant had the right to be supplied with any definite quantity of water or to claim damages, on the ground that water had been withheld from him. It was said that the Govt. had an absolute right to regulate the distribution of water or to withhold it both with regard to the lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme. It was also said that as the primary object of the scheme was to provide a water supply for Madras, any rights which the appellant had before the scheme came into operation had been put an end to by the project, the *raiyyats* having taken the risk of the water supply being restricted in return for the benefit to be derived from the scheme. The respondent put the appellant to strict proof that certain of his lands were 'wet' lands pertaining to the old ayacut and denied that he was in any event entitled to water for the cultivation of a second crop. The case was tried by Wadsworth, J. who held that the appellant was entitled to sufficient water for the cultivation of one wet crop a year on his lands, but subject to the power of the Govt. to control the distribution of water with reference to (1) the need for conserving water in the interests of the whole ayacut, and (2) the need for economizing water in seasons or months of shortage in order that a perennial supply might be available in the tank for the use of the municipality. On this basis the claim for damages was dismissed.

With regard to the nature of the appellant's lands, the respondent has contended

that 38.87 acres out of the total area of 43.44 acres are not really wet lands, that is, lands which are entitled to the supply of water for cultivation purposes. It is said that they are "wet waste lands", and as such, have no right to water from the channels under the control of the Govt. This contention is based on a deed of conveyance dated August 7, 1866, in which the lands are described as being "wet waste lands." Before us the learned Advocate-General has conceded that the 37.87 acres must be classified either as wet lands or as dry lands, there being no intermediate classification. We consider that all the lands must be classified as wet lands. They were so classified in the settlement of 1875 and have since been so classified. The *paimash* accounts of 1840 which would have shown the classification in that year were destroyed by an order of the Govt. dated March 26, 1938, and cannot be referred to, but there is no reason to believe that the classification then was different. On the question whether before the scheme the appellant's lands carried with them the right to sufficient water for the cultivation of two crops the learned trial Judge held that the evidence established that except in years of unusual small rainfall the lands on the ayacut received a regular supply of water for the irrigation of the first crop and a somewhat precarious supply of water for a second crop over a portion of the area. In the minutes of the proceedings of the Madras Govt., Public Works Department, dated April 26, 1870, it is stated that the Red Hills tank as it stood before the scheme was carried out would probably suffice for the whole area for the first crop and for a good deal of second crop cultivation. In subsequent official reports reference is made to the fact that lands in the old ayacut were well-irrigated before the scheme, but there is no statement to be found which indicates a right to water for a second crop. We concur in the finding of the learned Judge and hold that before the scheme was carried into effect the appellant's lands were in a normal year entitled to receive from the Red Hills tank sufficient water for the cultivation of one crop.

In carrying out the scheme the Engineers placed the level of the Municipal sluice at 31.31 feet above mean sea level, but in order to avoid pumping and allow water to reach Madras by gravitation it was necessary to have at least six feet of water always stored in excess of requirements. In 1892 the Chief Engineer for Irrigation pointed

out that the supply by gravitation to Madras could not be well-assured till the level was plus 38, and on his recommendation the Govt. directed that this level should be maintained. In 1908 it was ordered that there should be a complete stoppage of the issue of water for irrigation purpose during the months of July and August, even if the level was in excess of plus 38. In the year 1926 the rainfall was below normal and on November 30, 1927, the Govt. ordered that no water should be withdrawn for irrigation from either tank till the level of the water in the Red Hills tank had reached plus 44.67, which meant a full tank. On August 22, 1928, the rules for the issue of water were again changed. It was then ordered that so long as the level of water in the tank was at plus 38, or lower, no water would be issued for irrigation. If the level rose above plus 38, water would be issued for irrigation from September 1, to October 14 (inclusive), but the supply was liable to be cut off if in the meantime the water level in the tank fell to plus 38. During the north-east monsoon, the issue of water for irrigation would be stopped from October 15, and would not be resumed till December 15, or until the full tank level (plus 44.67) was reached, whichever date was later. After December 15, the issue of water would be continued till January 31, if in the meantime the level did not fall to plus 38, but if it did fall to that level the issue would be stopped. In pursuance of the policy of safeguarding the supply of water to Madras, the supply to the appellant was cut off altogether in the year 1926-27 and in 1927-28, no water was supplied to him in the month of August, September, October and November. In these years the water in the Red Hills tank was far in excess of what it was when the project was undertaken and no attempt has been made by the learned Advocate-General to show that the rainfall in 1926 was so small that the appellant would not have received sufficient water for the cultivation of one crop if the Red Hills tank had not been improved, but had remained as it was in 1870, and it must be taken, at any rate so far as the year 1926-27 is concerned, that the appellant's rights, assuming them to be the same as they were in 1870, were disregarded.

This brings me to the question whether the appellant's rights have undergone a change by reason of the scheme and the answer entails an examination of the

authorities. I may say at once, that the contention that the *raiya*s in the old ayacut undertook a risk and that for benefits to be derived from the scheme they surrendered their rights cannot be sustained. So far as the Court is aware, the *raiya*s were not even consulted with regard to the scheme, and far from surrendering their rights, they have from time to time protested against the preference given to Madras.

In *Kristna Ayyan v. Vencatachala Mudali* (1) it was held that the Govt. had an undoubted right to distribute the water of Govt. channels, but that power did not include the power to disturb existing arrangements to the prejudice of any tenant during the continuance of the tenancy, and this decision was quoted with approval in *Ramachandra v. Narayanasami* (2) which was a suit between *raiya*s holding lands under the Govt. in which the Collector was joined as a defendant. With the sanction of the Collector, defendant No. 1 had opened a new irrigation channel, thereby diminishing the supply of water necessary for the cultivation of the plaintiff's land. The trial Court held that the Collector's order was in excess of his powers and issued an injunction directing the channel to be closed. The plaintiff was also granted a decree for damages. This decision was upheld on appeal. In *Sankaravadielu Pillai v. Secretary of State* (3) White, O. J., as the result of the decisions in *Kristna Ayyan v. Vencatachala Mudali* (1) and *Ramachandra v. Narayanasami* (2) considered it to be settled law that the Govt. had the right to distribute the water of Govt. channels for the benefit of the public subject to the right of a *raiya*-*wari* land holder, to whom water had been supplied by the Govt. to continue to receive such supply as would be sufficient for his accustomed requirements. The question was again considered by White, O. J., sitting with Pinhey, J., in *Robert Fischer v. Secretary of State* (4) which concerned the rights of riparian owners. It was held that the Govt. had power, by the Customary Law of India, to regulate in the public interests, in connection with the collection, retention, and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by

(1) 7 M H O R 60.

(2) 16 M 333; 2 M L J 279.

(3) 28 M 72; 15 M L J 32.

(4) 32 M 141; 2 Ind. Cas. 325; 19 M L J 131.

means of works constructed at the public expense, and in the public interests, for purposes of irrigation, provided that they did not thereby inflict sensible injury on other riparian owners and diminish the supply they had hitherto utilized. The decision in *Robert Fischer v. Secretary of State* (4) was referred to in the judgment of the Privy Council in *Bala Surya Prasada Row v. Secretary of State* (5) and with the apparent approval as their Lordships observed that the law of the Madras Presidency as to rivers and streams was certainly different in some respects from the English Law.

In *Basavana Gowd v. Lakka Narayana Reddi* (6) Wallace and Krishnan Pandalai, JJ., were called upon to state the legal position where the *raiya*ts of wet lands in two Govt. *raiya*tware villages, situated on opposite sides of a Govt. river drew water for irrigation from channels under the control of the Govt. which were taken off at particular points in the river bed, and the *raiya*ts of one village moved the head of one of the channels to the detriment of the *raiya*ts of the other village. The Court held that a *raiya*t of *raiya*tware village acquired a legal right to the water when it reached his customary channel for the irrigation of his lands, and not merely when the water had reached his fields. It was open to the Govt. to alter at any time the manner and method by which it supplied the necessary water to a *raiya*t, but by undertaking the obligation to supply him with water the Govt. also undertook that it should be at his disposal by the usual and customary method, that is by a channel constructed either by the Govt. or by the *raiya*t or both, until and unless some other method was adopted. The *raiya*t could not insist as against the Govt. that he had any right to have his supply carried by any particular channel and could not object to the Govt. altering the channel of supply, but he had right as against other *raiya*ts and even, subject to the Govt.'s right to give him an equally efficient supply, as against the Govt. to the protection of law for that supply once it had passed into the channel earmarked for his supply. If the customary supply and the manner of supply

according to contractual or proprietary right were interfered with by private parties, such interference was an invasion of the *raiya*t's rights and would give rise to a cause of action. The most recent decision by a Bench of this Court is that given in the case of *Secretary of State v. Nageswara Iyer* (7). This appeal was heard by Varadachariar and Mockett, JJ. who accepted as correct the statement of the law in *Sankaravadiwela Pillai v. Secretary of State* (3). They pointed out that the rights and obligations as between the State and the *raiya*t in this country so far as supplying water for irrigation purposes was concerned, rested largely on unrecorded custom and practice. The *raiya*tware holder was ordinarily spoken of as entitled to the customary supply of water, but the obligation of the Govt. was not to find the required supply of water, but only not to interfere with the necessary supply if and so far as water was available.

The effect of these decisions is that in the Madras Presidency the *raiya*t is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Govt. or anyone else. The Govt. cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage, the only obligation of the Govt. is to make an equitable distribution of water. The *raiya*t has a claim against the Govt. when it withholds from him the water which he has a right to demand taking into consideration the supply available. In face of the authorities, the plea advanced on behalf of the Govt. that it has the right in law to supply Madras with water without regard to the claims of the *raiya*ts in the old ayacut cannot be accepted. It is of course manifest that the needs of the City of Madras are of very great importance and in the absence of rights in others, no one could reasonably complain of the policy of the Govt. in giving this large City a preference in supply of the water, but when others have acquired rights, the law requires that they shall be respected. It follows that in our opinion, the declaration granted to the appellant does not do justice to the appellant. The Govt. is not entitled to economize water in seasons or months of shortage in order that a perennial supply may be available for the use

(7) (1936) M W N 684, 166 Ind. Cas. 200; A I R 1936 Mad. 923; 71 M L J 238; 44 L W 388; 9 R M 345,

(5) 40 M 886; 41 Ind. Cas. 98; A I R 1917 P O 49; 44 I A 166; 35 M L J 144; 22 M L T 76; 15 A L J 697; 19 Bom. L R 751; 21 O W N 1089; (1917) M W N 536; 6 L W 340; 2 P L W 260; 26 O. L J 290 (P O).

(6) 54 M 793; 133 Ind. Cas. 507; A I R 1931 Mad. 284; 61 M L J 563; 33 L W 681; Ind. Rul. (1931) Mad. 747.

of Madras if this economy means that the *raiya*s in the old ayacut will have their customary supply diminished. The appellant will have a declaration that he is entitled to sufficient water for the cultivation of one crop per annum without reference to the needs of the City of Madras, subject to the power of the Govt. to control the distribution of available water in the interests of the landlords whose lands comprise the old ayacut. This declaration is not to be deemed to confer on the appellant greater rights than those which existed in 1870 or to diminish the powers of Govt. with regard to the distribution of the supply.

The position of the *raiya*s in the area which has been brought under wet cultivation since the inauguration of the scheme does not call for discussion in this case. The *raiya*s in the new area are in a different position to the *raiya*s in the old area, and it may very well be that their rights to water are subject to the requirements of the City of Madras. It is clear that as the result of the Govt. cutting off the supply of water for irrigation purposes altogether during 1926-27, the appellant suffered damage, and it is agreed that the damages shall be assessed at Rs. 450. No loss has been proved in respect of the following year and the claim for damages in respect of that year will be dismissed. The result of the appeal is, the appellant will have a declaration in the terms indicated in this judgment and a decree for damages in the sum of Rs. 450. As the appellant has succeeded on the main point, he will be awarded costs here and below.

-N.-D.

Order accordingly.

PATNA HIGH COURT Full Bench

Civil Revision No. 426 of 1938
September 26, 1939

HARRIS, C. J., FAZL ALI AND
AGARWALA, JJ.

RAMKHELAWAN SINGH—PETITIONER
versus

MONILAL SAHU AND OTHERS—
OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1, O. XLI, r. 19, s. 151—Order dismissing appeal for failure of appellant to file list within time—Application to set aside, not maintainable under O. XLVII, r. 1 but under s. 151—Applicability of s. 151—Matters to be considered—Words "any other sufficient reason," meaning of—New matter or evidence—Discovery must be by party—Error—Nature of.

An application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed cannot be entertained as an application for review under O. XLVII, r. 1; Civil P. C. Order XLI, r. 19, which is the only provision in the Code for the restoration of the appeal does not apply to such a case but such an application may be entertained under s. 151. 91 Ind. Cas. 483 (1), *Overruled*, *Fatimunnissa v. Doki Pershad* (2), held no longer good law, 138 Ind. Cas. 393 (3), 60 Ind. Cas. 919 (5) and 134 Ind. Cas. 1169 (6), relied on. [p. 481, col. 1; p. 482, col. 2.]

Section 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this section. [p. 483, col. 2.]

Rule 1 of O. XLVII must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in r. 1. 72 Ind. Cas. 566 (7) and 151 Ind. Cas. 41 (8), relied on. [p. 482, col. 1.]

Under O. XLVII, r. 1, the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. [*ibid.*]

Messrs. Jafar Imam, Mehdi Imam, Harinandan Singh and Akhauri Badri Nath Sinha, for the Petitioner.

Mr. D. N. Varma, for the Opposite Party.

Fazl Ali, J.—This case has been referred to a Full Bench in the following circumstances: The petitioner had filed an appeal to this Court against a decree passed by the Subordinate Judge of Arrah and this appeal was numbered as First Appeal No. 3 of 1938. On May 5, 1938, the appeal was laid by the Registrar before a Bench of this Court for final order with a note pointing out that the petitioner had failed to comply with several orders calling upon him to supply the appellant's list. On that date no one appeared for the petitioner and the appeal was dismissed. On June 11, 1938, the petitioner made an application for the restoration of the appeal. This application bore a stamp of Rs. 3 and purported to have been made under O. XLI, rr. 17 and 19 and s. 151, Civil P. C. The Stamp Reporter noted on the application that the court-fee was insufficient, his view being that such an application could have been made only under O. XLVII, r. 1 of the Code. The matter was then placed before my brother Agarwala and myself and we decided to

refer it to a Full Bench. The reasons which led us to make the reference as well as the point of law which we decided to refer are set out in the following extract from our order:

"The Stamp Reporter suggests that the application is in fact one for review of the order dismissing the appeal and that a court-fee of about Rs. 405 is leviable. On behalf of the petitioner, on the other hand, it is contended that this is an application for restoration of the appeal on which Rs. 3 stamp is leviable. In *Anant Potdar v. Mangal Potdar* (1) the cases in this Court for and against the view of the Stamp Reporter are enumerated. It will appear that from the institution of the Court up to 1923 applications such as the present were always treated as applications for review. In 1924 a Bench of which Sir Jwala Prasad was a member took another view although Sir Jwala Prasad had been a member of at least one of the Benches which had decided the other way in earlier cases. The earlier cases of this Court applied the Full Bench decision in *Fatimunnissa v. Deoki Pershad* (2). In *Haridasi Devi v. Sajanmohan* (3) it was pointed out that the decision in *Fatimunnissa v. Deoki Pershad* (2) was based on the language of an earlier Civil P. O. and held that the application was not an application in review. The question is continually arising in this Court and it is desirable that the matter should be settled one way or the other.

The question which requires consideration is whether an application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed can be entertained, unless it be treated as an application for review under O. XLVII r. 1, Civil P. O. We refer the matter to a Full Bench under Chap. V, r. 4 of the Rules of this Court."

In *Ramhari Sahu v. Madan Mohan Mitter* (4) at p. 311 a Bench of the Calcutta High Court had held that an application for re-admission of an appeal dismissed for the appellant's failure to deposit the costs for the preparation of the paper-book was not an application for review, but an application under the rules of the High Court. This decision was overruled in *Fatimunnissa v. Deoki Pershad* (2) by a Full Bench of five Judges who held that the remedy of the appellant in such a case was to apply for a review and the reasons they gave in support of this view were as follows:

"Under the Code there are only two ways known to the law by which a judgment and decree of a Division Bench of this Court can be set aside in India. These two methods are described in ss. 558 and 623 of the Code. The present case is clearly not one in which default was made in appearing at the hearing of the case, for the record shows that the Pleaders on both sides were in attendance and

heard. It seems to us therefore that the view expressed in the reference is correct, and that the case in *Ramhari Sahu v. Madan Mohan Mitter* (4) at p. 341* so far as it decides the contrary is wrongly decided."

In this Court before 1924 there was on the whole a tendency to follow the practice which had prevailed in the Calcutta High Court since the decision of the Full Bench; but in some cases it was observed that the dismissal of an appeal for failure to file the appellant's list or deposit the printing cost within the time allowed by the Court could be set aside under O. XLI, r. 19, read with s. 151, Civil P. O. In 1924 the question as to what was the proper procedure for setting aside such a dismissal was directly raised before a Division Bench of this Court in *Anant Potdar v. Mangal Potdar* (1) and the learned Judges who sat on the Bench held, following the decision in *Fatimunnissa v. Deoki Pershad* (2) that an application to set aside the dismissal must be regarded as one for review under O. XLVII, r. 1. The learned Judges recognized that the order dismissing the appeal was no longer a decree under the amended Code, but they pointed out that it was still a judgment. The correctness of this decision has been recently doubted in *Haridasi Devi v. Sajanmohan* (3) in which it has been held that an application for restoring an appeal dismissed for default in the payment of initial deposit is not an application for review but an application under O. XLI, r. 19, read with s. 151 of the Code. The same view seems to have been taken by the Bombay High Court in *Sonubai v. Sivajirao Krishnarao* (5) and by the Judicial Commissioners of Sind in *Dhayani v. Ishak* (6). The question which has now to be decided by this Bench is which of the two conflicting views is correct. Order XLVII, r. 1, provides that a party aggrieved by a decree or an order specified in cls. (a), (b) and (c) of r. 1 may apply for review on any of the following grounds: (1) on the ground of the discovery of new or important matter or evidence which after the exercise of due diligence was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made; (2) on account of mistake or error apparent on the face of the record; and (3) for any other sufficient reason.

(5) 45 B 648; 60 Ind. Cas. 919; A I R 1921 Bom. 20; 23 Bom. L R 110.

(6) A I R 1931 Sind 153; 134 Ind. Cas. 1169; Ind. Rul. (1932) Sind. 1.

* Page of 23 (O-484.)

(1) 4 Pat. 704; 91 Ind. Cas. 483; A I R 1926 Pat. 197; 7 P L T 391.

(2) 24 C 350; 1 O W N 21 (F.B.).

(3) 59 O 1334; 138 Ind. Cas. 393; A I R 1932 Cal. 770; 55 O L J 314; 36 O W N 564; Ind. Rul. (1932) Cal. 441.

(4) 123 O 339 at p. 341.

It seems to me that grounds Nos. 1 and 2 would not be ordinarily applicable to cases where an appeal is dismissed for the appellant's failure to file the list or to deposit the printing cost. In such cases the appellant usually applies for the restoration of the appeal on the ground that there was sufficient cause for his not depositing the printing cost or filing the list, as the case may be, within the time prescribed by the Court; and therefore if the application can be treated as an application for review, it can be treated as such only on ground No. 3. It has, however, been clearly pointed out by the Judicial Committee in *Chhajju Ram v. Neki* (7) and *Bisheshwar Pratap Sahi v. Parath Nath* (8) that r. 1 of O. XLVII, must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in r. 1. In view of these decisions it is no longer possible to hold that an application like the present can be treated as an application for review. As was remarked by the learned Judges of the Calcutta High Court in *Haridasi Devi v. Sajanimohan* (3):

"it would require no ordinary flight of imagination to treat a failure to deposit initial cost as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or a mistake or error apparent on the face of the record."

The points which we must bear in mind are firstly that under O. XLVII, r. 1 the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, that the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. That being so, in my judgment the decisions in *Fatimunissa v. Deoki Pershad* (2) and *Anant Potdar v. Mangal Potdar* (1) can no longer be relied on as good authorities on the subject.

The next question to be considered is

(7) 49 I A 144; 72 Ind. Cas. 166; A I R 1922 P O 112; 3 L 127; 30 M L T 295; 26 O W N 697; 41 P L R (P O) 1922; 3 P L T 435; 16 L W 37; 17 P W R 1922; 43 M L J 332; 24 Bom. L R 1238; 4 U P L R (P O) 99; 36 O L J 459 (P O).

(8) 15 P L T 763; 151 Ind. Cas. 41; A I R 1934 P O 213; 56 A 634; 61 I A 376; 7 R P O 43; 11 O W N 1084; 40 L W 383; (1934) A L J 918; 67 M L J 608; (1934) M W N 1005; 60 O L J 267; 39 O W N 1; 36 P L R 305; 36 Bom. L R 1179 (P O).

whether in a case like the present, the applicant has any remedy at all. It is plain that O. XLI, r. 19, which is the only provision in the Civil P. O. for the restoration of the appeal does not apply to such a case. Rule 19 enables the Court of appeal to re-admit an appeal which is dismissed under r. 11, sub-r. (2) or r. 17 or r. 18. Rule 11 and r. 17 provide for cases where on the date fixed, or another date to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing. Rule 18 provides for cases where it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit within the period fixed, the sum required to defray the cost of serving the notice. In the present case the appeal was dismissed not under any specific provision of the Code but under one of the rules framed by the High Court (Part 2, Chap. IX, r. 23). Are we then to hold that the petitioner is without any remedy, even if he is able to convince the Court that he was prevented by sufficient cause from filing the appellant's list or depositing printing cost within the time fixed by the Court? Unfortunately in our rules there is no rule corresponding to O. XLI, r. 19, but I am unable to hold that merely because there is no rule on the subject, this Court is powerless to grant any relief in such cases. In my opinion the failure to file a list or deposit the printing costs stands on no worse footing than the default referred to in rr. 11, 17 and 18 of O. XLI, and I find it difficult to hold that if there had been any rule in the Code corresponding to r. 23 (Chap. IX) of this Court, there would not have been any corresponding provision for restoring the appeal for sufficient cause. In my view if we have power to dismiss an appeal for the appellant's failure to file the appellant's list or deposit the printing cost, we have also power to restore the appeal in a proper case. Section 151 expressly saves the inherent power of the Court and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice. Thus, in my judgment, the answer to the question referred to this Bench is that an application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under s. 151 of the Code and generally speaking such an application cannot be made under O. XLVII, r. 1 of the Code.

I shall now proceed to deal with the facts of the present case in order to decide whether this particular appeal should be restored. It appears that on March 3, 1938 an Advocate, Mr. N. O. Roy who appeared for the petitioner applied for the inspection of documents and on March 4, the documents were actually inspected. Notwithstanding this fact, the appellant's list was not filed in time and on April 4, 1938 the Registrar directed the appellant to file it within 14 days of the date. On April 25, the list still not being filed, the Registrar recorded the following order in the order-sheet:

"Time has been twice allowed for the purpose of filing the appellant's list. The last order, though peremptory, has not been carried out. Final adjournment for seven days is given for compliance, failing which the appeal will be laid before the Bench with a recommendation for dismissal."

On May 3, the Registrar directed the appeal to be laid before the Bench as the final order for filing the list had been disregarded and the appeal was dismissed by the Bench on May 5. It is stated by the petitioner in his affidavit that his Advocate was fully instructed to file a list and he was in no way responsible for his appeal not being prosecuted properly but this is not borne out by the contents of a letter which was written to him by Mr. Roy on May 8, 1938. This letter which has been quoted in the petitioner's affidavit runs as follows:

"Dear Ramkhelawan Babu,

I wrote to you a few days ago that unless list in your F. A. No. 3-38 was filed immediately, your appeal would be dismissed on May 5, but when the High Court closed, the appeal (F. A. No. 3-38) came up before the Bench. I was, as you know, unwell and so did not go to Court, but I instructed somebody to apply for time. The Judges, however, have dismissed the appeal as the list has not been filed. An application for restoration should be filed soon. The petition should be drafted and kept ready at once. The High Court is closed and I shall leave Patna within five or six days. My fee Rs. 48 (as I wrote to you before) together with the fees for preparing the list should be paid now. The list should be kept ready and this may be prepared by us during this vacation. Please therefore come with sufficient money and do not spoil the case. Unless money is paid, nothing will be done. One of your men saw me on May 3, but he told me he was going to Muzaffarpur."

This letter shows that the Advocate had given due warning to the petitioner in a previous letter and that his fees as well as the fees for preparing the list had not been paid. The petitioner filed a fresh affidavit on the date on which this application was heard to the effect that he had paid a sum of Rs. 36-1-0 to his Advocate, but the Advocate is now dead, and, in view of the

fact that the statement in question was not made in the petition itself which was filed during his lifetime, I am not prepared to act upon it or hold that the Advocate did not act honestly and that he was negligent in the discharge of his duty towards his client. It is to be borne in mind that s. 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this section to a particular case, we have to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this section. In my opinion upon the materials on the record it is difficult to hold that the petitioner has made out a sufficient cause for restoring the appeal and I would therefore dismiss this application with costs.

Harries, C. J.—I agree.

Agarwala, J.—I agree.

S.

Application dismissed.

RANGOON HIGH COURT

Second Appeal No. 74 of 1939

May 31, 1939

ROBERTS C. J. AND DUNKLEY, J.

U THISEITTA—APPELLANT

versus

U EINDAWUNTHA—RESPONDENT

Burmese Buddhist Law—Ecclesiastical—Owner of Poggalika conferring rights of appointing successor upon others—Such right not exercised—Ownership of Poggalika—Election by Sangha—Nature and mode of—Election of presiding monk—Nature of.

The ownership of the Kyaung-daik, upon the death of the original Poggalika owner, vests in the Sangha at large, if the original Poggalika owner has not himself appointed his successor, but conferred the right to appoint a successor on a third party and that party fails to exercise that right. After the death of the owner the presiding monk is then to be elected by the Sangha. The latter may elect such monk in any manner they choose provided it is a real, valid and true election. The members may nominate some of the senior members of them representing the whole body to elect the monk and the election would be valid and proper election by the Sangha as such. 179 Ind. Cas. 803 (1), relied on.

Although there may be ceremonial contemplated at the time when the presiding monk is installed in his office, the question of his election by the Sangha is not analogous to ceremonial but is a plain question of fact and depends upon a consideration of the question whether the members of the Sangha were substantially in favour of his appointment. [p. 485, col. 1.]

S. A. against the decree of the District Court, Hanthawaddy, dated December 24, 1938.

Mr. *U Shu Maung*, for the Appellant.

Mr. *A. Loo Nee* for Mr. *U Tun Maung*, for the Respondent.

Roberts, C. J.—This is an appeal which comes before us from the learned Judge in second appeal to determine matters connected with Buddhist Ecclesiastical law. The facts are that *U Yazeinda* was the presiding monk of the *Nyaungbinkwin Kyaung-daik* and at a time when he was approaching death, he desired to make certain about the appointment of his successor. Accordingly, the *Poggalika* property was remitted to the donors, *U Po Thet* and *U Hein*, and they were asked to appoint, upon the death of *U Yazeinda*, some one who should be a worthy successor to him. Within a week or two of this arrangement, *U Yazeinda* died, and it is plain from the evidence before us that the donors disagreed as to who his successor should be and were themselves unable to carry out the task entrusted to them. *U Po Thet* is dead. But his widow, *Daw Set*, has told us in the plainest terms that there was a disagreement in respect of this matter between her husband and *U Hein*; and *U Ngwe Hlaing*, who is a physician residing at *Kyonmaye*, gives evidence to the same effect. *U Hein* himself says:

"After the death of the said *Sayadaw*, there was some difference between myself and *U Po Thet* regarding the appointment of a presiding monk and so we agreed to abide by the decision of 'Gana' *Sayadaws* consisting of 38 *Sanghas*."

And it is quite clear that there was no decision communicated to *U Hein* or *U Po Thet* which could have caused them to become reconciled, because *U Po Thet* died and shortly before his death he purported, acting by himself, to appoint the defendant, *U Eindawuntha*, the presiding monk of the *Poggalika Kyaung-daik*. He was acting quite beyond his powers in attempting to do anything of this kind and those *Sayadaws* who believed that *U Eindawuntha* had been properly appointed must have overlooked the fact that *U Hein* had an equal voice in the appointment of the presiding monk with *U Po Thet* and had by no means concurred in what was being done. That being so, the position at the death of *U Yazeinda* was this: he was the *Poggalika* owner of the *Kyaung-daik*, and, as was pointed out in *U Thita v. U Aresinna* (1), the owner-

ship of the *Kyaung-daik*, upon the death of the original *Poggalika* owner, vests in the *Sangha* at large, if the original *Poggalika* owner has not either himself appointed his successor, or conferred the right to appoint a successor on a third party. In this case, no doubt, the right to appoint a successor had been conferred jointly upon two persons, but they had failed to exercise that right and the position was that on the death of *U Yazeinda*, the ownership of the *Kyaung-daik* vested in the *Sangha* at large. There has been some confusion with regard to the selection because some of the learned *Sayadaws* who have addressed their minds to the texts of the *Vinayas* in this connection have reminded themselves that when a person or persons is or are delegated to perform certain acts, they cannot delegate again to other persons, but must perform the duties delegated to them themselves. That is, no doubt, true in connection with such proceedings as may have taken place if the *Sanghas* had met to make a report which *U Po Thet* and *U Hein* could act upon. But, quite different considerations arise when we have to consider, not a report of this character, but an ordinary election which takes place of a presiding monk when the *Poggalika* owner of the *Kyaung-daik* has died and the ownership of the *Kyaung-daik* vests in the *Sangha*. In circumstances of such a kind the only question which it is necessary to ask is this: Has there been a real, valid and true election by the *Sangha* as such? They may elect, as it seems to us, in any way they choose, and the only matter about which we must be satisfied is whether the election was a real election by the whole of the *Sangha*.

Now, in this particular instance, 38 monks met together, and, although it is not of particular importance in connection with that meeting, it is, I think, interesting to observe that the senior of them was *U Thanwara*, who was known as the *Kyingyaung Sayadaw*. This representative gathering of monks came to the conclusion that their numbers were great to permit of a settlement being arrived at and that it would be better to entrust the matter to five persons who should represent them, who were called *Nayakas*. Of these five persons, one *U Zayanta*, died and took no part in the proceedings. There were left, *U Thanwara*, *U Winmala*, *U Ardicca* and *Letkhana*, and we have to decide whether those persons could validly and properly

(1) (1938) Rang. 678; 179 Ind. Cas. 903; A I R 939 Rang. 76; 11 R Rang. 358.

elect a presiding monk of the Kyaung-daik. They at one time seem to have entertained the notion that they would leave the matter to the senior of their number, U Thanwara, but it is afterwards clear from the evidence that three of them met together and that U Letkhana was not present. U Letkhana was called for the defence. He is the Aungmyintha Sayadaw and he thought that as the four Nayakas had submitted the matter to U Thanwara for selection by himself, it was out of his hands; in other words, he was a person who was not only willing to abide by the decision of U Thanwara, but thought that his own services in connection with the election were no longer required. Of the other three, U Thanwara, who gave evidence upon commission and is described as a witness for the defendant, after giving a long and careful account of all the circumstances, said at the conclusion of his evidence, "I knew before that if an appointment is made by a majority of the Nayaka-Sayadaws it is valid." In my view, his opinion is entitled to great weight in this matter and it was shared by the other two Nayakas who were present, U Wimala, the first witness for the plaintiff, who says that the appointment was valid because those who made the appointment formed the majority, and by U Ardicca, who says it was finally settled that U Thiseitta should be the presiding monk of the said Kyaung-daik.

It is to be noted that at this meeting three other Sayadaws were present. They took sufficient interest in the matter to come to see what was going on. They made no protest, and at no time was it then suggested that because U Letkhana was unwilling to come and because U Zayanta was dead there was wanting any element in the validity of the election of the presiding monk of the Kyaung-daik. It is now urged upon us that the election of a presiding monk is of such an important nature that it is at least analogous to ceremonial. It is, of course, true that there are matters connected with ceremonial, the validity of which is affected unless the requisite number of monks is present. But, in my opinion, it is clear in this particular instance that, although there may have been ceremonial contemplated at the time that the presiding monk was installed in his office, the question of his election by the Sangha is a plain question of fact and depends upon a consideration of the question whether the members of the Sangha were substantially in favour of his appointment. If we were

to be driven to the contrary conclusion, it would be plain that there would be no answer to a case which might have arisen if the 38 members of the Sangha had appeared and one of them had dissented from the proposed appointment of a particular person; in those circumstances it would indeed be difficult to secure the election of a presiding monk, since unanimity might not always easily be obtained: and I am satisfied that the action which the members of the Sangha took in leaving the matter to several of the more senior of their number was not only a wise one and calculated to attain a measure of unanimity when there was a possible risk of disagreement, but that such unanimity was substantially achieved. There is no evidence at all that U Zayanta before his death dissented from the appointment of the appellant, and it is quite plain that all those who survived were ready and willing that he should be appointed. In those circumstances, it seems to me that this appeal must succeed and the suit of the plaintiff-appellant is decreed. As the parties are Buddhist monks, we think it proper to make no order as to costs.

Dunkley, J.—I agree. As my learned brother Braund pointed out in *U Thita v. U Arescinna* (1) at p. 680* where a special power is granted for its valid exercise the terms of the power must be strictly complied with. In the present case a special power to appoint the successor of U Yazeinda as owner of a Poggalika Kyaung-daik upon his death was granted by U Yazeinda to U Po Thet and U Hein, and the power was to be exercised jointly. They could not agree as to the manner of its exercise and consequently, it was never exercised. They had no authority to delegate their power of appointment to any other person, and therefore the view which has been taken by the lower Courts that they delegated their power of appointment to the Sangha is an incorrect view. Clearly, when they were unable to exercise that power this Poggalika Kyaung-daik became, after the death of U Yazeinda, Sanghika property and was at the disposal of the Sangha generally: see *U Zawtika v. U Kalyana* (2). It was therefore the privilege and duty of the Sangha to elect the presiding monk of that Sanghika Kyaung-daik, and the only question which fell for decision in this suit was whether such an election had

(2) 14 R 566; 168 Ind. Cas. 967; A I R 1937 Rang. 76; 9 R Rang. 381.

*Page of (1938) Rang. —[Ed.]

been made by the Sangha, that is, whether the election of the appellant by the three Nayakas did truly represent the will of the Sangha. It has been suggested that, when the Sangha delegated to these five Nayakas the power to elect the presiding monk, only the five Nayakas acting together could make the election; but no text of the Vinaya which says that under these circumstances the decision of the majority cannot prevail has been cited to us, and from the evidence of the learned Sayadaws themselves it is clear that the texts to which they have referred are texts concerned with ceremonial matters which can only be carried out by a certain number of monks, and the Vinaya lays down that in such cases the requisite number of monks must be present. But, in the case of an election, as my Lord has pointed out, an impossible position would arise if the will of the majority should not prevail, for a single monk by merely absenting himself from the election would render it impossible for a new presiding monk of a Sanghika Kyaung-daik to be elected. In my opinion, the evidence in this case shows clearly that the election of the appellant was an election which was in accordance with the witness of the Sangha generally, and therefore the appellant was properly elected as the presiding monk of the Kyaung-daik in suit.

D.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 1 of 1936

August 17, 1938

DAVIS, J. C. AND TYABJI. J.
KHANCHAND MAYARAM—

APPELLANT

versus

PESSUMAL LAKHUMAL AND ANOTHER

—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 102, 47, 115—Orders in execution under s. 47—Section 102, if applies—Appeal barred against judgment-debtor, if barred against surety—S. 115, scope of—Whether provides parties right of second appeal.

Section 102, Civil P. O., not only applies to appeals but to orders in execution under s. 47. If an appeal against an order under s. 47, is barred under s. 102 against the judgment-debtor, it is also barred against his surety.

Section 115, Civil P. O., is intended to relate to a question of jurisdiction. Section 115, is intended only to supplement the Code in relation to matters on which the Code is silent. It is not intended to provide the parties the right of a second appeal.

S. A. against a decree of the Assistant Judge, Sukkur, dated November 14, 1935.

Mr. Dipchand Chandumal, for the Appellant.

Mr. Manghanmal Bhojraj, for the Respondents.

Davis, J. C.—This comes before us as a second appeal against an order of the Assistant Judge of Sukkur, dated November 14, 1935, in which he allowed the appeal against an order dated January 11, 1932, of the Subordinate Judge of Jakobabad, in which he ordered a writ of arrest to issue against one Pessumal, a surety who stood surety for the judgment-debtor Choithmal, who, to escape arrest for a debt, declared his intention of applying in insolvency under s. 55 (1), Civil P. O. But it appears that this judgment-debtor Choithmal afterwards changed his mind and did not wish to apply for insolvency and was produced within thirty days before the Court by his surety Pessumal who applied for his discharge. The Subordinate Judge was of the opinion that the surety Pessumal in producing Choithmal before the Court did not fulfil the terms of his bond, one of which was that this Choithmal would apply in insolvency within thirty days, and therefore, this surety was liable under the terms of his bond to pay Rs. 200, the sum involved. But the lower Appellate Court took a different view and came to the conclusion that as Pessumal had produced Choithmal before the Court so that he could be re-arrested and committed to jail, the judgment-creditor could not proceed against the surety as he had proceeded against the principal. But interesting as this question may be, we do not see how under the provisions of s. 102, Civil P. O. an appeal will lie. There is ample authority for the view that s. 102, Civil P. O., not only applies to appeals but to orders in execution under s. 47, Civil P. O. and this appeal purports to be made under s. 47, Civil P. O. But it is said, that if an appeal against an order under s. 47, Civil P. O., is barred under s. 102, Civil P. O., it is only barred against the person who is a party to the suit, and, in this case, this surety was not a party to the suit. But reference to s. 145, Civil P. O., will clearly show that any such argument is untenable:

"When any person has become liable as surety for the payment of any money or, for the ful-

filment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon...such person shall, for the purpose of appeal, be deemed a party within the meaning of s. 47."

This is so provided in s. 145, Civil P. O. This being so, we can see no force whatever in the argument that s. 102, Civil P. O., which would apply to the judgment-debtor would not apply to his surety, the present appellant Pessumal. We are then asked to treat this second appeal as a revision application. But we have constantly pointed out that s. 115, Civil P. O. was only intended to relate to a question of jurisdiction, and to say that because a question of law is involved or the construction of the document, and one Judge has come to the conclusion and another has come to another, that is a matter affecting jurisdiction and is sufficient ground to treat an appeal as an application under s. 115, Civil P. O., would appear to us to make s. 115, Civil P. O., not a section dealing with matters for which no appeal has been provided, but to make it a section allowing an appeal in a matter in respect of which an appeal has been expressly prohibited by law. It would be to give to parties a right of second appeal when the law says clearly that this right is not allowed. Section 115, Civil P. O., is intended only to supplement the Code in relation to matters on which the Code is silent. It is not intended to provide the parties with the right of a second appeal. We think therefore that this second appeal as such would not lie, and as a revision application, it does not come under s. 115, Civil P. O., as no question of jurisdiction within the meaning of that section is involved. Therefore from any point of view, this appeal fails and must be dismissed with costs. Order accordingly.

D.

*Appeal dismissed.***ALLAHABAD HIGH COURT**

Letters Patent Appeal No. 98 of 1917

August 7, 1939

THOM, C. J. AND GANGA NATH, J.

Munshi BISHAN LAL—PLAINTIFF—

APPELLANT

versus

Lala BANWARI LAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Mortgage by conditional sale and out and out sale—Deed held out and out sale—Amendments to s. 58 (c), construction.

Whether a deed is a mortgage by conditional sale

within the meaning of s. 58 (c), T. P. Act, or an out and out sale is a question which falls to be determined on a consideration of the terms of the deed itself and of the surrounding circumstances. 36 Ind. Cas. 38 (1), relied on.

A vendor executed a sale deed by which she conveyed the property in dispute to the vendees for certain sum. The deed contained a condition that if she should re-pay the amount of the sale consideration to the vendees within one year, the vendees would be bound to re-transfer the property to her provided she paid the money out of her pocket. In other words it was a condition of the transaction that the obligation to re-transfer would not bind the vendees if the vendor mortgaged or transferred the property to a third party for the purpose of raising the money to pay back the amount of the sale consideration to the vendees. In the earlier part of the deed there was a recital of the fact that the property was subject to prior encumbrances and that as the creditors were making pressing demands it was proper to sell the property to pay off the debt:

Held, that the terms of the document were consistent only with an intention upon the part of the executant to sell the property absolutely and to retain for herself the right to repurchase within one year.

The amendment to s. 58 (c) does not provide that if a transaction is embodied in one document, it must of necessity be regarded as a mortgage by conditional sale and not an out and out sale.

L. P. A. from the decision of Mr. Justice Harries, reported in 171 Ind. Cas. 802.

Messrs. B. Malik, Panna Lal and Shiv Charan Lal, for the Appellant.

Messrs. S. N. Gupta, Kamla Prasad and S. P. Kumar, for the Respondents.

Judgment.—This is a plaintiff's appeal against the decision of the learned Single Judge of this Court. The appeal arises out of a suit for redemption. The plaintiff sought to redeem certain house property on payment to the defendants of the sum of Rs. 550. The trial Court decreed the claim. The lower Appellate Court dismissed the suit. The decision of the lower Appellate Court has been upheld by the learned Single Judge before whom the case came in second appeal. On November 10, 1932, one Mst. Kishan Piari executed a sale deed by which she conveyed the property in dispute to the respondents for the sum of Rs. 550. The deed contained a condition that if she should re-pay the amount of the sale consideration to the respondents within one year the respondents would be bound to re-transfer the property to her provided she paid the money out of her pocket. In other words it was a condition of the transaction that the obligation to re-transfer would not bind the respondents if the vendor mortgaged or transferred the property to a third party for the purpose of raising

the money to pay back the amount of the sale consideration to the respondents. Later, *Mst. Kishan Piari* sold her interest in the property to the plaintiff-appellant who filed the present suit within a year of the sale of November 10, 1932.

The defence to the suit is that the transaction of November 10, 1932, is a sale and not a mortgage by conditional sale and that therefore the plaintiff who purchased the vendor's interest cannot redeem the property. Whether a deed is a mortgage by conditional sale within the meaning of s. 58 (c), T. P. Act, or an out and out sale is a question which falls to be determined on a consideration of the terms of the deed itself and of the surrounding circumstances.

In this connection reference may be made to the decision of the Privy Council in *Jhanda Singh v. Wahiduddin* (1). The document of November 10, 1932, is upon the face of it a sale; the executant *Mst. Kishan Piari* purports to convey for the sum of Rs. 550 the property in suit. In the earlier part of the deed there is a recital of the fact that the property is subject to prior encumbrances and that the amount due upon these encumbrances is Rs. 495. The document then proceeds:

"The creditors are making pressing demands and are ready to file a suit. In case a suit is instituted, it shall be put to unnecessary expense. It appears to me to be proper to sell the said house and to pay off the said debt. In this way some money will be left for me, the executant."

It appears to us to be clear upon a consideration of this clause of the deed that the executant realized that if a suit were brought upon the basis of prior encumbrances nothing of the property would in the end of the day be left and that she determined that the best course open to her was to get rid of the property entirely and to take what was left out of the purchase price after paying off the amount due upon the prior encumbrances. There are further passages in the deed which support the view that the intention of the executant was to sell and not merely to mortgage her property; for example, in the body of the deed there is the following passage:

"I have received the sale consideration from the said vendees as specified below. I have taken out the property sold from the possession of the mortgagee and have put the same in possession of the vendees. Now neither I nor my heirs and representatives have or shall have any claim to or share left in the house sold. Either the vendees should live therein themselves or let it out on rent or

make any constructions or alterations therein. In short, from this date the vendees have all proprietary rights in respect of the property sold."

These provisions in the document appear to us to be absolutely inconsistent with the relationship of mortgagor and mortgagee. It is further to be remarked that the deed provides that the executant shall not sell or hypothecate the property to a third party for the purpose of raising money to re-pay the amount of the sale consideration to the vendees. The provision is as follows:

"I, the executant or my heirs and representatives shall not pay the amount by transferring or hypothecating the said house sold to any one for this purpose, nor shall they transfer or hypothecate the property to any one else for five years after taking it back on payment of the amount of consideration."

This restriction upon the executant in regard to her right to have the property re-transferred to her within one year is also in our opinion inconsistent with the relationship of mortgagor and mortgagee. In this connection we would refer again to the decision of the Privy Council in *Jhanda Singh v. Wahiduddin* (1). It is true that in that case the agreement between parties was embodied not in one document but in two separate deeds. Nevertheless, the condition restricting the vendor's right in regard to the re-purchase of the property was substantially the same as is the restriction imposed upon the vendor in the present case. The Board considered that such a restriction was not consistent with an intention merely to mortgage the property.

It was maintained for the appellant that in view of the plain provisions of s. 58 (c), T. P. Act, and the fact that the sum of Rs. 550 did not represent the real value of the property transferred by the deed of November 10, 1932, that deed must be taken to be a mortgage by conditional sale. Learned Counsel founded specially upon the amendment to s. 58 (c) effected in the year 1929. The amendment is as follows:—

"Provided that no such transaction shall be deemed to be a mortgage unless the condition (i.e., of re-purchase) is embodied in the document which effects or purports to effect the sale."

The object of this amendment was to put an end to the confusion which had resulted from innumerable decisions of the High Courts in India on such transactions embodied sometimes in two documents and which had occasioned disputes, the question in each case being as to whether the transaction was a sale or a mortgage by conditional sale. It is to be noted that the amendment does not provide that if a transaction is embodied in one document, it must of necessity be regarded as a mortgage by conditional sale and not an out

(1) 38 A 570; 36 Ind. Cas 38; A I R 1916 P C 49; 43 I A 284; 31 M. L. J 750; 21 O W N 66; 20 M L T 529; 14 A L J 1189; (1916) 2 M W N 570, 19 Bom L R 1; 5 L W 189; 25 O L J 524; 10 Bur L T 131 (P C).

and out sale. We are therefore thrown back upon the principle that the intention of the parties to the document must be gathered from the terms of the document itself and from the surrounding circumstances.

The main circumstance urged by the learned Counsel for the appellant in favour of the view that the document of November 10, 1932, was a mortgage by conditional sale was that the sale consideration was much less than the true value of the property. In support of this contention he referred to the fact that the plaintiff, shortly after the execution of the deed on November 10, 1932, had purchased from another branch of the family to which the executant belonged the share which they claimed in the same house for Rs. 300. Learned Counsel further pointed to the fact that on June 16, 1933, the appellant purchased *Mst. Kishan Piari's* interest in the property for the sum of Rs. 765; Rs. 550 of this sum was to be appropriated to the re-payment of the sale consideration to the respondents. Therefore it was contended that in all the plaintiff had paid Rs. 1,065 for the property. It cannot, however, be maintained that because the plaintiff paid Rs. 300 for the alleged interest of third parties in the property which was conveyed by the deed of November 10, 1932, that the property was then necessarily of greater value than Rs. 550. Neither can it be concluded from the fact that the plaintiff was willing to pay Rs. 765 for *Mst. Kishan Piari's* interest in the property that the property was worth more than Rs. 550. The Court, it is true, in interpreting the deed of November 10, 1932, has to look to the surrounding circumstances; it would be unsafe, however, to draw any definite conclusion from the acts, independent and not fully explained, of the plaintiff. These acts may be an indication of the true market value of the property, on the other hand they may not. It is not at all certain what considerations induced the plaintiff to pay the price he did. We are not in a position to say from the information before us whether on November 10, 1932, Rs. 550 was or was not a fair market value for the property. If the property had been worth over Rs. 1,000 as is claimed by the appellant, it would have been easy for him to have adduced definite and independent evidence to prove this. We hold, therefore, that there is nothing upon the record to entitle the Court to come to the conclusion that, all things considered, Rs. 550 was not a reasonable price

for the property in the condition in which it was on November 10, 1932.

The terms of the document of November 10, 1932, appear to us to be consistent only with an intention upon the part of the executant *Mst. Kishan Piari* to sell the property absolutely to the defendants and to retain for herself the right to re-purchase within one year. In this view of the matter, the appeal fails. In the result, the appeal is dismissed with costs. There is a cross-objection. There is no force in the objection; it is therefore dismissed with costs. The injunction order is discharged.

Appeal dismissed.

LAHORE HIGH COURT

Civil Revision No. 433 of 1937

January 16, 1939.

TEK CHAND AND DALIP SINGH, JJ.

BHAGWAN DAS AND OTHERS—

CREDITORS—PETITIONERS

versus

MOHAMMAD NAWAZ SHAH—

DEBTOR—RESPONDENT

Provincial Insolvency Act (V of 1920), ss. 25, 3 (6)—Unliquidated assets—Assets realisable at creditor's instance being less than debts due, debtor not willing to pay debts due for long time nor making efforts to liquidate assets—Debtor is deemed to be unable to pay debts—S. 25, scope of—Creditor proving act of insolvency of debtor—Debtor alleging his ability to pay—Duty of Court—Intent to defeat and delay, must be gathered from consequences of the debtor's act.

The mere presence of unliquidated assets does not necessarily prove that these assets are capable of being liquidated. Unliquidated assets cannot be sufficient to discharge debts until they are liquidated and until those steps are taken, whether willingly or unwillingly by the debtor, it cannot be said that, at the time when the petition is put in praying for his insolvency, he is able to discharge his debts in the ordinary sense of the term, namely that he is able to pay them off by making legal tender of the sum demanded. The fact that he might pay them off if a purchaser was available and if he had time given to convert his assets into cash does not affect the question whether at the time of the presentation of the petition and up to the time when this point arises for decision he is or is not able to pay his debts. Hence although he has assets which if liquidated would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present, he must be held not to be able to pay his debts and hence liable to adjudication as an insolvent. The mere fact that the "value" of the immovable property owned by the debtor is in excess of his liabilities is not sufficient to prove his ability to pay his debts regardless of all other considerations. A person may own very valuable properties but they may not be marketable at all or there may be no prospect of any purchaser forthcoming to buy them within a reasonable time even though the owner has made and is willing to

make every possible effort to raise money on them to meet his liabilities. It will be idle to contend in such cases, that the mere fact that the debtor owns valuable properties is *per se* sufficient to justify a finding that he is "able to pay his debts." What he has to show in each particular case is whether he possesses such realizable assets, as can within a reasonable time be made available to meet all his liabilities. Where it is obvious that the assets realizable at the instance of the creditors are much less than the debts due to them, and there is no reasonable prospect of the debtor paying them by voluntary alienation of his land and the debts have been due for a considerable time; but no effort whatever has been made by the debtor to pay off the creditors nor has he any present intention of paying them anything by liquidating any of his assets, it must be held that the debtor is "unable to pay his debts" and that no "other sufficient cause" has been shown under s. 25 of the Provincial Insolvency Act for the dismissal of the creditors' petition. [p. 494, col. 1.]

The provisions of s. 25 relate to the defence that the debtor may put up even though the petitioning creditor satisfies the conditions required by the Insolvency Act and therefore it cannot be said that his ability or inability to pay his debts is not a circumstance into which a Court may enter when once the act of insolvency has been proved. It is the duty of the Court to enter into the matter and if satisfied that the debtor is able to pay his debts, must dismiss the creditors' petition. [p. 492, col. 1.]

The "intent to defeat or delay the creditors" is to be gathered from the consequences of the debtor's act, and if the transfer has the effect of substantially reducing the area, which was available to the creditors for realizing their debts by temporary alienation, and if the transfer by itself is not enough to bring in sufficient money to discharge the existing liabilities, the transfer must be deemed to have been made with intent to defeat and delay creditors although the primary motive of the debtor in effecting the transfer might be different. [p. 494, col. 2]

O. R. from the order of the Additional District Judge, Lyallpur Division at Jhang, dated May 28, 1937.

Order of Reference

Tek Chand, J.—This petition for revision raises questions of law of considerable importance on which there appears to be a serious divergence of judicial opinion. The petitioners, who are four of the creditors of the respondent and to whom a sum of Rs. 10,537 has been found to be due, applied for his adjudication as insolvent, alleging that he had transferred a part of his property with intent to defeat and delay the creditors and that he was unable to pay his debts. The respondent is a member of a notified agricultural tribe of Jhang District and owns a considerable area of agricultural land. He resisted the application on the two-fold ground that he had not committed any "act of insolvency" as defined in s. 6, Provincial Insolvency Act, and that he was

"able to pay his debts." The Insolvency Judge upheld both these contentions and dismissed the application. On appeal the learned District Judge disagreed with the finding on the first point and found that the respondent had committed an act of insolvency. He held, however, that the respondent owned a considerable area of agricultural land which was worth about Rs. 42,000 and that therefore he was able to pay his debts "if he so desires." He accordingly dismissed the appeal. The creditors have come in revision and it is contended on their behalf that on the facts as found by the learned District Judge, he has erred in law in dismissing the application for the adjudication of the respondent as insolvent. The first contention raised is that where the creditors of a debtor apply for his adjudication as insolvent and successfully prove that he has committed an act of insolvency and that Rs. 500 or more is due to the petitioning creditors, the Insolvency Court has no jurisdiction to decide whether such debtor owns sufficient property to pay his creditors. In this connection reliance is placed on a Single Bench decision of Skemp, J. reported in *Harbans Singh v. Kahla Singh* (1) which certainly supports the contention of the learned Counsel for the petitioners. As at present advised, I venture to think that the broad proposition laid down in this decision is not correct. It appears that the attention of the learned Judge was not drawn to s. 25, Insolvency Act, where it is laid down that a creditor's application shall be dismissed if the Court is satisfied by the debtor that he is able to pay his debts. The onus of proving this no doubt lies upon the debtor, but if he alleges that he is able to pay his debts and attempts to prove this allegation, the Court is bound to go into this matter.

It is next contended that the debtor in this case being a member of an agricultural tribe, the mere fact that the value of the land owned by him exceeds his total liabilities is no criterion of his "ability to pay his debts," as according to the provisions of the Punjab Alienation of Land Act, such land cannot be sold in execution of decrees, and under the recent relief of indebtedness legislation, a large part of his land cannot be made available even for temporary alienation. It is also pointed out that whatever the value of the respondent's land might be, he is not possessed

(1) A I R 1937 Lah. 618; 173 Ind. Cas. 918; 39 P L R 292; 10 R L 497.

of liquid assets, sufficient to pay even a fraction of his debts, as is clear (*inter alia*) from the fact that he has not yet discharged any of the decrees which have been outstanding against him for years and which were payable in easy instalments. It is therefore argued that he must be held to be "unable to pay his debts." In support of these arguments, the petitioner's Counsel relies upon a Single Bench decision of Dalip Singh, J. in *Karm Bakhsh v. Gaja Dhari* (2) and the leading judgment of Rankin, C. J. in *Pratapmal v. Chuni Lal Jahuri* (3) in which it was laid down that

"although a debtor may have assets, which if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquid assets wherewith to pay his debts at present, he must be held not to be able to pay his debts (within the corresponding provision of the Presidency Towns Insolvency Act) so as to resist a creditors' petition for adjudication."

The respondent's Counsel on the other hand, relies on *Dad Khan v. Chandi Ram*, 89 Ind. Cas. 585 (4), *Moti Ram Prem Chand v. Kewal Ram Dharam Chand*, 105 Ind. Cas. 569 (5) at p. 575, *Kashmira Singh v. Badar Din*, 120 Ind. Cas. 173 (6) and *Allah Ditta v. Dewa Singh* (7) which are all Single Bench decisions of this Court, in which it has been held that in determining whether a debtor of an agricultural tribe is able to pay his debts within the meaning of the insolvency law his land cannot be excluded from consideration. It is not easy to reconcile the various decisions cited above, and in any case, it is a matter for consideration, whether the view taken in the cases cited for the respondents still holds good, having regard to the recent indebtedness relief legislation. The questions raised are of great importance and are frequently arising and I think, they should be authoritatively decided by a larger Bench. I accordingly refer the case to a Division Bench. The papers will be laid before the Hon'ble Chief Justice for constituting a Bench to hear this case at an early date.

Mr. Inder Dev, for the Petitioners.

Mr. Muhammad Amin, for the Respondent.

(2) A I R 1934 Lah. 63; 148 Ind. Cas. 48; 6 R. L. 527.

(3) 60 O 345; 144 Ind. Cas. 142; A I R 1933 Cal. 417; Ind. Rul. (1933) Cal. 507.

(4) 89 Ind. Cas. 585; A I R 1925 Lah. 630.

(5) 105 Ind. Cas. 569 at p. 575; A I R 1928 Lah. 202; 28 P. L. R. 468; 9 L. L. J. 550.

(6) 120 Ind. Cas. 173; A I R 1929 Lah. 572; Ind. Rul. (1930) Lah. 13.

(7) A I R 1935 Lah. 183; 153 Ind. Cas. 460; 37 P. L. R. 82; 7 R. L. 441.

Order of Division Bench.

Dalip Singh, J.—The facts of this case are given in the referring order, dated March 10, 1938. The question involved in the reference was the proper interpretation of the term "able to pay his debts" in s. 25, Insolvency Act. This question has been answered in *Pratapmal v. Chuni Lal Jahuri* (3) and in a Single Bench ruling of this Court, *Karm Bakhsh v. Gaja Dhari* (2) in which the term was interpreted as meaning that a debtor is not able to pay his debts, although he has assets which, if liquidated, would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present he must be held not to be able to pay his debts and therefore liable to a liquidation as an insolvent. On the other hand, in four Single Bench cases of this Court, *Dad Khan v. Chandi Ram*, 89 Ind. Cas. 585 (4), *Moti Ram Prem Chand v. Kewal Ram Dharam Chand*, 105 Ind. Cas. 569 (5), *Kashmira Singh v. Badar Din*, 120 Ind. Cas. 173 (6) and *Allah Ditta v. Dewa Singh* (7) in the case of debtors' petitions to be declared insolvents, it was held that such a petition was bad if it was shown that the debtor had property which, if liquidated, would be sufficient to pay his debts. I do not think that it is necessary to consider the correctness or otherwise of these decisions for the simple reason that these are all decisions in debtors' petitions to be declared insolvents and the criterion for determining whether a debtor is able to pay his debts or not in such a case may be different from the criterion whether the debtor is able to pay his debts or not in a creditor's petition. I express therefore no opinion one way or the other on this point.

It is sufficient to say that I can see no reason why in a creditor's petition it should be held that a debtor is "able to pay his debts" because he has unliquidated assets which, if liquidated, would provide sufficient money to discharge his debts. In the first place, the mere presence of unliquidated assets does not necessarily prove that these assets are capable of being liquidated. For instance, in the case of land, as in the present case, there may be land whose market value is greater than the debts, but it may well be a question of fact that there is no purchaser available and hence, though the market value of the land may be greater than the debts, the land may not be at all convertible into liquid assets capable of discharging the debts. But, apart from this altogether, it appears to me that, at any

rate, unliquidated assets cannot be sufficient to discharge debts until they are liquidated and until those steps are taken, whether willingly or unwillingly by the debtor, it cannot be said that, at the time when the petition is put in praying for his insolvency, he is able to discharge his debts in the ordinary sense of the term, namely that he is able to pay them off by making legal tender of the sum demanded. The fact that he might pay them off if a purchaser was available and if he had time given to convert his assets into cash does not appear to me to affect the question whether at the time of the presentation of the petition and up to the time when this point arises for decision he is or is not able to pay his debts. From this point of view therefore it appears to me that, at any rate, in a creditor's petition the debtor is "unable to pay his debts," if he has no sufficient liquid assets to discharge the same. It is a totally different question that in certain circumstances and under proper conditions the Court might view with sympathy a request by the debtor to have time to discharge the debts by liquidating his assets or not. The Court might, further, in a proper case, dismiss the petition as being unwarranted by the circumstances. But none of these considerations can apply to the case of a man whose Counsel very frankly conceded on his behalf that he was unwilling to pay his debts and who claimed that this Court should hold that he was "able to pay his debts" because he had unliquidated assets sufficient to discharge the debts if liquidated.

I would therefore hold that, so far as this point is concerned, the learned District Judge was wrong in holding that the debtor could not be declared an insolvent. I have only to add that the ruling referred to by the petitioners' Counsel and in the referring order in *Harbans Singh v Kahla Singh* (1) appears to have overlooked the provisions of s. 25, Insolvency Act, and only to have considered what the petitioning creditor ought to have proved in order to have his petition for insolvency entertained. The provisions of s. 25, however, relate to the defence that the debtor may put up even though the petitioning creditor satisfies the conditions required by the Insolvency Act and therefore it cannot be said that his ability or inability to pay his debts is not a circumstance into which a Court may enter when once the act of insolvency has been proved. The only other point left to be decided is the question whether

the learned District Judge was right in holding that the debtor had committed "an act of insolvency." It appears that the debtor had parted with 414 *kanals* 7 *marlas* of land out of a total unencumbered property of 1211 *kanals* 10 *marlas* in order to save the property of his brother which otherwise was to be farmed out to somebody who had stood surety for the debt of his brother. The learned District Judge held that, in the circumstances of this case, the transfer was "an act of insolvency" within the meaning of s. 6 (b), Insolvency Act. The point does not appear to have been raised at all before the learned Single Judge at the time of the referring order. It is essentially a question of fact, and, ordinarily speaking, the decisions of the learned District Judge in the case would be final, but even without this, on examining the facts of the case, it would appear that the evidence on the record would show that, so far as the creditors are concerned, all they can get is the lease of certain land and the value of this lease would be insufficient to discharge the total debts of the debtor. To have such property further reduced by nearly one-fourth would obviously tend to defeat and delay his creditors, and I think the law should imply an intent to defeat and delay, though this may not have been the primary motive of the debtor in effecting this transfer. It would therefore accept this petition and hold that the debtor should be adjudicated an insolvent. The respondent will pay the petitioner's costs throughout. The case will go back to the Insolvency Court at Jhang for taking further proceedings, according to law.

Tek Chand, J.—I agree in the conclusion reached by my learned brother that this petition must be accepted and the respondent adjudicated insolvent. On behalf of the petitioners two contentions are raised before us. Firstly, it is urged that where the petitioning creditors successfully prove that Rs. 500 or more is due to them and that the debtor has committed an 'act of insolvency' as defined in s. 6 of the Act, the requirements of s. 9 are fulfilled and the Insolvency Court must adjudicate the debtor an insolvent forthwith and it has no jurisdiction to enquire as to whether the debtor is able to pay his debts. In support of this contention, reliance is placed upon a Single Bench decision of this Court, reported in *Harbans Singh v. Kahla Singh* (1). With

great respect, I am unable to accept this decision as laying down the law correctly. It apparently proceeded upon the assumption that s. 9 is the only section in the Act governing a creditor's application for adjudication of the debtor as insolvent, and it entirely overlooked s. 25 of the Act. Section 9, however, lays down the conditions on which a creditor is entitled to present an insolvency petition against a debtor; while s. 25 enumerates the defences that the debtor may put forward and on proof of which he may successfully resist the petition and ask for its dismissal. That section expressly provides that the creditor's petition shall be dismissed if the debtor satisfies the Court (*inter alia*) that he is "able to pay his debts," or that for "any other sufficient cause" no order ought to be made on the petition. The onus to prove this, of course, lies upon the debtor; but if he alleges that he is able to pay his debts, the Court is bound to enquire into the matter and, if satisfied of his ability to do so, it must dismiss the petition. In this connection, reference may be made to *Murli v. Sohoni Lal Bansi Lal* (8) and *Maung Po Sai v. Bank of Chettinad, Ltd.* (9) where the proposition accepted in *Harbans Singh v. Kahla Singh* (1) was put forward but rejected. The provisions of the Act are explicit, and the respondent is clearly entitled to show that he is "able to pay his debts." This contention of the learned Counsel for the petitioners is, therefore, without force and must be overruled.

His second contention is that on the facts found the respondent must be held to have failed to prove that he is "able to pay his debts," and the lower Court has erred in law in coming to the contrary conclusion. It is common ground, that the onus to prove that the respondent is "able to pay his debts" lies on him; and the question is whether he has succeeded in discharging it. The facts found or admitted by the parties are: (a) that the respondent owes debts, amounting to Rs. 18,691 which have been outstanding for years against him: decrees have been obtained on some of these debts, payable in easy instalments, but the respondent has not paid anything substantial towards them; (b) that he is not possessed of any liquid assets with which to pay these debts; (c)

that he owns agricultural land, the value of which has been found by the lower Appellate Court to be more than twice the aggregate amount of his liabilities; (d) that the respondent, being a statutory agriculturist, cannot be compelled to sell this land for payment of his debts. Therefore, unless he voluntarily sells or mortgages it to another agriculturist, all that his creditors can do is to have a temporary alienation, for a period not exceeding 20 years, of such portion of it as is left after setting apart a sufficient area for the maintenances of himself and his family: it is conceded that the amount for which such temporary alienation can be made, will be much less than the debts due and (e) that the respondent has made no attempt whatever to voluntarily raise money on this land for paying off his creditors nor is he willing to do so now. On these facts, I have no doubt that it must be held that he has not proved that he is "able to pay his debts." There has been some controversy before us as to the exact meaning of the expression "the debtor is able to pay his debts" as used in s. 25. The petitioner's learned Counsel has contended that this means that "he has no liquid assets wherewith to pay his debts at present" and in support of this contention he has referred to certain observations in the judgment of Rankin, C. J. in *Pratapmal v. Chuni Lal Jahuri* (3) which was a case under the corresponding provision of the Presidency Towns Insolvency Act which is in identical terms with s. 25, Provincial Insolvency Act. But with great deference, I venture to think that this goes much further than the section. Neither s. 13 (4), Presidency Towns Insolvency Act, nor s. 25 of Act V of 1920 contains the words "at present" and there is nothing in the context to justify their being imported in it so as to hold that whatever be the extent of the marketable assets of the debtor if he is unable to meet all his liabilities forthwith by "making legal tender" of the total amount due, he is liable to be adjudicated insolvent. This would lead to startling consequences which if I may say so with respect are not warranted by the statute. As pointed out by Mukherjee, J. in *Samiruddin v. Kadar Moyee Dassi*, 7 Ind. Cas. 691 (10)

"although a debtor may not be able to satisfy the Court that he is then and there able to pay his debts, yet he may be able to satisfy the Court

(8) A I R 1930 Lah. 855; 127 Ind. Cas. 360; Ind. Rul. (1930) Lah. 856.

(9) A I R 1936 Rang. 26; 160 Ind. Cas. 109; 13 R 717, 8 R Rang. 340.

(10) 7 Ind. Cas. 691; 12 O L J 445; 15 O W N 244.

that there is a reasonable prospect of his being able to make such payment." the Court will dismiss the creditor's petition for adjudging him an insolvent. At the same time I am unable to accept the contention put forward by the respondent's Counsel and accepted by the lower Court that the mere fact that the "value" of the immovable property owned by the debtor is in excess of his liabilities is sufficient to prove his ability to pay his debts regardless of all other considerations. A person may own very valuable properties but they may not be marketable at all or there may be no prospect of any purchaser forthcoming to buy them within a reasonable time even though the owner has made and is willing to make every possible effort to raise money on them to meet his liabilities. It will be idle to contend in such cases, that the mere fact that the debtor owns valuable properties is *per se* sufficient to justify a finding that he is "able to pay his debts." What he has to show in each particular case is whether he possesses such realizable assets, as can within a reasonable time be made available to meet all his liabilities. In the case before us, it is obvious that the assets realizable at the instance of the creditors are much less than the debts due to them, and there is no reasonable prospect of the debtor paying them by voluntary alienation of his land. The debts have been due for a considerable time; the insolvency petition has been pending since October 25, 1935; but no effort whatever has been made by the respondent to pay off the creditors. Indeed, Counsel frankly stated that the respondent has no present intention of paying them anything by liquidating any of his assets. In the circumstances, it is obvious that the respondent is "unable to pay his debts" and that no "other sufficient cause" has been shown under s. 25 of the Act for the dismissal of the creditors' petition.

Before concluding this part of the case, it may be mentioned, that the respondent's Counsel relied upon *Dad Khan v. Chandi Ram*, 89 Ind. Cas. 585 (4), *Moti Ram Prem Chand v. Kewal Ram Dharam Chand*, 105 Ind. Cas. 569 (5) at p. 575, *Kashmira Singh v. Badar Din*, 120 Ind. Cas. 173 (6) and *Allah Ditta v. Dewa Singh* (7). These cases are, however, all distinguishable and it is not necessary to discuss them in detail. They all arose out of debtor's petitions for adjudication as insolvent, and the criteria for determining the question in such petitions are different. It may be stated, however, that the view taken therein is in

accord with the rulings of the other High Courts: see *Baldeo Das v. Sukhdeo Das* (11), *Thayarammal v. Balusami Chetty* (12) at p. 396 and *Ram Deo v. Preetam Singh* (13). Where the debtor himself is the petitioner and is invoking the jurisdiction of the Court on the ground that he is "unable to pay his debts," he must make out a *prima facie* case that his liabilities exceed his assets and that he has made every effort to liquidate them but has not been able to raise the requisite funds. If, therefore, he possesses agricultural land or other rights in immovable property, which he can sell, and which, if sold, would bring in sufficient money to pay off the creditors, but he does not wish to do so, it cannot be said that he is "unable to pay his debts." It is, however, not necessary to pursue the matter further in this case.

At the close of his argument before us, respondent's Counsel raised another point, which he had not urged at the hearing before the Single Bench. He contended that the lower Appellate Court was in error in holding that in making the transfer in favour of the mortgage bank, the respondent had committed an "act of insolvency" within the meaning of s. 6 (b), Provincial Insolvency Act. It was admitted that out of a total of 1,211 *kanals* 10 *marals* of unencumbered land, the debtor had mortgaged 414 *kanals* 7 *marlas* to the bank within three months of the petition, but it was contended that this was not done with the "intent to defeat or delay the creditors." The intent however is to be gathered from the consequences of his act, and it is obvious that the transfer had the effect of substantially reducing the area, which was available to the creditors for realizing their debts by temporary alienation, and which itself was not enough to bring in sufficient money to discharge his existing liabilities. It may be, that the primary motive of the respondent in effecting the transfer was different, but that is immaterial. I hold that the petitioning creditors have fulfilled the conditions laid down in s. 9, and the respondent has failed to make out a case for the dismissal of the petition under s. 25. For these reasons, I agree that this petition must be accepted and the respondent adjudicated insolvent. The petitioner will get his costs in all Courts. The case will be

(11) 19 A 125; A W N 1896, 187.

(12) A I R 1928 Mad. 394 at p. 396; 108 Ind. Cas. 208; (1928) M W N 62.

(13) A I R 1936 Rang. 108; 161 Ind. Cas. 588; 8 R Rang. 488.

returned to the Insolvency Judge for taking further proceedings in accordance with law.
D. *Petition accepted.*

BOMBAY HIGH COURT

Second Appeal No. 400 of 1936

February 27, 1939

WASSCODEW, J.

RAICHAND GULABCHAND ACOHA—
PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE—DEFENDANT—
RESPONDENT

Bombay Land Revenue Code (Act V of 1879), ss. 65, 48, 213, 214—Code to be strictly construed—Determination of purpose to which building is put by farmer—Its character and amount spent, if material—Proprietor of land building godowns and using them for storing grass cut from his own land for selling it subsequently—If liable to non-agricultural assessment when his original intention was to use it for non-agricultural purpose—Rules framed under ss. 213 and 214, r. 91—"Any holding... assessed", meaning of.

The Bom. Land Revenue Code not only imposes a pecuniary burden on the subject, but restricts the use and enjoyment of his property. Such a statute must always be regarded as subject to the rule of strict construction. The proprietor is, therefore, entitled to ask the Court to construe it in his favour. [p. 497, col. 1.]

The character of the building or the amount of money spent upon its construction is immaterial in judging the purpose for which it is put eventually by the farmer. [*ibid.*]

The use of the words "farm-buildings, wells or tanks" in s. 65, Bom. Land Revenue Code does not exhaust but illustrates the kind of improvements intended by the Legislature to entitle the owner to the benefit of lesser assessment. The phrase "make any other improvements thereon for the better cultivation of the land" in s. 65 ought not to receive a narrow construction limited to some object directly connected with agricultural operations or the act of production merely. Any improvement which conduces to profitable husbandry and facilitates the marketing of agricultural produce, would be included within the class of improvements protected by s. 65. That would include the provision for store-houses made by an agriculturist for the protection of his agricultural produce until it leaves his farm. Thus, if grass as agricultural produce is cut, pressed, baled and stored in a godown with the object of eventually selling it when the market improves and it is profitable to sell the produce, the construction of such a godown which facilitates the object in question would be protected. The farmer produces his crops in order to sell the same and thus to provide the means to carry on further cultivation, that is, in other words, the business of farming or cultivation. Thus the use of the land being for agricultural purpose, its proprietor is not liable to non-agricultural assessment merely because he previously intended to use it for non-agricultural purpose, as the mere intention to use the property for non-agricultural purpose without its actually being so used will not enable the Govt. to alter the agricultural assessment. *Hoddell v. Parker* (2), distinguished. [p. 497, col. 2.]

The expression "any holding which has been assessed" implies "legally assessed." When therefore the basis for altered assessment fails, the levy of altered assessment would be illegal. [p. 498, col. 1.]

S. A. from a decision of the District Judge, Thana, in Appeal No. 111 of 1934.

Messrs. G. N. Thakor and K. V. Joshi, for the Appellant.

Mr. B. G. Rao, Assistant Govt. Pleader, for the Respondent.

Judgment.—This is a second appeal from a decision of the District Judge, of Thana. The question raised is whether in view of the character of the construction of the two godowns on the plaintiff appellant's agricultural land in Bhilad, the latter has rendered himself liable for the payment of the full rates of non-agricultural assessment for the land on which they were erected, irrespective of the actual use to which they were put by him. The plaintiff alleged that although at the time of building those godowns he intended to let them cut for strong grass to others, as there was no demand for such godowns ever since he built them, he had stored in them his own grass cut from his own *varikas* fields in order eventually to export the same to the market for sale. It was expressly admitted that only the grass cut but by the plaintiff from his own fields has always been stored by him in those godowns, and both the Courts below have held that the grass so stored belonged to the plaintiff and was not sold to any outsider. It seems that in 1921 the first godown was built with the express permission of the Collector upon an application stating that the intended use was unconnected with agriculture. The second godown was built in 1923, avowedly for the same purpose. Assessment was fixed at the maximum rates prevailing, namely Rs. 60 per acre. In consequence of certain representation of the plaintiff, and the latter's unwillingness to sign an agreement in favour of the Collector in regard to the levy of altered assessment, the Deputy Collector offered a reduced rate of Rs. 20 per acre.

Eventually in 1929, the plaintiff was dissatisfied of his position and refused to pass an agreement to the Collector according to the Rules and Standing Orders of Govt. The Collector notwithstanding that fact assessed the land by reference to its use, which he assumed was unconnected with agriculture. That assessment the plaintiff refused to pay, and he applied to the Collector in or about

the year 1929 to re-consider his decision stating that the godowns were used exclusively by him for agricultural purpose only and that lesser rates should be levied. The plaintiff was willing to pay Rs. 12 per acre which was somewhat higher than the agricultural assessment (*vide* Ex. 29). No notice was taken of that representation. Therefore, the plaintiff filed this action against the Secretary of State for a declaration that the godowns had not been used for non-agricultural purpose, and that consequently the defendant was not competent to levy non-agricultural assessment on the property. He also prayed for a declaration that all orders passed in the matter for enhancement of assessment were illegal, and in the alternative, that the defendant could at the most levy assessment at the rate of Rs. 12 to Rs. 18 per acre. There was an additional prayer for refund of the excess assessment recovered from him.

Both the Courts below have held that the two godowns could not be described as farm-buildings, nor could they be described as an improvement for the better cultivation of the land. The learned District Judge took the view that, although the godowns provided proper facilities for storing the produce derived from the plaintiff's land, they were not exempt under s. 65, Bom. Land Revenue Code, for among the exempted buildings were those which enabled the agriculturist to live on the land, and to keep his implements and cattle there, and which provided facilities for cultivating the land in a proper way, and that the structures in question were not essential or necessary to enable the agriculturist to better cultivate his lands. He therefore confirmed the decree of the trial Court dismissing the plaintiff's suit with costs. Against that decree the plaintiff has appealed.

It cannot be denied that the basis of assessment of land by Govt. under the Bom. Land Revenue Code, is the use to which it is put by the owner or occupant. By erecting the two godowns on agricultural land, the utility of the land occupied by the godowns for actual cultivation necessarily ceased. But by mere cessation of cultivation it would not follow that the land was put to any other use unconnected with agriculture. That would depend on the question whether the cessation of cultivation was the result of its use for any other purpose. If it was so, the question would be whether that altered use was unconnected with agriculture within the meaning of s. 80 in

Chap. XIV, Land Revenue Rules, under ss. 213 and 214, Bom. Revenue Code, and of the provisions of the Code. What use is unconnected with agriculture has to be determined by reference to s. 65, Land Revenue Code. That section says:

"An occupant of land assessed or held for use for agriculture is entitled by himself, his tenants, agents, or other legal representatives to construct wells or tanks, or any other improvements thereon for the better cultivation of the land or its more convenient use for the purpose aforesaid."

Obviously, the use of the words "buildings, wells or tanks", does not exhaust but illustrates the improvements intended by the Legislature to entitle the owner to the better assessment. If the land is put to any use unconnected with agriculture, s. 65 of the Code would come into operation. The provisions of that section, which empower the Govt. to alter the assessment, are as follows:

"(1) The land revenue leviable on any land under the provisions of this Act shall be assessed, or deemed to have been assessed, as the case may be, by reference to the use of the land—

- (a) for the purpose of agriculture;
- (b) for the purpose of building; and
- (c) for a purpose other than agriculture or building."

"(2) Where land assessed for use for any purpose other than agriculture, the assessment fixed by the provisions of this Act upon such land, notwithstanding that the term for which such assessment may have been fixed has not expired, may be altered and fixed at a different rate by the authority and subject to such rules as the Govt. may prescribe in this behalf."

The determinative factor in the altered assessment according to the provisions is the altered use to which the property is put. In my opinion, the intention to use property for a particular purpose, without its actual use for that purpose, will not enable Govt. to alter the agricultural assessment, which is the lowest standard of assessment on property under the Land Revenue Code. It is contended on behalf of Govt. that the assessment was altered upon the plaintiff's own application to the effect that by building the godowns he was converting the land to a non-agricultural use, and secondly, that the admitted fact that the godowns have been put to use connected with agriculture as the plaintiff contends, do not constitute any improvement for the better cultivation of the land. It seems to me that that argument is not well founded. If the term "farm-building" is used in its ordinary sense, it

ink, absorb within its meaning many kinds and classes of buildings such as store-houses for implements, manure, seed and farm produce. The godowns in question might fall under the last description. Although in point of outlay and stability the construction is more ambitious and expensive than the ordinary store-house to which the poor and backward Indian farmer is accustomed, the question is whether on that account alone the plaintiff should be penalized. There is authority of this Court which emphasizes the principle that the character of the building or the amount of money spent upon its construction is immaterial in judging the purpose for which it is put eventually by the farmer. Where the Court allowed wide interpretation of the term "agriculture" as used in s. 48; see *Bhau Mahadu v. Vithal Dattatraya* (1). In that connection the following observations appear in the judgment of Norman Macleod, C. J., (p. 612*):

"The only ground on which the judgment can be supported would be that this building was of such a substantial character that it was far too good to be used for agricultural purposes. But that is not the question. If it is put up for agricultural purposes, it does not matter how much the builder had spent on it."

Heaton, J. (as he then was) has also observed as follows (pp. 613, 614*):

"It is not shown in the judgments, it is not even suggested, that this substantial structure which the defendant put up was put up not in order that he might live there and conduct his agricultural work from there, but for some other purpose of profit."

It is too late in the day to suggest that a strong or substantial store-house or a godown is unnecessary for facilitating farm operations and the protection of agricultural produce, and I think the suggestion that, apart from the use, the substantial character of those godowns alters their character as farm buildings is unreasonable. The test applied by the Courts below in judging the character of the buildings is the direct and immediate effect of the use of those buildings on actual cultivation or farm operations apart from their potential or ultimate value to the farmer in the cultivation of his land. The Land Revenue Code not only imposes a pecuniary burden on the subject, but restricts the use and enjoyment of his property. Such statute must always be regarded as subject to the rule of strict construction. The proprietor is, therefore,

entitled to ask the Court to construe it in his favour. If cultivation merely implies ploughing, sowing, tilling and reaping; without more, it might be said that any improvement directly connected with those acts alone is permitted by the statute. I find from Anderson's Land Revenue Rules that dairy farming has been allowed by Govt. to be regarded as part of agricultural use of land, and so also cane crushing and gum boiling: see pp. 78 and 79, 1921 Edn., printed under Govt. Resolution. That view follows the language of r. 80 in Chap. XIV of the Land Revenue Rules of 1921. It says:

"Where unalienated land assessed or held for purposes of agriculture only is subsequently used for any purpose unconnected with agriculture, the assessment upon the land so used shall... be altered under sub-s. (2) of s. 48 and such alteration shall be made by the Collector in accordance with the following rules."

The words "used for any purpose unconnected with agriculture" are significant and indicate the intention of Govt. In my opinion, the phrase "make any other improvements thereon for the better cultivation of the land" in s. 65 ought not to receive a narrow construction limited to some object directly connected with agricultural operations or the act of production merely. Any improvement which conduces to profitable husbandry and facilitates the marketing of agricultural produce would, in my opinion, be included within the class of improvements protected by s. 65. That would include the provision for store-houses made by an agriculturist for the protection of his agricultural produce until it leaves his farm. Thus, if grass as agricultural produce is cut, pressed, baled and stored in a godown with the object of eventually selling it when the market improves and it is profitable to sell the produce, the construction of such a godown which facilitates the object in question would be protected. The farmer produces his crops in order to sell the same and thus to provide the means to carry on further cultivation, that is, in other words, the business of farming or cultivation. I was referred to the case in *Hoddell v. Parker* (2), decided by reference to the provisions of s. 9, sub-s. (1), Locomotives Act, 1893. That case is clearly distinguishable on the facts. There a threshing engine was let out on hire by the appellants to a farmer to thresh wheat and to haul the wheat, when threshed, in trucks to a mill to be ground.

(1) 44 B 609; 57 Ind. Cas. 549; A I R 1920 Bom 118; 24 Bom. L R 793

*Pages of 44 B.—[24.]

(2) (1910) 2 K B 323; 79 L J K B 759; 103 L T, 42; 71 J P 315; 8 L G R 690.

There was no evidence as to whether it was to be returned to the farm when ground. The trucks were the property of the owners of the threshing engine, and it was held that the engine, when being used for hauling the wheat to the mill, was not being used for an agricultural purpose. Here the facts are entirely different. The act of cutting and removal of the grass to a safe place in the farm itself must be regarded as necessary and innocent, being part of farm operations. That safe place is provided by the godowns in question erected on the farm. If the erection of those godowns is the gravamen of the charge, the plaintiff must be acquitted of the charge on the facts stated and admitted. The basis upon which the altered assessment has been levied fails, for notwithstanding the original intention to subject the property to non-agricultural use, it has never been so used.

The other argument urged on behalf of Govt. is that inasmuch as the plaintiff has accepted the legality of the altered assessment he cannot, by mere proof that he has not actually used the property according to his original intention, claim reduced rate of assessment. That argument, as I have pointed out above, is not in accordance with the principle governing the imposition of altered assessment. My attention has been directed to r. 91 of the Land Revenue Rules to the following effect:

"When any holding, which has been assessed or of which the assessment has been altered for any non-agricultural use is used for agriculture only, the Collector may, on the application of the holder, remove the non-agricultural assessment and impose either the old agricultural assessment, if any, and if the settlement period has not expired; or may impose in other cases a new agricultural assessment equivalent to that imposed on other similar agricultural lands in the vicinity.

It is difficult to say what act amounts to 'assessing' land. The mere fixing of assessment rightly or wrongly if it implies assessing land, r. 91 might come into operation, and I think the plaintiff would have then to proceed under that rule as a matter of formality. But, I think, that the expression "any holding which has been assessed" implies "legally assessed." When therefore the basis for altered assessment fails, the levy of altered assessment would be illegal. The plaintiff is therefore granted a declaration that he has not used the godowns in question for any purpose other than agriculture, and that so long as they are not so used, the land is not liable to altered assessment under the provisions of the Code at a different rate by such authority

as prescribed in s. 48. The plaintiff is also allowed the consequential relief prayed for. Accordingly, this appeal is allowed, and the lower Courts' decrees are set aside, with costs throughout.

s.

Appeal allowed.

PATNA HIGH COURT

Appeal No. 186 of 1938

August 9, 1939

ROWLAND AND CHATTERJI, JJ.

RAM RANBIJAYA PRASAD SINGH

—APPELLANT

versus

MADHO TURHA AND OTHERS—RESPONDENTS

Appeal—Abatement—Setting aside of—Held, sufficient cause was shown for setting aside abatement—Civil Procedure Code (Act V of 1908), O. XXII, r. 11, O. XLIII, r. 1 (k)—Order refusing to set aside abatement of appeal—Whether appealable.

The critical question in deciding whether an abatement should be set aside is whether sufficient cause has been shown and that is a matter for decision on the facts of each case. No hard and fast rule can be laid down as to what constitutes sufficient cause.

An application for setting aside the abatement of the appeal was made by the appellant on the ground that his law agent who was in charge of the appeal was neither living in the village nor had any touch with the village where the deceased respondent lived and that he came to know of the death of respondent only after several months from his death:

Held, that sufficient cause was made out for setting aside the abatement.

An appeal lies against an order refusing to set aside an abatement of an appeal. 174 Ind. Cas. 40 (1) and 85 Ind. Cas. 1010 (2), followed.

A. from the original order of the Additional District Judge, Shahabad, dated April 6, 1938.

Messrs. S. M. Mullick and B. P. Sinha, for the Appellant.

Messrs. A. D. N. Sinha and M. Azizullah, for the Respondent.

Chatterji, J.—This is an appeal against an order refusing to set aside an abatement of an appeal. There were 24 defendants in the suit, all residents of the same village, and they were also the respondents in the lower Appellate Court. Respondent No. 21 died on May 7, 1937, after notices of the appeal were duly served. On September 6, 1937, respondent No. 16 filed a petition stating that the appeal abated as respondent No. 21 died more than three months ago. On September 13, 1937, the appellant made an application for substitution of respondent No. 20 in the place of the

deceased respondent. On the following day, however, respondent No. 18 intimated to the Court that the deceased respondent had left a son and two nephews who were not on the record. The matter was put up on the next day when the Court recorded an order that the appeal abated. Thereafter, on October 1, 1937, the appellant made an application for setting aside the abatement. The appellant is the Maharaja of Dumraon. The ground for setting aside the abatement was that the conduct of the appeal was in the hands of his law agent who lived at Arrah for the purpose and he came to know of the death of respondent No. 21 only when the petition was filed on September 6, 1937, by respondent No. 16. At the hearing the law agent gave evidence in support of the application. No evidence was adduced on behalf of the respondents. The learned District Judge has held that no sufficient case was made out for setting aside the abatement. He remarks that the deceased respondent being resident of a village where the appellant's *patwari* and *tehsildar* live, it was possible for him, if he was diligent, to keep himself informed of the death of respondent No. 21.

A preliminary objection is taken to the maintainability of the appeal. It is contended that O. XLIII, r. 1 (k) which provides for an appeal against an order refusing to set aside an abatement by its terms applies only to suits and not to appeals. However looking to the provisions of O. XXII, r. 11, it is clear that so far as abatement is concerned, 'suit will be deemed to include an appeal.' The matter is concluded by authorities of this Court. In *Wajid Ali v. Fagoo Mandal* (1), a similar objection was taken but it was overruled. Their Lordships with reference to the provisions of O. XXII, rr. 9 and 11 held that an appeal lies against an order refusing to set aside an abatement of an appeal. On the same point there is also the case in *Hari Saran Singh v. Saiyid Mohammad Eradat Hussain* 85 Ind. Cas. 1010 (2). These are Division Bench decisions of this Court and we have to follow them.

On behalf of the appellant Mr. Mullick, relying on the same decisions in *Wajid Ali v. Fagoo Mandal* (1), and *Hari Saran Singh v. Saiyid Mohammad Eradat Hussain*, 85 Ind. Cas. 1010 (2), contends that in an appeal after (1) 18 P L T 1014; 174 Ind. Cas. 40; A I R 1938 Pat. 125; 17 Pat. 84; 4 B R 379; 10 R P 471. (2) 85 Ind. Cas. 1010; A I R 1925 Pat. 162; 2 Pat. L R 279.

notices have been duly served on the respondents, it is not obligatory on the appellant to keep himself informed about the movements of the respondents. On behalf of the respondents on the other hand reliance is placed on the earlier cases in *Mahanth Rampurkash Das v. Kunj Lal* (3) and *Phulwati Kumari v. Maheshwari Prasad Singh* (4), which lay down that it is obligatory on an appellant to keep himself informed of any devolution of interest that may take place by reason of the death of any of the respondents and it is not sufficient for setting aside an abatement merely to say that the appellant had no knowledge of the death of the respondent till many months after such death. To my mind this proposition was too broadly stated. The critical question in deciding whether an abatement should be set aside is whether sufficient cause has been shown and that is a matter for decision on the facts of each case. No hard and fast rule can be laid down as to what constitutes sufficient cause. In this particular case the appeal was in charge of the appellants law agent, it is not suggested that he was living in the village or had any touch with the village where the deceased respondent lived. The reason given by the learned District Judge is that the appellant has his *patwari* and *tehsildar* in the village and if he had been diligent, he might have known of the death of the deceased respondent. This is hardly fair. There is nothing to suggest that in the ordinary course of business the appellant could have known of the death. Nor is there anything to show that the *patwari* or *tehsildar* had any connection with the appeal. The respondents do not suggest that the appellant's law agent who was in charge of the appeal had been to their village near about the time when respondent No. 21 died.

In the circumstances I do not consider that the learned District Judge was justified in rejecting the evidence of the law agent. Accepting his evidence, I would hold that sufficient cause was made out for setting aside the abatement. I would therefore allow the appeal and set aside the abatement and direct that the appeal be disposed of according to law. The abatement will be set aside on condition of the appellant paying the costs of the lower Court as well of this Court to the contesting

(3) 4 P L T 567; 79 Ind. Cas. 414; A I R 1924 Pat. 126.
(4) 5 P L T 319; 75 Ind. Cas. 809; A I R 1924 Pat. 607.

respondents: Hearing fee Rs. 4 in the lower Court and two gold mohurs in this Court.

Rowland, J.—I agree.

S.

Appeal allowed.

MADRAS HIGH COURT

Civil Appeal No. 194 of 1937

October 18, 1938

BURN AND STODART, JJ.

Rani VEERAMMANI—APPELLANT

versus

Raja VEERABASAVA CHIKKA

ROYAL AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—One of several decree-holders as result of arrangement arrived at between them, applying for execution of decree—Omission to state in application expressly that he was only one out of several decree-holders—Whether invalidates application—Application, if can be allowed to be amended so as to bring it into compliance with O. XXI, r. 15.

The omission in an application by one of several decree-holders for execution to mention that there are other decree-holders does not necessarily invalidate the application and when the attention of the Court is drawn to the defect, the Court can allow the application to be amended.

Where, therefore, one of the several decree-holders, as a result of an arrangement arrived at between them applies for the execution of the decree without expressly stating in the application that he is only one of the decree-holders, his application is not liable to be dismissed by reason of the defect and the Court can allow the decree-holder to amend the application in order to bring it into compliance with the requirements of O. XXI, r. 15. It is not open to the judgment-debtor to raise an objection to the arrangement arrived at between the decree-holders. He can only request the Court under O. XXI, r. 15, to see that his interests were not in any way jeopardized by payment to one out of many decree-holders. 135 Ind. Cas. 207 (1) and 122 Ind. Cas. 179 (2), relied on.

O. A. against the order of the Sub-Judge, Chittoor, dated November 12, 1936.

Mr. S. V. Venugopalachariar, for the Appellant.

Mr. N. C. Vijayaraghavachari and A. C. Sampath Ayyangar, for Respondents.

Burn, J.—The appellant was plaintiff No. 1 in O. S. No. 25 of 1930 on the file of the Subordinate Judge of Chittoor. There were 4 plaintiffs altogether and the decree passed in the suit was in favour of all of them. In E. P. No. 22 of 1936, on February 10, 1936, plaintiff No. 1 applied for execution of the decree without stating expressly that she was only one of the four decree-holders. It appears that in a subsequent suit, O. S. No. 42 of 1933, in the same Court

which was a suit between plaintiff No. 1 and plaintiff No. 2 in O. S. No. 25 of 1930, there was a compromise by which these two persons agreed that out of the amount still due under the decree in O. S. No. 25 of 1930 plaintiff No. 1, Rani Veerammani Garu, should receive Rs. 3,000 and the balance should be taken by plaintiff No. 3, Rani Mahadevammani Garu, without any further claim by the first two plaintiffs in O. S. No. 25 of 1930. It was further declared in the decree in O. S. No. 42 of 1933 that the plaintiff be entitled to a first charge on the decree in O. S. No. 25 of 1930 to the extent of Rs. 3,000 with interest thereon and that she be entitled to execute the said decree in her own name to the said extent. It is recited in the decree that Rani Mahadevammani and Raja Mahadeva Raja Varu, plaintiffs Nos 3 and 4 in O. S. No. 25 of 1930, had recorded their consent to this arrangement in the compromise petition. It is not disputed that this latter recital is correct, when plaintiffs Nos. 3 and 4 did agree to plaintiff No. 1 taking Rs. 3,000 out of the amount decreed in O. S. No. 25 of 1930.

It is not known how the Court came to pass the decree in O. S. No. 42 of 1933 in these terms because it is not possible under the provisions of O. XXI, r. 15, for one of several decree-holders to execute the decree for his or her own benefit. However, the decree was passed and it is quite clear that all the joint decree-holders in O. S. No. 25 of 1930 did consent to that arrangement. It cannot therefore be alleged for a moment that plaintiff No. 1 when she filed E. P. No. 22 of 1936 was attempting to perpetrate any fraud upon the Court or upon her fellow decree-holders. The judgment-debtor in O. S. No. 24 of 1930 raised the objection that the execution petition was liable to be dismissed as it was filed only by one joint decree-holder. Notice was thereupon given to the other decree-holders in O. S. No. 25 of 1930 and they, for some unexplained reason, supported the objection raised by the judgment-debtor. The learned Subordinate Judge dismissed the execution petition outright. Mr. Sheetharama Rao who appears for the appellant in this Court concedes that the execution petition ought to have been filed on behalf of all the decree-holders in O. S. No. 25 of 1930 but suggests that in the circumstances, the lower Court would have been well advised to allow any necessary amendments to be made in the execution petition to bring it into accord with the provisions of O. XXI,

r. 15. Mr. Sampath Ayyangar who appears for the 3rd and 4th decree-holders in O. S No. 25 of 1930 has no strong objection to raise to such permission being granted at this stage. The learned Advocate for the judgment-debtor, however, opposes this suggestion. He says in the first place that the appellant, as soon as the defect in the execution petition was brought to her notice, might have filed a fresh application at once in accordance with O. XXI, r. 15 without pursuing the matter to the bitter end in the Subordinate Court and then preferring an appeal to this Court. He points out also that it is possible that by this time more than three years may have elapsed since the dismissal of the last prior execution petition. In that case he says that the judgment-debtor would be deprived of the plea of limitation if amendment of the execution petition were now allowed. We do not think that these considerations should prevent us from saying that the petition should be allowed to be amended now. It has been pointed out by Sir Shadi Lal in *Ghanya Lal v. Madho Parshad* (1) that the omission in an application by one of several decree-holders for execution to mention that there are other decree-holders, does not necessarily invalidate the application. The learned Chief Justice observes:

"Order XXI, r. 15, provides that any one or more of the joint decree-holders may apply for the execution of the whole of the decree for the benefit of them all; and it is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree is such a defect as would invalidate the execution proceedings."

The learned Chief Justice then refers to a case decided by a Division Bench of the Calcutta High Court in which it was held that such an omission does not render the execution proceedings invalid. It is pointed out also in *Dharmdeo Rai v. Jwala Prasad* (2) that:

"Although under r. 15 of O. XXI, no duty has been cast upon the Court receiving the application for execution to have the defects remedied, it does not follow that if any requirements of r. 15 of O. XXI, have not been complied with by inadvertence or otherwise, the Court when its attention is drawn to the defect, subsequently cannot allow the amendment."

We agree with the observations of the learned Judges in that case at p. 190* where

(1) A I R 1931 Lah. 600; 135 Ind. Cas. 207; 32 P L R 290; Ind. Rul. (1932) Lah. 79.

(2) A I R 1930 All. 188; 122 Ind. Cas. 179; (1930) A L J 474; Ind. Rul. (1930) All. 211.

*Page of A. I. R. 1930 All.—[Ed.]

they observe:

"The learned Judge has dismissed the last application on the additional ground that only one of the two decree-holders applied for execution without making it appear on the face of it that it was made for the benefit of the legal representatives of the deceased co-decree-holder. In taking to this course, the learned Judge has allowed his mind to be influenced by too technical a consideration which is devoid of all substance and in utter disregard of the ends of substantial justice."

We think the same remarks apply here. It is quite clear, as we have already said, that the appellant was acting in perfect honesty when she applied for execution of the decree for her own benefit to the extent of Rs. 3,000. That was the arrangement which had been come to between the four decree-holders and it was not an arrangement to which the judgment-debtor could take a valid objection; he could only request the Court under O. XXI, r. 15, to see that his interests were not in any way jeopardized by payment to one out of four decree-holders. This being so, we think that this appeal must be allowed and the order of the learned Subordinate Judge dismissing the execution petition set aside. The execution petition must be restored to file and disposed of according to law after allowing the appellant to amend it in order to bring it into compliance with the requirements of O. XXI, r. 15. We think it is right to order that the appellant should pay the costs of all the respondents in the execution petition and in this appeal.

N.B.

Appeal allowed.

ALLAHABAD HIGH COURT

Miscellaneous Case No. 998 of 1938

August 23, 1939

ALLSOP, J.

VISHWANATH PRASAD JALLAN
AND ANOTHER—APPLICANTS

versus

HOLYLAND CINETONE, LTD, BENARES
—OPPOSITE PARTY

Companies Act (VII of 1913), s. 31 (2)—"Debt," meaning of—Signatories of Memorandum undertaking to purchase certain shares—No time for payment for such shares fixed—Shares, if can be forfeited on failure to pay before date fixed for payment by general public subscribing to shares.

It is no doubt true that money becomes a debt when it is due under the Articles of Association and Memorandum, but money does not become due merely because signatories of the Articles of Association or the Memorandum have undertaken to purchase shares and pay for them. There is a distinction between money which is due and money which is presently due and it is only money which is presently due which can be described as a debt. [p. 505; col. 1.]

The signatories of the Memorandum and Articles of Association of a certain company undertook to purchase certain number of shares each. There was no term in the Articles of Association or Memorandum by which the signatories contracted to pay any sum on any particular date or any particular time or on demand. The signatories failed to pay the prescribed amount of their shares on or before the date fixed by the directors for payment by the members of the public subscribing for the shares, and their shares were forfeited:

Held, that the amount was not presently due from the signatories and, therefore, their shares were not liable to forfeiture. *Alexander v. Automatic Telephone Co. (1)*, referred to.

Mr. B. Malik, for the Applicants.

Mr. A. Sanyal, for the Opposite Party.

Order.—This is an application by Vishwanath Prasad Jallan and Piare Lal Srivastava containing three prayers, namely (1) that the register of the members of the Holyland Cinetone Co., Ltd., should be rectified and that the names of the applicants should be included in the said register, (2) that it be declared that the applicants are still directors and members of the company, and (3) that it be declared that the action taken after January 26, 1936, is void and illegal and does not bind the company and its shareholders. It is admitted that the first prayer only can be granted under the provisions of s. 38, Companies Act. This Court cannot give the other declarations asked for and I may say at once that the application in so far as it asks for those declarations is hereby rejected. There remains the question whether the names of the applicants should be entered in the register of the members of the company. In order to understand the dispute between the parties it is necessary to set forth certain facts in the history of the company.

The Memorandum and Articles of Association were subscribed by 17 persons on November 18, 1935. The capital authorized was 25 lacs, of which 10 lacs were to be issued. There were to be 20,000 ordinary shares of Rs. 100 each and 5,000 preferential shares of the same value. It was set forth that the qualification of a director was that he must have subscribed for 100 shares and that he must have paid all calls or any other moneys due to the company. Twelve of the signatories of the Memorandum and Articles of Association undertook to purchase 100 shares each and they were to be the first directors of the company. Their names were Madhoramsand, Gurucharan Prasad Khatri, Harinarain Moolchand, Gopal Lal Khanna, Durga Prasad, Bindbasni Prasad, Madan-

gopal Kedia, Vishwanath Prasad Jallan, Vishnushankar, Kedarnath Singh, Thakur Chhedi Singh and Piare Lal Srivastava. It is to be noticed that the applicants are included in the lists. Each of the directors undertook in the Memorandum to subscribe for 100 shares and no more. Of the other five signatories, three undertook to purchase five shares each and the other two to purchase one share each.

A meeting of the directors was held on December 14, 1935, and four managing directors were elected, namely Madhoramsand, Gurucharan Prasad Khatri, Bindbasni Prasad and Madangopal Kedia. Doubtless the directors purported to act under Art. 115 of the Articles of Association, but this Article sets forth that the directors shall elect from amongst themselves five directors constituting the Board of Managing Directors of the company. It is to be noticed that only four were elected. The Managing Directors under the Articles of Association have been given very large powers. A meeting of this Board of Managing Directors was held on December 26, 1935, and it was decided at the meeting that the subscribers to the Memorandum who were directors should be asked to pay Rs. 2,000 to the company. This resolution was based on Art. 7 of the Articles of Association which says that the amount payable on application for each share offered to the public for subscription shall be 20 per cent. of the nominal amount of the share and another 20 per cent. shall be payable on the allotment of the share. The Managing Directors were asking the directors to pay on their shares the percentage corresponding with that which any member of the public would have to pay on application for shares, Rs. 2,000 being 20 per cent. of Rs. 10,000, the price of the shares which each of the directors had contracted to purchase. On January 17, 1936, the secretary of the company who happened at that time to be the applicant, Piare Lal Srivastava, wrote a letter to all the directors drawing their attention to provisions of s. 85, Companies Act, and indicating that they would cease to be directors if they did not pay the sum of Rs. 2,000 each on or before January 26, 1936. Section 85, Companies Act, lays down that it shall be the duty of every director, who is by the Articles required to hold a specified share qualification and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by

the Articles. The January 26, 1936, was the end of the period of two months next after November 25, 1935, the date of registration. Madhoramsand, Gurucharan Prasad Khattri, Durga Prasad and Madangopal Kedia each paid a sum of Rs. 2,000 on January 25, 1936.

On January 26, 1936, there was a meeting at which the resignation of Moolchand was accepted and Thakur Ohhedi Singh was elected to the Board of Managing Directors, although he had not paid his sum of Rs. 2,000. Moti Chand was elected to the Board either under Art. 89 of the Articles of Association which gives the directors power to co-opt a qualified share-holder as a director or under Art. 90 which empowers the directors to elect any share-holder as an honorary director to the Board it not being necessary for such director to hold a qualification share. Moti Chand had not paid anything at that time to the company and he was not one of the signatories of the Memorandum and Articles of Association. Then on March 4, 1936, there was another meeting of the directors at which those present were Madhoramsand, Durga Prasad and Madangopal Kedia. No notice of this meeting was sent to those directors who had not paid the sum of Rs. 2,000. Presumably those who had paid had decided that the other directors could no longer act. It was originally set forth in the Articles of Association that the number of directors should not be less than 11 nor more than 21, but at this meeting the directors resolved that the minimum number should be reduced from 11 to 5 and that an extraordinary general meeting of shareholders should be held as soon as possible. The Articles required that there should be a quorum of five directors until it was otherwise determined, but that Article gave the directors power to regulate their meetings and proceeding as they thought fit and to determine the quorum necessary for the transaction of business.

A meeting of the directors was held again on March 5, 1936, but nobody appeared and the meeting was therefore adjourned by the General Manager to the next day, March 6. On that date the directors present were Madhoramsand, Durga Prasad and Madangopal Kedia and they decided that the quorum should be reduced to three. A meeting of shareholders was called for March 23, 1936, but it was adjourned for want of a quorum, the Article requiring that it was necessary for 15 members personally to be present to form a quorum at

a general meeting. The meeting was adjourned to March 30, 1936, when it was attended by Madhoramsand, Durga Prasad and S. N. Mitra. This meeting proceeded to transact business under the provisions of Art. 68 of the Articles of Association which allows an adjourned meeting to transact business even if a quorum has not been formed. This meeting reduced the minimum number of directors to four. On April 11, 1936, there was again a meeting of directors at which Madhoramsand, Durga Prasad, Madangopal Kedia and Gurucharan Prasad were present. They confirmed the resolution of March 6, 1936. They accepted the resignation of Moti Chand who had been elected on January 26, and decided that legal action should be taken against those directors who had not paid the sum of Rs. 2,000 which they had been required to pay. On April 14, 1936, a meeting of the shareholders took place, but it was adjourned to April 21, 1936, for want of a quorum, and on April 21, the resolution of March 23, 1936, was confirmed. The next meeting of the directors was held on November 17, 1936. Those present were Gurucharan Prasad, Madhoramsand, Madangopal Kedia and Durga Prasad. They elected Shyam Sunder Lal, Jagannath Prasad and S. N. Mitra to be honorary directors. Article 90 of the Articles of Association states that the number of honorary directors shall in no case exceed three. At the same meeting Madangopal Kedia's resignation was accepted and it was decided that the directors should pay another sum of Rs. 2,000 this being the equivalent of the sum which would be payable by members of the public on 100 shares at the time of allotment. On the same date Durga Prasad resigned his position as Managing Director and Jagannath Prasad and S. N. Mitra were appointed to the Board of Managing Directors.

The next date with which we are concerned is December 13, 1936. By that time apparently an application had been made to the Registrar, Joint Stock Companies; that the company should be allowed to commence business and a certificate of commencement had been received from the Registrar. On that date the directors present were Gurucharan Prasad, S. N. Mitra, Jagannath Prasad, Shyam Sunder Lal and Durga Prasad. They saw the commencement certificate and decided that they would approach the defaulting directors individually in order to obtain pay-

ment. On December 28, at another meeting it was decided that further attempts should be made to obtain payment of this money. These efforts succeeded to some extent because Harnarain Mulchand paid Rs. 2,000 on January 1st, 1937. Madhoramsand and Gurucharan Prasad had paid a further sum of Rs. 2,000 each on April 1st, 1936 and Durga Prasad paid a sum of Rs. 2,000 on November 17, 1936. On December 29, there was a meeting at which Gurucharan Prasad, Shyam Sunder Lal and S. N. Mitra were present. They passed a resolution that a notice should issue formally to all the defaulting directors to make payment of the sums due from them. They warned the directors that their shares would be forfeited if they did not pay the sums due on or before January 15, 1937. Then there was a meeting on January 19, 1937, at which Jagannath Prasad, Gurucharan Prasad, Shyam Sunder Lal and Durga Prasad were present and this meeting passed a resolution forfeiting the shares. The applicants did nothing about this matter at the time but the company then sued them for a sum of Rs. 4,000 each and it appears that a decree has been passed against one of them while the suit of the other is pending. The decree which has been passed is now in appeal. It is explained on behalf of the applicants that they did not really wish to have anything to do with the company and that they would be quite content to give up their shares if they were not required to pay Rs. 4,000; but now they are in a position that they may be required, if the decree is upheld, to pay a sum of Rs. 4,000 each and at the same time to lose their shares in the company, and they feel, therefore that they are entitled to stand upon their strict rights to demand, if the resolution of forfeiture is invalid, that their names should be restored to the register of the members of the company.

The argument put forward in the first instance on behalf of the company was that the signatories to the memorandum became members of the company and were allotted shares automatically on the date when the company was registered and consequently on that date they were bound to pay a sum of 20 per cent. of the value of their shares as they would have had to do if they had applied for shares on that date and a further 20 per cent. as they would have to do if shares had been allotted to them on that date as members of the public. At a later stage in the arguments

the company had to abandon this position because if it was the proper position, then a sum of Rs. 4,000 was due from each of the original directors on November 25, 1935, and no director was qualified to act under the Articles of Association unless he had paid the sum of Rs. 4,000 on or before January 26, 1936. If this is the true position then none of the directors who continued to act on behalf of the company was entitled to do so because none of them had paid Rs. 4,000 on or before January 25, 1936, and those who had acted would render themselves liable to a penalty of Rs. 50 a day under s. 85, sub-s. (2), Companies Act, provided that the argument of the company was correct that sub-s. (1) of s. 85 applied not only to the purchase of shares but also to the payment for these shares as part of the qualification for directorship under the Articles of Association. The directors who now purport to represent the company were on the horns of a dilemma. If this original argument of theirs was correct, they were liable at least to a severe penalty and if it was not correct, then they were certainly not entitled to forfeit the shares of the other directors merely because payments were not made on or before January 26, 1936.

The company therefore fell back upon the argument that these sums of 20 per cent. corresponding with application money and 20 per cent. corresponding with allotment money were payable from the dates on which they were respectively demanded by the company. Learned Counsel for the company relied on s. 21 (2), Companies Act, which says that any money payable by any member to the company under the Memorandum or Articles of Association shall be a debt due from him to the company. He maintains that this money which he considers to be due from the directors was a debt payable on demand. On the other side, it is argued on behalf of the applicants that there is nothing in the Memorandum or Articles of Association which requires them to pay any sums corresponding with those which would be payable by members of the public subscribing for shares at the time of application or at the time of allotment. It is undoubtedly true that there is no such specific provision either in the Articles of Association or in the Memorandum. It seems to me that s. 21 (2), Companies Act, does not help the company in this case. It is no doubt true that money becomes a debt when it is due under Articles of Association and Memo-

randum, but I think that money does not become due merely because signatories of the Articles of Association or the Memorandum have undertaken to purchase shares and pay for them. Subscribers who are members of the public also promise to take up and pay for shares, but the amounts due from them at any time are only such part of the price of the shares as they are required to pay at a particular time, that is the part they are required to pay on application, the part they are required to pay on allotment and the part that they may be required to pay if the calls are made upon them in accordance with the provisions of the Articles of Association. From the model Articles set forth in table A of Sch. I, Companies Act, it will appear that a distinction is made between money which is due and money which is presently due and in my judgment it is only money which is presently due which can be described as a debt. A question of this nature arose in *Alexander v. Automatic Telephone Co.* (1) where some directors of a company sought to compel others to pay on their shares in the same proportion as had been paid by share-holders who were members of the public. The case was decided under an English Act in which there were provisions similar to those in s. 21, Indian Companies Act, and it was held that the directors were not legally bound to make the payments, but that the Court of Chancery would compel them to pay upon the ground that they had been acting in contravention of the trust which had been reposed in them as directors of the company.

The Companies Act seeks to deal with a situation of this kind by the provisions of s. 103 which do not allow a company to commence business until every director has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription. In the case before me the directors who had signed the Memorandum of Association were bound to pay a sum of Rs. 4,000 each before the company was entitled to commence business. From this it does not necessarily follow that they were liable to forfeiture of their shares if they did not make the payment. As I have already said, there is no term in the Articles of Association

or Memorandum by which the signatories contract to pay any sum on any particular date or any particular time or on demand or otherwise except in so far as the Articles allow the company to make calls on its members. The provision for calls was originally that the directors might from time to time make such calls as they thought fit upon the members in respect of all moneys unpaid on the shares held by them respectively and not by the condition of allotment thereof made payable at fixed times, and each member should pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. There is no resolution of the Board of Directors requiring any members to make payments. There is only a resolution of the so-called Board of Managing Directors, but as I have already pointed out the Articles of Association required that the Board of Managing Directors should consist of five directors and four directors only were appointed. It seems to me therefore that these four directors were not entitled to exercise the functions of the Board of Managing Directors and the resolution passed by them requiring the other directors to pay these sums of Rs. 2,000 was not valid. The directors might have treated the so-called Managing Directors as a committee which could make a recommendation to them and, if the Board of Directors, as such, had passed a resolution that the recommendation of the Managing Directors that money should be demanded should be accepted, then possibly the directors would have had to pay these sums and if they had not paid them, they would have been sums presently due. In the circumstances of this case, however, I hold that these sums of Rs. 2,000 were never presently due and consequently that the directors were not bound to make payments.

It has been urged on behalf of the company that the result is unfortunate because some directors have prevented the company from functioning properly. I do not think that any unfortunate result need have arisen if the proper procedure had been adopted. If the majority of the directors were unwilling to pay the sums which they should have paid under s. 103, Companies Act, then the company would not have been able to commence business and if it did not commence business within a certain period, then it could have been wound up on the application of any member. Once

(1) (1900) 2 Ch 56; 69 L J Ch 428; 82 L T 400; 48 W R 546; 16 T L R 339.

it was wound up, all the sums due on the shares would have been available to the company and any necessary expenses incurred for promoting and registering the company could have been paid out and the whole matter would have come to an end. The company may say that it should not have been at the mercy of some of its directors, but on the other hand those directors are equally entitled to say that they should not have been at the mercy of the minority of their body. If the majority were unwilling to proceed with the matter and by their conduct automatically caused the winding up of the company, they were perfectly entitled to do so. I hold that these sums of Rs. 2,000 were never presently due from the applicants and therefore, that their shares were not liable to forfeiture. I may add that there are provisions for forfeiture in the Articles of Association and it is at least doubtful whether all the provisions were observed so as to lead to forfeiture even if it could be said that there was a call upon the applicants, but I do not think that it is necessary to go into the details of that matter because I have already held that there was no proper call and for that reason no money was due to be paid at any particular time by the applicants.

On the other hand, it seems to me that it is discretionary in the Court to pass an order for the rectification of the register of members and the fact remains that the Registrar of Joint Stock Companies has issued a certificate enabling the company to commence business which he would not have done if he had known that the present applicants as directors should have paid a sum of Rs. 4,000 each before the date when he issued his certificate. In these circumstances I do not think that I should exercise my discretion in favour of the applicants unless they make the payment which they should have made to enable the company to commence business. Learned Counsel on behalf of the applicants has suggested that his clients, if they pay Rs. 4,000, may find themselves in a very difficult position. He contends that all the proceedings of the company through the remaining directors after January 26, 1936, were absolutely void and there may be many complications.

I do not think that any possible complications should prevent me from passing a conditional order in favour of the applicants because what I propose to do is to impose the condition that the applicants shall pay these sums of money within a certain time

and that their applications shall be rejected if they do not pay the money. The money will be deposited in Court and what eventually happens to it may be left to subsequent decision. It may be that it will be utilized towards the payment of any decrees which may be ultimately passed in favour of the company or it may be that it will be paid to the company when all disputes are set at rest or finally it may eventually be returned to the applicants. I direct that the register of members of the company shall be rectified by the entry of the names of the applicants or either of them on condition that each of the applicants or either of them deposits a sum of Rs. 4,000 in this Court on or before November 21, 1939. If either applicant fails to make the deposit within that time, his application shall be rejected. I do not pass any order for the payment of costs because both parties seem to be in some measure to blame for the state of affairs which has arisen.

S.

Order accordingly.

BOMBAY HIGH COURT

Criminal Revision Application No. 11 of 1939

April 6, 1939

N. J. WADIA AND LOKUR, JJ.

M. A. BHAGVATI—ACCUSED No. 2

—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Electricity Act (IX of 1910), ss. 44 (b) 26 (5)—Electricity Rules, r. 31—S. 44 (b) requirements of—Removal of meter from its old position after breaking of seals, to new position by extending service line—Offences under s. 44 (b) and r. 31, held, committed—R. 31, if conflicts with s. 26 (5).

Section 44 (b) Electricity Act does not require that the "works" laid or connected up with any other "works" belonging to the licensee must also be "works" belonging to the licensee. "Works" as defined in s. 2 (n) of the Act includes electric supply lines. The supply line, therefore, up to the point at which it enters the meter comes within the meaning of "works" as defined in s. 2 (n).

Held, that the accused in laying the additional line from the former position of the meter up to its new position was laying "works" within the meaning of s. 44 (b), and he laid that line for the purpose of connecting it with other works belonging to the licensee, namely the old supply line which terminated at the original position of the meter. His act, therefore, clearly amounted to an offence within the meaning of s. 44 (b).

Held, further that as the accused broke open the seals which had been placed by the company upon the meter, his act clearly amounted to an offence under r. 31 (1) of the Electricity Rules.

Rule 31 of the Electricity Rules does not deal with cases which s. 26 (5) contemplates but deals with the tampering with the seals placed on a meter

which is already working. There is, therefore, no conflict between r. 31 and s. 26, sub-s. (5).

Or. R. App. against the conviction and sentence passed by the Presidency Magistrate, Third Court Bombay.

Messrs. G. C. O'Gorman, P. A. Mahale and S. A. Kher, for the Petitioner.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Crown.

Messrs. K. A. Somjee and S. D. Vimadalal, for the Complainant.

N. J. Wadia, J.—This is an application in revision against a conviction of the accused by the Presidency Magistrate, Third Court, Bombay, under s. 44 (b), Electricity Act, and r. 31 (1) read with r. 122 (a) Electricity Rules, 1937. The applicant, accused No. 2, is an electrical contractor and engineer. Accused No. 1, who is not before us, was the owner of a building in Kolbhat Lane. The Bombay Electric Supply and Tramways Co. had been supplying electricity to the building, and on March 4, 1937, accused No. 1, the owner of the building sent a requisition to the company asking for an estimate for the work of shifting the meter board from its old position on the verandah to a new position. The company sent an estimate of Rs. 112. This estimate was considered excessive by both the accused, and, on May 21, 1937, another letter was sent to the company who repeated their former estimate. Accused No. 2, the contractor, then had an interview with the Assistant Manager of the company and asked for a reduction of the estimate which the company refused to make. The first accused then wrote a letter to the company on September 21, 1937, in which he stated that as they were not prepared to be "reasonable, he gave them 48 hours' notice under s. 44, Electricity Act, and a similar notice under r. 29, Electricity Rules, that he would break the seals, remove the meter board and reconnect it in the new position. The accused then got the meter board removed to the new position, accused No. 2 doing the work as contractor. The company thereupon prosecuted them under s. 44 (a) of the Act and r. 31, Electricity Rules, 1937. The learned Magistrate has held that both the accused were guilty under s. 44 (b), and under r. 31 (1) read with r. 122 (a), and has convicted them. Accused No. 2 has applied in revision.

Section 44 (b) of the Act provides that whoever lays or causes to be laid, or connects up any works for the purpose of

communicating with any other works belonging to a licensee, without such licensee's consent, shall be liable to a certain penalty. The case of the prosecution was that the accused removed the meter from the old position in which it was placed, after breaking the seals placed on the meter by the company, to a new position about 30 feet further away, and extended the company's service line from where it had originally ended at the meter to the place where it entered the meter in its new position. The learned Counsel for the applicant contended that the act of the accused does not amount to any offence under s. 44 (b) of the Act inasmuch as the new wiring which he laid did not connect up any work belonging to the licensee company with any other work belonging to the company. Section 44 (b) does not require that the "works" laid or connected up with any other "works" belonging to the licensee must also be "works" belonging to the licensee. In fact it is obvious that the section could not mean that, since it would be impossible for anybody but the licensee to lay a new work belonging to the licensee. "Works" as defined in s. 2 (n) of the Act includes electric supply lines. Under r. 35 of the Electricity Rules, 1937, with s. 19-A of the Act, the point at which the supply of energy by a licensee to a consumer shall be deemed to commence, where the amount supplied is ascertained by meter, is the point at which the conductor enters the meter. "Electric supply line" is defined in s. 2 (f) of the Act as meaning a wire, conductor or other means used for conveying, transmitting or distributing energy. The supply line, therefore, up to the point at which it enters, the meter comes within the meaning of "works" as defined in s. 2 (n). That being so, the applicant in laying the additional line from the former position of the meter up to its new position was laying "works" within the meaning of s. 44 (b), and he laid that line for the purpose of connecting it with other works belonging to the licensee, namely the old supply line which terminated, at the original position of the meter. His act, therefore, in our opinion, clearly amounted to an offence within the meaning of section 44 (b).

In carrying out the work of removing the meter from its old position to its new one, the accused broke open the seals which had been placed by the company upon the meter, and his act clearly amounted to an offence under r. 31 (1) of the

Electricity Rules. That Rule provides that a licensee may affix one or more seals to any meter placed upon a consumer's premises in accordance with r. 40 and no person other than the licensee shall break any such seal. It is contended that s. 26, cl. (5), permits a consumer to do this, that r. 31 conflicts with this section, and where there is a conflict between a rule and a section of the Act, the section ought to prevail. Section 26 (1) does not deal with the breaking of the seals placed on a meter. Section 26 (1) deals with the providing of meters, and cl. (5) says that a consumer shall not connect any meter referred to in sub-s. (1) with any electric supply line through which energy is supplied by a licensee, or disconnect the same from any such electric supply line, without giving to the licensee not less than 48 hours' notice in writing of his intention. The clause deals with a case of connecting a new meter with the company's supply line. Clause (1) provides that the consumer is not bound to take the company's meter and may provide his own, and in a case of that sort, there would be no question of breaking the seals of the meter since no seals would be placed by the company on the meter till after it had been connected. Rule 31, therefore, does not deal with cases which s. 26 (5) contemplates. The Rule deals with the tampering with the seals placed on a meter which is already working. There is therefore no conflict between r. 31 and s. 26, sub-s. (5), and the applicant's act clearly did not fall within the purview of s. 26 (5). He did not merely connect a new meter with the existing supply line of the company, but removed a meter which had already been sealed by the company by breaking open its seals, and altered its position by extending the supply line of the company and then fixing the meter in a new position. His act, in our opinion, clearly amounted to a breach of r. 31. The conviction of the accused both under r. 44 (b) and r. 31 (1) read with r. 122 (a) was, therefore, correct. The application is dismissed and the Rule discharged.

s.

Rule discharged.

RANGOON HIGH COURT

Second Appeals Nos. 126 and 127

of 1938

July 28, 1938

BRAUND, J.

ROSHAN N. M. A. KARIM OMER & Co.

—APPELLANTS

versus

MOHAMED EBRAHIM AND ANOTHER—

RESPONDENTS

Stamp Act (II of 1899), Sch. I, Art. 1—Document, when comes within mischief of Art. 1—Document held did not so come—Question whether certain document falls within mischief of Art. 1, if can be decided on authority of one decision—Precedents.

In order to bring a document within the mischief of Art. 1, Sch. I of the Stamp Act, what has to be established is that it is an acknowledgment of a debt created in order to supply evidence of such debt. This article requires something more than an acknowledgment of a debt. The primary question is whether the document was brought into existence with the "dominant intention" of supplying evidence of the debt. The fact that the document is apt to serve other purposes does not absolve the Court from enquiring, as it is enjoined to do, by Art. 1, what was the purpose for which it was meant. [p. 511, col. 2.]

There was a running account between A and B, throughout the period of transaction consisting on the one hand of the loans by A to B and on the other hand of price of goods supplied by B to A. It was the practice at the end of each month, for A to submit B a statement. Each statement opened by bringing forward from previous month the balance of the account. The statement then stated the cash loans made by A to B and on the other side the value of the goods supplied by B to A. At the end a balance was struck below which B put his signature accompanied by no other writing and handed it over to A which then remained in his possession:

Held, that taking into consideration the course of business between these two parties, and the facts that these transactions were continuing transactions, and at no point of time was it ever contemplated that any of these particular balances, except possibly the last one, would ever become payable in cash by B to A, the real purpose for which these documents were brought into existence was not the supply of the evidence of an actual debt, that that money was actually due, but simply as one of a series of statements of accounts which for the convenience of the parties were exchanged at fixed intervals. It was not, therefore, a document required to be stamped under Art. 1, Sch. I, Stamp Act.

On the question whether a particular document in suit amounts to an acknowledgment of a debt, one decision can hardly be an authority for another, for each case must depend on its own circumstances. 15 Ind. Cas. 279 (2), relied on. [p. 512, col. 2.]

S. As from the judgment of the District Court, Mandalay, in O. A. No. 53 of 1937.

Mr. K. C. Sanyal, for the Appellants.

Mr. Chari, for the Respondents.

Judgment—This is a point which lies within a very small compass but is nevertheless not quite free from difficulty. The

suit was originally tried in the Court of the Sub-Divisional Judge of Mandalay. The plaint discloses that the plaintiffs were merchants dealing in, among other things, hides, while the defendants were alleged to carry on a business in partnership as butchers. It is then said—and this much is common ground between the parties—that for some years past there had been an arrangement between them under which moneys were from time to time lent by the plaintiffs to the defendants, while the defendants from time to time supplied the plaintiffs with hides which were no doubt derived from the animals used by the defendants in their capacity as butchers. And between the plaintiffs and the defendants there was, therefore, throughout the period during which this arrangement lasted, a state of running account consisting on the one hand of the loans by the plaintiffs to the defendants and upon the other hand of the price of hides supplied by the defendants to the plaintiffs. It is for the balance of that account as on March 31, 1934, which is the date on which the arrangement is said to have come to an end, that this suit has been brought.

The balance is said to have been Rs. 504-9-6 to which is added an almost equal sum for interest, making the total claim Rs. 988-6-6. I need not, I think, for the present purpose deal with the defence. It is sufficient for me to say that the case was tried by the Sub-Divisional Judge who came to a conclusion, based, as it seems to me, upon the circumstance that he was unable to admit in evidence a certain document, which is Ex. A in the case. That document is in the form of an account signed by one of the defendants and by means of it, it was sought by the plaintiffs to prove the debt. The Sub-Divisional Judge in the course of his judgment observes that if that set of accounts is admissible, then the case is concluded in favour of the plaintiffs. But he went on to hold that the document in question was inadmissible in evidence for any purpose and, accordingly, upon the remaining materials before him he was unable to find the plaintiffs' debt established. That was taken on appeal to the District Court of Mandalay and the learned Judge of that Court took the same view of the document which is Ex. A.

Upon appeal in this Court the primary point that I have to consider is whether, as a matter of law, the Sub-Divisional Judge was right in excluding Ex. A from his

consideration. The ground upon which it has been said that Ex. A is admissible in evidence for no purpose is that it is a document which falls within the mischief of Art. 1, Sch. I, Burma Stamp Act. And, for the purpose of determining whether or not it is a document such as is described in that Article, it will be necessary for me to consider carefully both the nature of Ex. A itself and the circumstances in which it is brought into existence. But before I do that, I must refer to the terms of Art. 1, Sch. I, to the Act itself. That Article reads thus:

"1. Acknowledgment of a debt exceeding twenty rupees in amount or value, written or signed by, or on behalf of, a debtor in order to supply evidence of such debt in any book (other than a banker's pass-book) or on a separate piece of paper when such book or paper is left in the creditor's possession."

Then follows the Proviso with which I am not concerned. Thus, there are a number of conditions to be fulfilled before any particular document qualifies as an acknowledgment of a debt so as to be liable to a one anna stamp duty under this Article. First and foremost, it must be an acknowledgment of a debt exceeding Rs. 20 in amount or value; *secondly*, it must be written or signed by or on behalf of a debtor; *thirdly*, it must be so written or signed in order to supply evidence of such debt; *fourthly*, it must be so written or signed in a book or on a separate piece of paper and *fifthly*, if it is in a book, that book, or if it is on a paper, that paper, must be left in the creditor's possession. I may say at once that in this case the document in question was constituted by a separate piece of paper and there is no dispute but that such separate piece of paper was left in the plaintiffs' possession. We are, therefore, not concerned with the fourth and fifth of those conditions. I have in dealing with a statutory provision of this kind to deal with the matter strictly. It has been pointed out in more than one place that the penalty for omitting to stamp with a one anna stamp a document that should be so stamped under this Article is important because the Act, whether by design or not, I do not know, has omitted to give any opportunity for having it stamped under the usual penalty.

If the document offends against this Article, then it is admissible in evidence for no purpose whatever and by no means can it be made so admissible. It has been rightly pointed out that that is a very severe penalty for what after all is

not a very serious loss to the revenue. However that may be, and however inclined a Judge might be on that account to take a generous view of the requirements of the Article, nevertheless one must, when faced with this question, decide it strictly and judicially. I shall have again to refer to this Article but I propose now to deal with the document itself and the circumstances in which, so far as I can tell from the evidence, it was brought into existence.

During the currency of the arrangement between the plaintiffs and the defendants, to which I have already drawn attention, it was the practice at the end of each month for the plaintiffs to submit to the defendants a statement which the defendants, or rather defendant No. 1 in particular, in the circumstances that I have before me signed and then handed back to the plaintiffs. I have been in some doubt as to whether the defendants obtained or were given each month a copy for themselves; but upon a reference to Ex. E written by the plaintiffs to the defendants, so far as I can see, it would seem that a copy of the account was either retained by or given to the defendants. The monthly statements, at any rate in three instances, namely those for January, February and March, 1934, which I have before me, are written upon sheets which are, I think, the ordinary bill sheets of the plaintiffs. It may be that it is the notepaper of the plaintiffs, or it may be that it is their bill form. I do not think it matters much. In either case, it contains in print the plaintiffs' name, their description, their address and all the other items of business interest that are usually found in documents of this kind.

The first of these statements, that for January—and I emphasize that the exhibited statements are only three instances of the statements that were delivered regularly each month during the term of the arrangement—is in this form. It opens by bringing forward from the previous month the balance of the account. In this case there was at the beginning of the month of January a debit against the defendants for Rs. 419-1-6. They are then debited with a sum of cash which may have been a cash loan and on January 20, they are debited with another cash loan of Rs. 100 and there are two trifling items of three annas each to their debit, the meaning of which I do not know. On the other side of the account they are given credit in that month for

Rs. 37 and Rs. 44 which no doubt represent the value of hides supplied by them during the month. And, as a result of that, the month closes with a debit of Rs. 468-3-0 in favour of the plaintiffs against the defendants. Beneath that is placed the signature of defendant No. 1. It is accompanied by no writing; it is simply signed by defendant No. 1.

The account for February is in the same form and is similarly signed. The concluding balance against the defendants is Rs. 399-13-6. The March statement again is precisely similar and ends with a balance of Rs. 504-9-6 in the plaintiffs' favour. That is the principal sum which is now sued for and that document, like its predecessors, has been signed by Ebrahim without a comment of any kind. The point I desire to emphasize again is that those three documents are the three concluding documents of a series which as far as I know—I think it is admitted by the parties—lasted throughout the term of the business relations between the parties.

There is one other matter of fact which I think I ought to mention, which is that the plaintiffs held two promissory notes for Rs. 100 each. One or both of these promissory notes are unstamped and are of course inadmissible in evidence; but that does not, I think, prevent me from taking notice of the promissory notes themselves and the fact that the promissory notes were unstamped, I think, is a matter extraneous to the point I have to decide. So far as the oral evidence in the case goes, it is remarkable having regard to the contest involved in this suit that no really explicit evidence is given as to why the monthly statements of which Exhibits A are the samples were brought into existence by the parties. Abdul Shakur says in his evidence-in-chief:

"Every month we used to make statements of accounts. We used to take the signature of one of the defendants on these statements. The defendants had had dealings with us for the last 13 years. Exs. AA and B are the extracts from our books of accounts."

I should perhaps have said, in order to make it quite clear, that the statements, the contents of which I have been explaining, were really only extracts from the plaintiffs' books. We have the relevant pages of the plaintiffs' books themselves in evidence and it is clear that each of the monthly statements was a mere copy of the plaintiffs' own account. Abdul Shakur goes on to say:

"Exhibits A, A-1 and A-2 were the statements of

accounts made and the signatures thereon are those of Ebrahim, defendant No. 1. These exhibits are in my handwriting. Ebrahim signed them in my presence."

An in cross-examination he says:

"The accounts were settled once in a month or once in two months. Then sometimes we took back such receipts from the butchers but we did not do so sometimes."

And later on in cross-examination he says:

"When I made out statements of accounts, I required the butchers (that, of course, is the defendants) to bring the receipts which they had obtained from the *durwan*."

That refers to the receipts for hides delivered by the defendants to the plaintiffs during the course of the arrangement. And a little later on he says:

"The butchers brought receipts issued by the *durwan* when I made out statements. The money we gave to the butchers are not loans but advances for supply of hides though promissory notes were taken."

Abdul Gaffar, the assistant manager of the plaintiffs, says:

"The procedure adopted in all offices is to advance money to butchers on promissory notes as well as without promissory notes and such advances are entered in the books of accounts. When hides are supplied we pay one-anna less than the market price. When the butchers stop supplying hides to us, we charge interest on the advances and file suits against them."

Abdulla, the sixth plaintiffs' witness, said in examination-in-chief.

"The accounts were settled once a month. The *durwan* kept a small book in which he noted receipts. The plaintiffs kept a small box. When accounts were settled, entries were made in the big book maintained by the plaintiffs."

Ebrahim himself, defendant No. 1, says:

".....we settled accounts once in ten days or once in two or three months. "Now that is really the whole of the evidence so far as it has been given in this case; but, having regard to the real point which has emerged, I cannot say that it is either very explicit or very helpful. Having explained therefore what Ex. A is and the circumstances in which it came into existence as well as I can, I must now refer for a moment to Art. 1, Sch. I, to the Act. In order to bring a document within the mischief of this Article, what has to be established is that it is an acknowledgment of a debt created in order to supply evidence of such debt. When this case was first opened, I was inclined to take a strong view that where you find a document of any kind with a balance struck and a debtor's signature attached to it, it must necessarily be an acknowledgment of a debt. But having regard to the authorities that I have been referred to and to a further consideration of Art. 1, I have been reluctantly com-

pelled to admit that the question is not quite so easy to decide.

It may well be that the view which I have admitted, I was in the first place inclined to take contains part of the truth. It may well be that, when you find a document either in the form of this Ex. A or in one of the numerous other forms upon which litigation has arisen in the various cases to which my attention has been drawn, the signature of a debtor attached to a statement does, among other things, amount to an acknowledgment of a debt. But it has to be appreciated—and it is not easy to appreciate at first sight—that this article requires something more than an acknowledgment of a debt. It requires an acknowledgment of a debt brought into existence in order to supply, that is for the purpose of supplying, evidence of such debt. When a man writes a figure on a piece of paper and signs it, it may well be that in one sense that is an acknowledgment of a debt; but the purpose for which he writes it may or may not be the purpose of furnishing his debtor with evidence of the debt. There may be a hundred and one reasons why such a piece of paper is brought into existence. I have endeavoured in saying that to express in my own words what is shortly and better expressed in the words of Sir Walter Scrwabe, C.J. of Madras in *Surjimull Murlidhar v. Ananta Lal* (1). He says:

"The first question that arises is whether any particular document is given to supply evidence of the debt. It is quite clear to my mind on the authorities that the question is whether it is given with the dominant intent to supply evidence of the debt and it has been held that where the document contains other entries from which it is right to deduce that the intention is to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the sending of the document, although it contains a balancing item at the end, is not to supply evidence to the creditor."

It is the first part of that passage to which I am drawing attention, namely, that the primary question is whether the document was brought into existence with the "dominant intention" of supplying evidence of the debt. The fact that the document is apt to serve other purposes does not absolve the Court from enquiring, as it is enjoined to do by Art. 1, what was the purpose for which it was meant; that is the reason why I have endeavoured to point out that a document may well be a document which is an acknowledgment of a

(1) 46 M 948; 74 Ind. Cas. 1029, A I R 1924 M L J 353; 45 M L J 339; 18 L W 425; (1923) M W N 743.

debt and may still not be a document which is an acknowledgment of a debt within the meaning of Art. 1. Even though it is an acknowledgment of a debt it does not come within the mischief of Art. 1 unless it was created in order to supply evidence of such debt; so that what we have to seek here is the intention of the plaintiffs and the defendants in bringing into existence Ex. A. I have been referred to a large number of authorities, but I may say at once, that except in so far as any authority contains any statement of principle other particular cases are not of assistance in this case; each case must depend upon its own facts as was pointed out by Woodroffe, J. in *Galstaun v. Hutchison* (2). The learned Judge in that case in his opening words points out:

"On the question whether a particular document in suit amounts to an acknowledgment of a debt, one decision can hardly be an authority for another, for each case must depend on its own circumstances."

With that I respectfully agree and it is for that reason that I do not propose to refer to the many authorities which have been cited to me. I have to search for the intention with which Ex. A was created. Mr. Chari, on behalf of the respondents to this appeal, says that I cannot reasonably find that Ex. A was created for any other purpose than the purpose of furnishing evidence of a debt. Mr. K. U. Sanyal on the other hand, on behalf of the appellants, says that the view I should take upon the facts and the history of this particular case is that the series of documents, of which Ex. A contains three, are merely periodical documents brought into existence for the purpose of record.

Now it has to be borne in mind in this case what the nature of the transactions was. On the one side, namely on the plaintiffs' side it is quite definite that particular sums of money were advanced from time to time. But on the defendants' side entries, it is not quite so clear cut. The defendants were supplying hides apparently through the plaintiffs' *durwan* who entered the number of hides received in his notebook. No particular price was fixed for the hides, but they were to be supplied at the market price less one anna, and bearing that in mind, it supplies, in my opinion, an intelligible reason why at the end of each month a statement should be made of the hides supplied; because the defendants could then see first of all the number of hides for which they had been given credit and the price at which they have been

brought into the account. That is the first point which has struck me.

The second point is this. As I have already pointed out more than once, this was a running account and the last of these accounts, although it happens to coincide with the date on which the agreement seems to have terminated, is no different from any of the earlier accounts. If therefore we take, for instance, the January account, it is dated January 31. Whether or not it was actually signed on that date I do not know. But bearing in mind that these transactions were continuing transactions and went on almost from day to day, one has to appreciate that at no given moment except possibly upon the very day on which the document was signed is this document evidence of what the defendants were actually owing to the plaintiffs. I am not sure whether I have made the point clear. For instance, if on February 15, 1934, the plaintiffs had been minded to sue the defendants, then on that date the first of the documents comprised in Ex. A is not evidence of what the debt was. There is no doubt that it is capable of being used as evidence of what was owing on January 31. But at no given point except possibly at the moment at which it is signed is it evidence of any particular debt.

Now bearing these considerations in mind, bearing in mind the course of business between these two parties, bearing in mind that these transactions were continuing transactions and bearing in mind that at no point of time was it ever contemplated that any of these particular balances, except possibly the last one, would ever become payable in cash by the defendants to the plaintiffs, it seems to me to be impossible for me to say that the real purpose for which these documents were brought into existence was the supply of the evidence of an actual debt. As I have said if you take any one of the balances other than the last one on March 31, 1934, it would be quite impossible for anybody to contend that it was ever within the contemplation of either party that the actual sum so stated as the balance would be paid by the defendants to the plaintiffs. Take the January one; nobody contemplated that Rs. 468-3-0 should be paid by the defendants to the plaintiffs. It was contemplated by the parties that the transaction would go on and that the balance would, in the course of time, become more or less than that and it seems to me that the balance was struck and signed, not for the purpose of

being evidence that that money was then due but simply as one of a series of statements of account which for the convenience of the parties were exchanged at first intervals. That seems to me to be the real purpose of Ex. A. The question is not free from difficulty and I have had to determine it as best as I can. I regret to take a different view from the view taken by the learned Judge in first appeal because as I have said I think it admits of much argument each way. Having taken that view, I am bound to come to the conclusion that the document in question was wrongly excluded from evidence by the Township Judge inasmuch as, in my opinion, it was not a document required to be stamped under Art. 1 of Sch. I. It seems to me, therefore that the proper course to take is to allow this appeal and to remand the case to the Township Judge now to be tried upon the footing that the document has been wrongly excluded from evidence and should now be admitted. It will be remanded to the District Court to re-try it upon all the issues other than issues Nos. 1, 2, 3, 4 and 11. The costs of this appeal which I assess at five gold mohurs will be costs in the suit.

Case remanded.

ALLAHABAD HIGH COURT

Privy Council Appeal No. 10 of 1939

August 4, 1939

BENNET AND VERMA, JJ.

SRI NARAIN KHANNA—APPLICANT

versus

SECRETARY OF STATE—OPPOSITE PARTY
Civil Procedure Code (Act V of 1908), s. 110—Amount granted by lower Court in land acquisition case, increased by High Court—There is affirmation of decision—Questions relating to method of calculating value of bungalows for land acquisition are substantial questions of law.

Where in a case under the Land Acquisition Act, the District Judge has granted certain amount and on appeal the High Court has increased that amount, it must be taken for the purposes of s. 110, Civil P. C., that the decision of the lower Court has been affirmed by the High Court and therefore it must be shown that the appeal involves some substantial question of law. 182 Ind. Cas. 367 (1), and 62 Ind. Cas. 516 (3), relied on, 86 Ind. Cas. 501 (4), distinguished, 135 Ind. Cas. 234 (3), explained.

Where the grounds of appeal refer to questions of law relating to method of arriving at the value of bungalows for the purposes of land acquisition they are substantial questions of law.

P. O. A. for leave to appeal to His Majesty in Council.

Messrs P. L. Banerji and B. Mukerji, for the Applicant.

Mr. S. K. Dar, for the Opposite Party.

Bennet, J.—This is an application on behalf of one Sri Narain Khanna for leave to appeal to His Majesty in Council against an appellate decision of this Court in F. A. No. 166 of 1935. The application is made under s. 110, Civil P. C., and s. 109 (c), Civil P. C., has been added to-day. The facts are that there was a land acquisition case in Meerut and Sri Narain Khanna made an application under the Land Acquisition Act to the District Judge and the District Judge granted Rs. 26,238. Sri Narain Khanna appealed to this Court and we increased that amount by Rs. 9,902 and allowed interest. The amount claimed by Sri Narain Khanna before the District Judge and in this Court and in the proposed appeal to the Privy Council is over Rs. 10,000. The first question is whether he has a right of appeal under s. 110, Civil P. C. This provides:

"And where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

Learned Counsel claims that it is not necessary to show a substantial question of law because the decree of this Court does not affirm the decision of the District Judge. Now, the decision of this Court affirms the decision of the District Judge so far as the grant by the District Judge of Rs. 26,238 is concerned. The decree of this Court grants a further amount in favour of the appellant of Rs. 9,902. It is not against this further increase that the appellant desires to appeal as that increase is in his favour. It appears to us that the natural construction of the wording of s. 110 is that this is a case where the decree has affirmed the decision of the Court below. The decision of the Court below was that Rs. 26,238 should be granted to Sri Narain Khanna and that decision stands good and is, therefore, affirmed. Some metaphysical argument was made that the decree of the District Judge read by inversion means that nothing more could be granted and this Court did grant something more and therefore it should be read as varying the decree of the District Judge. We do not think that this is a fair construction of the language of s. 110, Civil P. C.

Reference was made by learned Counsel to a case not yet reported, *Raj Dei Bibi v. Babu Radhika Prasad*, P. O. A. No. 24 of 1938 decided by another Bench of this Court on September 16, 1938. The facts of that case were that the trial Court had dismissed the

suit of the plaintiff against defendant No. 7. Plaintiff appealed and the High Court decreed Rs. 8,872-8-0 for the plaintiff against defendant No. 7 and the plaintiff desired to appeal to the Privy Council for a larger sum. The Bench held that this was a case where the decree or final order of the trial Court had not been affirmed. The decree of the trial Court was that the plaintiff should receive nothing from defendant No. 7. That was certainly not upheld by the High Court and therefore the case is in our opinion quite a different one from the present case. The view which we have taken has been held by this Bench in a reported ruling, *Wiqar Ali Khan v. Narain Das* (1) and that follows another reported ruling, *Kamal Nah v. Bithal Das* (2). It is true that some observations were made against the validity of this ruling by the late learned Chief Justice in *Nathu Lal v. Raghbir Singh* (3) to the effect that by implication their Lordships of the Privy Council had overruled that view of law in *Annapurna Bai v. Ruprao* (4) but that view was not stated in the judgments of the other two learned Judges in that Full Bench. We have distinguished this ruling of their Lordships of the Privy Council in the reported ruling, *Wiqar Ali v. Narain Das* (1). We consider, therefore, that to bring the case under s. 110 it must be shown that the appeal involves some substantial question of law. Now, the grounds of appeal do refer to certain questions of law and these questions relate to the method of arriving at the value of bungalows for the purposes of land acquisition. In our opinion they are substantial questions of law. Permission has already been given to the Secretary of State to appeal from this particular decision of this Court on these questions. We think, therefore, that it is a case where permission should be granted and accordingly we certify that this case is a fit one for appeal to His Majesty in Council.

8.

Application granted.

(1) (1939) A L J 62; 182 Ind. Cas. 367; A I R 1939 All. 322; I L R (1939) All. 443; 12 R A 1.

(2) 44 A 200; 64 Ind. Cas. 916; A I R 1922 All. 89; 20 A L J 9.

(3) (1931) A L J 968; 135 Ind. Cas. 234; A I R 1932 All. 65; 54 A 146; Ind. Rul. (1932) All. 58 (F B).

(4) 51 O 969; 86 Ind. Cas. 504; A I R 1925 P O 60; 51 I A 319 (F O).

PATNA HIGH COURT

Letters Patent Appeal No. 1 of 1939

August 29, 1939

HARRIES, C. J. and FAZI ALI, JJ.

DURGA SINGH AND OTHERS—

APPELLANTS

versus

KESHO LAL AND ANOTHER—

RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 6, 130—Claim to debt which cannot be conferred by action is not property—Part of debt, whether assignable—Act, if makes distinction between whole debt and part of debt—Held on facts that assignment was of a distinct and separate debt and not part of debt.

Fazi Ali, J.—Under the T. P. Act, "debts" are actionable claims. It follows that a claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must apply to a part of a debt; and, in order to determine whether or not it is property, whether an action can be sustained to recover it. Thus if claim to a part of a debt cannot be enforced under O. II, r. 2, Civil P. O., it is not an actionable claim and s. 130 can have no application to it. [p. 517, col. 2; p. 518, col. 2.]

The T. P. Act does not recognise any distinction between a whole debt and part of a debt. Both may be transferred under that Act, if they come under the category of "actionable claims" as an actionable claim is "property." The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim as under O. II, r. 2, Civil P. O. a single cause of action cannot be allowed to be split up into several causes of action. Order II, r. 2 being a rule of procedure, it does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory:

(Indian and English Case-law discussed.)

Held, on facts that the assignment was not an assignment of part of a debt but was in substance and in fact an assignment of a distinct and separate debt. It was accordingly a valid assignment which gave the assignee a right to sue. [p. 518, cols. 1 & 2.]

L. P. A. against a judgment of Mr. Justice Rowland, dated November 11, 1938.

Messrs. K. Sahi and Avadhesh Nandan Sahai, for the Appellants.

Mr. Bhubaneswar Prasad Sinha, for the Respondents.

Fazi Ali, J.—This is an appeal from a decision of Mr. Justice Rowland in a suit brought by the respondents to recover a certain sum of money from the appellants. The suit was decreed by the trial Court, but was dismissed on appeal by the lower Appellate Court. Mr. Justice Rowland has in second appeal set aside the judgment of the lower Appellate Court and restored the judgment of the trial Court. The defendants first party who contested the suit have accordingly preferred this appeal under the Letters Patent.

The circumstances which gave rise to this litigation may be briefly stated as follows: On November 6, 1923, defendant No. 11 executed a *zarpehgi* lease in respect of a seven pies share in *Mauza Bahpuri Majurahi* in favour of the appellants (defendant first party). On November 10, 1928, he mortgaged the same property to defendant No. 12 for a sum of Rs. 1,000 and on October 13, 1932, he borrowed a sum of Rs. 330 from the latter by executing a hand-note in his favour. On June 23, 1933, he sold to the appellants the property already mortgaged to them and defendant No. 12 for a sum of Rs. 5,000. It was recited in the sale-deed that out of the total sum of Rs. 5,000, Rs. 2,125 had been set off against the mortgage-debt due to the vendees on the basis of the mortgage dated November 6, 1923, and a sum of Rs. 2,227 had been left in deposit with them for the purpose of paying off the mortgage dues of defendant No. 12. The balance of the consideration money, namely, Rs. 648 was paid in cash. As the debt due to defendant No. 12 from defendant No. 11 on the hand-note was not paid by the appellants, defendant No. 11 had to borrow a sum of Rs. 450 from the plaintiff for the purpose of paying it off and on January 28, 1935, in consideration of the advance made by the plaintiff to him he executed a registered deed (Ex. 1) by which he assigned to him (the plaintiff) his right to realise a sum of Rs. 500 from the appellants. It was recited in the deed of assignment that the sum of Rs. 2,227 which had been left with the vendee represented the total sum due on the date of the sale to defendant No. 12 from defendant No. 11, both on the mortgage-bond dated November 10, 1928, and the hand-note dated October 13, 1932. It was also stated that by mistake the dues under the hand-note had not been mentioned in the sale-deed though the understanding between the parties was that this debt should also be paid off out of the money left with the appellants. After the assignment the plaintiff brought the present suit to recover the sum of Rs. 500 with interest up to the date of the suit calculated at the rate mentioned in the handnote dated October 13, 1932, and prayed that the money claimed should be charged on the property which had been sold by defendant No. 11 to the defendants first party. The suit was decreed by the Munsif but his decision was reversed by the Subordinate Judge on the ground that in law a part of a debt could not be

assigned and therefore the plaintiff had no right of suit. This view was not accepted in second appeal by Mr. Justice Rowland who accordingly set aside the judgment of the Subordinate Judge and restored the decree of the Munsif. The principal point therefore which arises in this appeal is whether the assignment of a part of a debt is valid in India.

The point is a somewhat difficult one and it does not appear to have been fully discussed in any of the Indian authorities cited at the Bar. In *Sabjan Sahib v. Abdul Azzeez Sahib*, 42 Ind. Cas. 684 at p. 693 (1) Seshagiri Ayyar, J. sitting singly made an observation to the effect that the omission of the word "absolute" from s. 130 of the T. P. Act which deals with the assignment of actionable claim "was a deliberate departure from the rule of English Law and indicated that an assignment of part of a chose in action can be given effect to under the T. P. Act." In *Doraiswami Mudaliar v. Doraiswami Aiyangar* (2) Ramesam, J. (also sitting singly) dissented from the observation of Seshagiri Ayyar, J. and after referring to certain English cases expressed the view that the assignment of part of a debt is not valid. In *Raja of Ramnad v. Subramanian Chettiar* (3) a Bench of two Judges of the Madras High Court followed an earlier case of 1919 in preference to the decision of Ramesam, J. in *Doraiswami Mudaliar v. Doraiswami Aiyangar* (2) but all that they said on the point is to be found in the following passage:—

"The transfer of a part of a debt was not recognised in English Common Law, but the assignment of a part of a debt was always held to be good in equity and was deemed to pass the property in that portion of the debt. In enforcing such claim, it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to enforcing a claim for part payment of a debt (*vide* in *Re: Steel Wing Co.*). It has also been held that the partial transfer of a debt is valid in Appeal No. 53 of 1919 in this Court, and this objection must therefore be disallowed although there is a remark in *Doraiswami Mudaliar v. Doraiswami Aiyangar* (2), which throws some doubt upon this conclusion."

In *Ghishulal Ganeshi Lal v. Gambhirmal Pandya* (4) a Division Bench of the Calcutta High Court consisting of Lord-Williams and Jack, JJ. expressed a contrary view but

(1) 42 Ind. Cas. 684 at p. 693; A I R 1918 Mad. 1337.

(2) 48 M L J 432; 87 Ind. Cas. 382; (1925) M W N 180; A I R 1925 Mad. 753.

(3) 52 M 465; 116 Ind. Cas. 827; A I R 1928 Mad. 1201; 30 L W 36; Ind. Rul. (1929) Mad. 619.

(4) 62 O 50; 164 Ind. Cas. 111 (2) 39 O W N 606; 9 R O 137; A I R 1938 Cal 377.

they did not discuss the point and based their decision wholly on *Doraiswami Mudaliar v. Doraiswami Ayyangar* (2) decided by Ramesam, J.

It will not be out of place here to refer to certain cases decided in England after the passing of the Judicature Act of 1873. It is well-known that according to the Common Law of England choses in action could not, as a rule, be assigned but in equity such assignments were allowed to be made from a very early date and even at Common Law an assignee was generally allowed to sue in the name of the assignor and in some cases under a power-of-attorney obtained from him. After the passing of the Judicature Act, 1873, however, s. 25 (6) of that Act enabled the legal right in debt or other thing in action to be transferred to the assignee together with all remedies including the right to sue in his name. Section 25 of the Judicature Act has now been superseded by s. 136 of the Law of Property (15 Geo. Ch. 20) which runs as follows:—

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same, and (c) the power to give a good discharge for the same without the concurrence of the assignor, etc., etc."

Now, the question as to whether a part of a debt was assignable under s. 25 of the Judicature Act appears to have been raised in many cases, but it has not yet been authoritatively answered. In *Brice v. Bannister* (5) Lord Coleridge expressed the view that such an assignment fell within the Act, but on appeal Cotton, L. J. treated the particular assignment as a case of equitable assignment. In *Durham Bros. v. Robertson* (6) Chitty, L. J. questioned the correctness of the view expressed by Lord Coleridge in *Brice v. Bannister* (5) and observed:

"The decision of Lord Coleridge, O. J., in *Brice v. Bannister* (5), that the case fell within the 25th section appears to me to be open to question..... The section speaks of an absolute assignment of any debt or other chose in action. It does not say "or any part of a debt or chose in action." It appears to me as, at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the

(6) (1878) 3 Q B 569; 47 L J Q B 722; 38 L T 739; 26 W R 670.

(8) (1878) 1 Q B 765; 67 L J Q B 484; 78 L T 438.

original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However, it is not necessary to decide the point in the present case, and I leave it open for future consideration."

In the same case Collins, L. J. while agreeing with Chitty, L. J. refrained from pronouncing any opinion on the question whether an assignment of a part of a debt was within s. 25, sub-s. (6) of the Judicature Act of 1873. In *Jones v. Humphreys* (7) an assignment of "so much and such part of my income, salary and other emoluments from H. As shall be necessary to pay a definite sum and any further sums in which I may hereafter become indebted to you" was held by Darling, J. to be not such an assignment as was contemplated by s. 25 sub-s. (6) of the Judicature Act. The learned Judge observed that "having regard to the expression of opinion by Chitty, L. J. in *Durham Bros. v. Robertson* (6) it is extremely doubtful whether the assignment being of part of a debt only would come within the Act." Lord Almonston, O. J. and Channell, J., however, refrained from expressing any opinion in that case as to whether an assignment of a part of a debt fell within the section. In *Forster v. Baker* (8) a judgment-creditor having assigned a part of the judgment-debt for valuable consideration, the assignee applied for leave to issue execution. It was held by Bray, J. that there could not be an absolute assignment within s. 25 (6) of the Judicature Act of a definite part of an existing debt or other legal chose in action. The Court of Appeal, however, without expressing an opinion on the point held that as the original judgment-creditor could only issue a single execution upon his judgment and could not split up the judgment-debt and issue separate executions upon the different parts, he could not give to an assignee of a part of the judgment-debt a right which he himself did not possess. In *Hughes v. Pump House Hotel Co., Ltd.*, (9) Mathew, L. J. did not express any definite opinion on the question, but observed:

"In the course of the argument the question was raised whether an assignment of part of a debt comes within s. 25 of the Judicature Act, 1873. We are not called upon to decide that question in this case, and I will express no opinion upon it further than to say that, as at present advised, I

(7) (1902) 1 K B 10; 71 L J K B 23; 85 L T 466; 50 W R 191.

(8) (1910) 2 K B 636; 79 L J K B 664; 102 L T 527; 26 T L R 421.

(9) (1902) 2 K B 190; 71 L J K B 630; 86 L T 794; 50 W R 660.

think, when that question arises for decision, much may be said in favour of the view than an assignment of part of a debt could not be an absolute assignment within the section."

In *Skipper & Tucker v. Holloway & Howard* (10) Darling, J. (notwithstanding the fact that he had expressed a contrary view in *Jones v. Humphreys* (*supra*) (7) held that an assignment of part of a debt came within s. 25 of the Judicature Act, but in *Forster v. Baker* (*supra*) (8) Bray, J. refused to follow the decision and observed as follows:—

"But if an absolute assignment of part of a debt is valid under s. 25, sub-s. (6), the consequence is that the assignee is able to sue the debtor without joining the assignor or the assignee of the other part of the debt, if there have been two assignments; and it may happen that if the debt had been split up into two, three or four parts, there might be two, three or four actions with different results. All sorts of difficulties would arise, and a great burden, an unnecessarily great burden, would be placed upon the debtor. In the case of a judgment-debtor that consideration applies with even greater force because the remedy on a judgment-debt is execution, and the result would be that if a judgment-debt was divided into, say, three or four parts, each of which was assigned to a different person, there might be three or four executions, and three or four petitions in bankruptcy, and the debtor might be considerably and unnecessarily harassed. These considerations, in my opinion, point to the fact that I ought not, unless compelled by the language of the section, to construe the words "legal debt or chose in action" as including part of a legal debt or part of a chose in action."

In *re: Steel Wing Co., Ltd.* (11) P. O. Lawrence, J. agreed with the opinion of Bray, J. as expressed in *Forster v. Baker* (*supra*) (8) and held that the assignment of part of a debt does not operate to pass the legal right to that portion of the debt as it is not an assignment within s. 25, sub-s. (6) of the Judicature Act. He, however, held at the same time that such an assignment does operate in equity to transfer the part assigned and it constitutes the assignee a creditor for the original debtor. It may be stated here that this view was perfectly in consonance with the opinion expressed in a long line of cases and even in *Durham Bros. v. Robertson* (*supra*) (6) Chitty, L. J. though he questioned the correctness of Lord Coleridge's dictum in *Brice v. Bannister* (5) (*supra*), conceded that the assignment in question before him was valid as an equitable assignment.

In *Bank of Liverpool and Martins, Ltd. v. Holland* (12) which was decided in 1926, it

was held firstly, that an assignment of a debt which limited the amount to a certain sum was good on the ground that it was an assignment of the whole debt with a proviso that any excess of certain sum must be held by the assignee as trustee for the assignor and secondly, that even if it was an assignment of part only of the debt, it would still be a good equitable assignment and the plaintiffs were entitled to recover.

It will thus appear that though the point cannot be taken to have been finally settled in England, the weight of authority in that country seems to be in favour of the view that the assignment of a part of a debt does not operate to pass the legal right to that portion of the debt under s. 25, sub-s. (6) of the Judicature Act, but such an assignment would operate in equity to transfer the part assigned and constitute the assignee a creditor for the original debtor. In India, however, the position is somewhat different, because if it is found that a part of a debt cannot be assigned under the T. P. Act, it will be difficult to hold that such an assignment can still be valid in equity. The first question to be answered therefore is whether a part of a debt can be validly assigned under the T. P. Act. The answer to this question depends on whether a part of a debt is "property", because s. 6 of the Act clearly provides that "property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force".

Now, at the first sight it would seem that if the whole debt is property, as it undoubtedly is, a part of the debt must be so. The matter is, however, not so simple as it seems. Under the T. P. Act "debt" belong to a particular species of property, namely, actionable claims. An actionable claim has been defined as "a claim to a debt the . . . which the Civil Courts recognise as affording grounds of relief". It follows that a claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must, in my opinion, apply to a part of a debt; and, in order to determine whether or not it is property, we must find out whether an action can be sustained to recover it.

At this point it seems necessary to refer to O. II, r. 2, which runs as follows:

(10) (1910) 2 K B 630; 79 L J K B 91; 26 T L R 82.
(11) (1921) 1 Ch. 349; 80 L J Ch. 116; (1920) B. & C R 160; 24 L T 684; 65 S J 240.
(12) 43 T L R 29.

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may

relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

This rule in my opinion meets the point so emphatically raised in the judgments of Chitty, L. J., in *Durham Bros. v. Robertson* (6) and of Bray, J., in *Forster v. Baker* (8) (*supra*). Both the learned Judges have pointed out that if a part of a debt can be legally transferred, it would seem to leave it in the power of the original creditor to harass his debtor by splitting up the single cause of action of his debt into as many legal causes of action as he might think fit. This rule will, in my opinion, prevent him from doing so. It appears to me to be elementary that a creditor cannot confer upon his assignee a higher right than what he himself possesses. Thus if he himself could not sue the debtor twice with regard to parts of the same debt under O. II, r. 2, he cannot be allowed to defeat that provision by assigning one part of a debt to one person and another part to another. There is, however, nothing to prevent him from relinquishing one part of the debt and transferring another part, as such an assignment will be tantamount to an assignment of the whole debt which remains unpaid after a part of the debt has been relinquished. He may also transfer one part of the debt to one person and another part to another person and the two assignees may possibly jointly sue the debtor in a common action and ask for a joint decree in respect of the whole debt. But once a suit has been brought on a part of the debt, then no suit can be brought subsequently for the remaining part either by the creditor or by any person to whom he assigns the remainder. It appears to me that the assignment of the remainder in such a case must be ineffectual because as the creditor himself cannot sue upon it, it ceases to be his property and he cannot be transferring it to another person confer upon him a higher right than what he himself possessed.

Reference may also be made in this connection to s. 130 of the T. P. Act which provides the mode of transferring an actionable claim. The language of this section bears some resemblance to the language of s. 25 (6) of the Judicature Act, 1873, and s. 136 of the Law of Pro-

perty Act, 1925, but it is not precisely the same. One of the points of difference which alone need be pointed out here is that while the two English Acts speak of the assignment of "any debt or other legal chose in action", s. 130 of the T. P. Act purports to deal with the "transfer of an actionable claim" only. The difference may at the first sight appear to be one without distinction as the definition of "actionable claim" include a claim to a debt, but that definition also provides that it must be such a claim as the Civil Courts recognise as affording grounds of relief." Thus if claim to a part of a debt cannot be enforced under O. II, r. 2, it is not an actionable claim and s. 130 can have no application to it.

Thus the conclusion which I have arrived at may be summed up in a few words. The T. P. Act does not recognise any distinction between whole debt and part of a debt. Both may be transferred under that Act, if they come under the category or "actionable claims" as an actionable claim is "property." The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim as under O. II, r. 2, a single cause of action cannot be allowed to be split up into several causes of action. Order II, r. 2, being a rule of procedure, it does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory.

I have dealt with the question as to whether or not a part of a debt can be transferred at some length in view of its general importance as well as because we have been pressed to do so by the learned Counsel for the appellant. In my opinion, however, the present case can be decided on a short and simple ground apart from this question. As I have already said, it was recited in the appellants' own sale-deed that a sum of Rs. 2,227 had been left in deposit with them for the purpose of paying off the mortgage dues of defendant No. 12. On calculation it appears that the mortgage dues of defendant No. 12 amounted only to Rs. 1,855 odd on the date of the sale-deed and the dues on the hand-note amounted to Rs. 371 odd on that date and to Rs. 501 on January 28, 1935, when Ex. 1 was executed by defendant No. 11 in favour of the plaintiff. Thus defendant

No. 11 had left with the appellants a surplus sum of money over and above the amount which was payable to defendant No. 12 on the basis of his mortgage. This sum clearly represented a single and whole debt and not part of a debt and there can be no doubt that it could be validly assigned by defendant No. 11 to the plaintiff. The appellants' Counsel has pointed out that in the deed which was executed by defendant No. 11 in favour of the plaintiff it has been expressly stated that what had been transferred to the plaintiff was a part of Rs. 2,227. That is undoubtedly so but the deed must be read as a whole, and when read as a whole, it clearly shows that according to the statement made by defendant No. 11 in that deed, he left with him two distinct sums, one payable to defendant No. 12 on the basis of a mortgage-deed and another on the basis of a hand-note. These two items being quite separate, there was nothing to prevent defendant No. 11 from recovering them by two separate suits brought on two different occasions especially when in the deed executed by defendant No. 11 in favour of the appellants no time was fixed for the payment of the two debts due to defendant No. 12. Thus the debt of Rs. 500 which was assigned by defendant No. 11 to the plaintiff was a distinct and separate debt and not merely part of a debt. In my opinion, therefore, even if we were inclined to hold that a part of a debt cannot be assigned under the T. P. Act, the assignment in favour of the plaintiff could not be held to be invalid.

Another point which was raised on behalf of the appellants was that the amount decreed by the trial Court cannot be charged on the property sold to them. It is unnecessary to decide this point as the respondent does not press for a charge. I would, therefore, direct that instead of a decree for charge, a money decree only be passed in this case, and subject to this modification, I would dismiss the appeal with costs.

Harries, C. J.—I agree that this appeal should be dismissed. Upon the facts of the case, I agree that two sums were left in deposit with the purchaser, one sum to pay off what was due on the mortgage and one sum to pay off what was due on the hand-note.

What the assignor assigned was the sum left with the purchaser to pay off the hand-note dues together with interest thereon. The assignment was not an assignment of

part of a debt but was in substance and in fact an assignment of a distinct and separate debt. It was accordingly a valid assignment which gave the assignee a right to sue. This is sufficient to dispose of the appeal, and the point whether part of a debt is assignable does not strictly arise. In these circumstances, I prefer to express no opinion in this judgment upon the very difficult point as to whether a part of a debt is assignable.

s.

*Appeal dismissed.***BOMSAY HIGH COURT**Civil Revision Application No. 390
of 1938

March 8, 1939

BEAUMONT, C. J. AND N. J. WADIA, J.
LOKMANYA MILLS, LTD., BARSİ.

—APPLICANT

versus

MUNICIPAL BOROUGH, BARSİ

—OPPONENT

*Civil Procedure Code (Act V of 1908), s. 115—
Order of Sessions Judge passed in revision under
s. 111, Bombay Municipal Boroughs Act (XVIII of
1925)—Second revision, if lies—Interference, when
justified.*

The fact that revision is allowed to one Court by a statute does not necessarily exclude a further application in revision to the High Court. The High Court has jurisdiction under the Civil P. C. in a proper case to entertain an application in revision against an order in revision passed under s. 111, Bom. Municipal Boroughs Act, but such applications should be very sparingly entertained. The mere fact that the Sessions Judge has gone wrong in his law is not a ground which would justify the High Court in interfering in revision, in other than very special circumstances. 175 Ind. Cas. 891 (2), relied on, 112 Ind. Cas. 585 (1), not followed.

C. R. App. from an order of the Additional Sessions Judge, Sholapur, in Criminal Revision Application No. 8 of 1938.

Mr. P. B. Gajendragadkar, for the Applicant.

Mr. S. K. Aragade, for the Opponent.

Beaumont, C. J.—This is a civil revision application, which was referred to a Bench because there appeared to be some difference of opinion between a decision of a Bench of this Court in *Ahmedabad Municipality v. Vadilal* (1) and a decision of *Norman, J.*, in *Surat Borough Municipality v. Hamiduddin* (2). The point is a very short one.

(1) 30 Bom. L. R. 1084; 112 Ind. Cas. 585; A I R 1928 Bom. 376; 29 Cr. L. J. 1081.

(2) 40 Bom. L. R. 387; 175 Ind. Cas. 891; A I R 1933 Bom. 301; 11 R. B. 6.

Under s. 110, Bom. Municipal Boroughs Act, 1925, appeals against demand notices under the Act may be made to any Magistrate or Bench of Magistrates by whom, under the directions of District Magistrates, such class of cases is to be tried. Then s. 111 provides for a revision application against any such decision on appeal by the Magistrate or Bench of Magistrates being made to the Court to which appeals against his or their decisions ordinarily lie. In the present case an appeal under s. 110 was made to a First Class Magistrate from whose decision an appeal lay to the Sessions Court. That would be so in most cases though there might be a case in which an appeal would lie to a First Class Magistrate. The position is somewhat anomalous, because the question of liability to tax is a purely civil matter, and the Magistrate hearing an appeal against a demand notice is a Criminal Court, so that an appeal lies from him to the Sessions Court, and not to the District Court. It was held by this Court in *Ahmedabad Municipality v. Vadilal* (1) that the Sessions Judge in a case of this sort was exercising powers of a Civil Court and not of a Criminal Court, and therefore no revision lay under the Criminal P. C.; and I think that the learned Judges in that case rather indicated the view that no revision application lay to this Court in any capacity. Under the Civil P. C., s. 115, the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court, and in s. 3 it is provided that for the purposes of the Code the District Court is subordinate to the High Court. Of course, the Sessions Court is not subordinate to the High Court for the purpose of the Civil P. C. but it has been held that s. 3, Civil P. C. is not exhaustive, and this Court on many occasions has entertained revision applications against orders of the Collector passed in revision under the Mamlats' Courts Act, though the Collector is not a Subordinate Court under s. 3. Those cases also show that the fact that revision is allowed to one Court by a statute does not necessarily exclude a further application in revision to the High Court. It certainly would seem anomalous that this Court should have jurisdiction to revise a civil order made by a District Judge and a criminal order made by a Sessions Judge, who, of course, is the same individual, but should not have power to revise a civil order made by a Sessions Judge sitting under a statute temporarily as a Civil Court. I am disposed to agree

with the decision of Norman, J. in *Surat Borough Municipality v. Hamiduddin* (9) that this Court has jurisdiction under the Civil P. C. in a proper case to entertain an application in revision against an order in revision passed under s. 111, Bom. Municipal Boroughs Act, but that such applications should be very sparingly entertained.

On the merits in this case the real complaint is that the Sessions Judge has gone wrong in his law. But that is not a ground which would justify us in interfering in revision, in other than very special circumstances. It is a matter of appeal and no appeal lies. The application fails and must be dismissed with costs.

N. J. Wadia, J.—I agree.

8.

Application dismissed.

LAHORE HIGH COURT

Civil Revision No. 863 of 1938

October 24, 1938

BALDE, J.

LAL DIN—PLAINTIFF—PETITIONER

versus

OFFICIAL RECEIVER, LYALLPUR—

DEFENDANT—RESPONDENT

Provincial Insolvency Act (V of 1920), s. 37—Adjudication annulled—Official Receiver, if can sell leasehold rights of insolvent

All that the Insolvency Judge can do on the annulment of the adjudication is to direct that the property of the insolvent should vest in a certain person. Even if he passes a vesting order, the Receiver can only hold the property for the benefit of the creditors, and the creditors would have to enforce their claim by a proper suit. The property cannot be sold in any case by the Insolvency Court.

Where, therefore, the Insolvency Judge has annulled the adjudication, no further proceedings can be taken by the Official Receiver for the sale of the leasehold rights of the insolvent.

[Case-law relied on.]

C. R. from the order of the District Judge, Lyallpur, dated May 23, 1938.

Mr. Ram Chand Manchanda, for the Petitioner;

Order.—This appeal has been heard *ex parte* as the respondent failed to appear in spite of service. The appellant Lal Din had been adjudged insolvent but having failed to apply for his discharge in time, the adjudication was annulled and the Insolvency Judge passed the following order:

"His adjudication order is, therefore, annulled under s. 43, Provincial Insolvency Act, with the

reservation that any money in the hands of the Official Receiver, and any money which he would recover by the lease of the land of the insolvent for the maximum period shall be available for distribution amongst creditors."

When the Official Receiver proceeded to sell the leasehold rights of the Insolvent, he objected on the ground that the Insolvency having been annulled, the Receiver had no right to sell the aforesaid rights. This objection was overruled by the learned Insolvency Judge and his decision has been upheld on appeal by the learned District Judge. From this decision a second appeal has been preferred. It seems to me doubtful whether a second appeal is competent, but the matter can be considered at any rate, on the revision side. The main contention of the learned Counsel for Lal Din is that the Insolvency Judge having annulled the adjudication, no further proceedings could be taken by the Official Receiver for the sale of the leasehold rights of the insolvent. In support of this contention he has relied on *Roop Narain v. King King & Co.* (1), *Shakar Khan v. Ishar Das* (2), and *Panna Lal v. Official Receiver, Jhansi* (3). Two Full Bench rulings of the Rangoon High Court reported as *Jain Singh v. R. K. Banerji* (4), and *Annammalai Chettiar v. R. K. Banerji* (5), also support the contention. It would appear from these rulings as well as from the wording of s. 37, Provincial Insolvency Act that all that the learned Insolvency Judge could do on the annulment of the adjudication was to direct that the property of the insolvent should vest in a certain person. He has passed no such clear vesting order. Even if he had passed a vesting order, the Receiver could only hold the property for the benefit of the creditors, and the creditors would have to enforce their claim by a proper suit. The property could not be sold in any case by the Insolvency Court, in view of the authorities cited above. It seems to me clear in the circumstances, the Official Receiver had no right to sell the leasehold rights.

I accordingly accept this petition *ex parte* and set aside the order of the Insolvency Judge, regarding the sale of the leasehold rights, but direct at the same

time that such rights shall vest in the Official Receiver for a period of two years from this date for the benefit of the creditors. The creditors will, however, be able to avail themselves of those rights only by taking proper proceedings, for example, by a suit, etc. No order as to costs.

D.

Petition accepted.

ALLAHABAD HIGH COURT

Second Civil Appeal No. 1103 of 1936

September 8, 1939

MOHAMMAD ISMAIL, J.

PANCHAM SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

DEB RAM AND OTHERS—DEFENDANTS

—RESPONDENTS

Land tenure—Khaekari tenure—Rights of khaekars—Hissedar not in actual possession of khaekar land recorded in his name as khudkasht—If acquires title in it—Record of Rights—Village records in Kumaun Garhwal—Reliability.

The pucca khaekars are in all respects equal to proprietors with the exception that they cannot sell their holding, and pay small sums called *malikana*, in addition to the quota of revenue due from the land recorded in their names. The proprietors or *hissedars* have no power to interfere with these khaekars or their land, waste or cultivated, and on the death of a khaekar without direct heirs, the lapsed holding reverts to the whole community of khaekars, and not to the *hissedar*. 174 Ind. Cas. 470 (1), relied on.

If a *hissedar* brings fallow land under plough and actually cultivates it himself, he will be entitled to retain possession of the same, but he can acquire no title in khaekar land which is not in his actual possession and is merely recorded in his name as *khudkasht*.

The village records in Kumaun Garhwal are not always reliable documents.

S. C. A. from the decision of the District Judge, Kumaun, dated July 20, 1936.

Mr. D. P. Uniyal, for the Appellants.

Mr. E. V. David, for the Respondents.

Judgment.—This is a plaintiffs' appeal from a decree of the learned District Judge of Kumaun which reversed a decree of the learned Civil Judge of Chamoli. The suit which has given rise to this appeal was brought by the Panch Khaekars of village Nail in the district of Garhwal against the defendants, who are *hissedars* in that village, for a declaration of right in certain plots of land bearing Nos. 446, 800, 805, 808, 58-1060 and 809, comprising an area of 298 9-16 *nalis*. The plaintiffs' case was that they were in possession of the land in suit, having broken it up some years ago. They alleged that the defendants had succeeded

(1) A I R 1936 Lah. 370; 94 Ind. Cas. 234.

(2) A I R 1936 Lah. 568; 163 Ind. Cas. 1007; 36 P L R 273; 9 R L 73.

(3) 53 A 313; 134 Ind. Cas. 848; A I R 1931 All. 71; (1931) A L J 18; Ind. Rul. (1931) All. 864.

(4) 11 R 287; 145 Ind. Cas. 320; A I R 1933 Rang. 253; 6 R Rang. 33 (F B).

(5) A I R 1936 Rang. 284; 163 Ind. Cas. 217; 14 R 251; 8 R Rang. 620 (F B).

in having their names recorded in the recent settlement, although they were never in possession of the same. The trial Court came to the conclusion that this village was a *pucca khaekari* village, that the plaintiffs were in possession of the land in dispute, that the defendants *hissedars* were in possession of only 18 4/16 *nalis* and that the rest of the land was in cultivatory possession of the plaintiffs. On these findings the plaintiffs' suit was decreed. The learned District Judge, however, took a contrary view and dismissed the suit, although he held that the village was a *pucca khaekari* village. The plaintiffs have now come to this Court in appeal.

By my order dated December 22, 1933, I directed the learned District Judge to record a finding as to the specific plots actually in cultivatory possession of the plaintiffs before the institution of the suit and the period of such possession. The learned District Judge upon a consideration of evidence has come to the conclusion that the plaintiffs began to cultivate the land in dispute three or four years before the institution of the suit. This is a finding of fact and cannot be disturbed in appeal. The main question for determination in this appeal relates to the question of title. The plaintiffs are *pucca khaekars*. The *pucca khaekars* are representatives of old proprietors who hold the entire area of the village in virtue of having first reclaimed it from waste. It appears that the *pucca khaekars* are in all respects equal to proprietors with the exception that they cannot sell their holding, and pay small sums called *malikana*, in addition to the quota of revenue due from the land recorded in their names. The proprietors or *hissedars* have no power to interfere with these *khaekars* or their land, waste or cultivated, and on the death of a *khaekar* without direct heirs, the lapsed holding reverts to the whole community of *khaekars*, and not to the *hissedar*: vide *Jaint Singh v. Nand Ram* (1).

A short history of the plots in dispute will be helpful in determining the question of title. In Beckett's Settlement (1862) the entire land in this village was recorded in the name of Gaon Sanjait. This entry clearly shows that the *hissedar* had nothing to do with the cultivation of any portion of the land in dispute. In Pauw's Settlement (1866) 13 14/16 *nalis* of land was recorded

in the name of *hissedars*. The entry against this area was *parti qadim*. There was litigation with respect to this land in the Revenue Courts and it was held that the *hissedars* were entitled to the plots within this area. Learned Counsel for the appellants states that there is no dispute with regard to this land and the plaintiffs have no claim to the land shown in the name of *hissedars* in the settlement of 1866. In Ibbotson's Summary Settlement (1927-28) the entire area in dispute was recorded as *khudkasht* of the *hissedars*, although the entry with respect to *parti qadim* continued. From the findings of the Courts below it appears that the plaintiffs began their cultivatory possession of the land in dispute between 1924 and 1934. It follows therefore, that in Ibbotson's Settlement the land in dispute was not in actual cultivatory possession of the *hissedars* (defendants). This is confirmed by the entry of *parti qadim*, which shows that the land was only fallow land. The learned District Judge has rightly attached great importance to the order of the settlement officer who was responsible for the entry of the names of the *hissedars* with respect to the plots in dispute, but on the basis of this entry it is impossible to hold that the *hissedars* actually cultivated the land. The learned District Judge has not found in favour of the respondents on this point; in fact he has come to the conclusion that the plaintiffs were in actual cultivatory possession before the institution of the suit. In the last settlement (1937-38) the Record Officer, Garhwal, by his order of April 25, 1938, directed the names of the *khaekars* to be entered with respect to the plots in dispute. The Record Officer made the following observations:

"This is a *pucca khaekari* village, in which the *hissedar* in Mr. Pauw's Settlement got a large area of uncultivated land recorded in his name as *khudkasht*. This is now found cultivated. It appears to me that to all uncultivated land *khudkasht* is a contradiction in terms. In *pucca khaekari* village, the *khaekars* are under-proprietors. If they broke new land, they are automatically *khaekars* in it."

This judgment was not before the lower Appellate Court. At the instance of the appellant I admitted it under O. XII, r 27. It is stated by the learned Counsel for the respondents that his client was not represented before the Record Officer. That may or may not be so. Even if it was so, it will not affect the question under consideration because the entry referred to by the Record Officer is relied upon by the learned District Judge. This shows that the land

(1) (1938) A L J 4; 174 Ind. Cas. 470; A I R 1938 All 136; 1938 R D 153; 1938 A L R 282; 10 R A 579.

was not in actual cultivatory possession of the *hissedar*. There is no doubt that if a *hissedar* brings fallow land under plough and actually cultivates it himself, he will be entitled to retain possession of the same, but he can acquire no title in *khaekar* land which is not in his actual possession and is merely recorded in his name as *khudkasht*. It appears that the village records in Kuman Garhwal are not always reliable documents. The following quotation from Mr. Stowell's Book, pp. 17 and 18 support the above observation:

"Owing however to venality, carelessness, or ignorance on the part of the *amins*, who made the original entries, and the lack of intelligence and of caution on the part of the villagers, a great many wrong entries remain uncorrected; in very many cases the villagers concerned never discovered that the entries were wrong for years afterwards. These mistakes are most common in the older records, such as those of Mr. Beckett's Settlement which still hold good for all the old cultivation in Almora, and they consist most frequently of the entry of specific fields in the names of the wrong *hissedar* or *khaekar*, though there are a good number of mistakes due to the mistaken entry of the names of certain men as co-sharers in joint shares.... It is therefore necessary to enter a caution against giving the settlement records in the hills any such weight of presumption as attaches to the regularly revised and checked village papers in the plains. In the case of the latter papers the much greater familiarity of the people with their annual records and the greater caution taught by experience is a further safeguard against error."

Having regard to the proved facts I have no hesitation in holding that the land was fallow land until a few years before the institution of the suit when the appellants brought it under cultivation. Under these circumstances, it is impossible to affirm the decree of the Court below. In the result, I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Civil Judge. The appellants are entitled to their costs from the respondents. Leave to appeal under Letters Patent is granted.

S.

Appeal allowed.

CALCUTTA HIGH COURT

Appeal No. 1486 of 1937

May 8, 1939

B. K. Mukherjee and LATIFUR

RAHMAN, JJ.

AMBIOA PROSAD SANYAL—PLAINTIFF—

APPELLANT

versus

MESSRS. SOORAJMULL NAGARMULL

FIEM—DEFENDANT AND ANOTHER—

RESPONDENTS

Civil Procedure Code (Act V of 1903), O. XXI

rr. 62, 63—Order under r. 62, nature of—Mortgagee's application under r. 62 to have attachment continued subject to mortgage, dismissed—Order not set aside by suit under r. 63—Order becomes final and mortgagee is estopped from asserting rights denied by that order—Mortgagee choosing to take advantage of summary procedure under r. 62, must suffer disadvantage also—Suit under r. 63—Whether claim under r. 62 was investigated or not is immaterial.

Order XXI, r. 62, Civil P. C., is an enabling provision and when the Court is satisfied that the attached property is subject to a mortgage or charge in favour of some person not in possession, it can direct the continuance of the attachment subject to such mortgage or charge. The order contemplated by this Rule clearly indicates that this is a judicial determination, though in a summary way of the question as to whether there is a valid mortgage or charge existing upon the attached property and when the Court passes an order directing the continuance of the attachment subject to such charge, what is put up to sale is nothing more than the equity of redemption which the judgment-debtor has got in the attached property. The decree-holder or the purchaser cannot, in such cases, dispute the mortgage unless he brings a suit to set aside the summary order under O. XXI, r. 63. The same principle applies when the Court does not pass an order directing the continuance of attachment subject to a mortgage but the mortgagee's application to have such a direction is dismissed or refused. Whether the attachment on the property is directed to continue either subject to or free from the mortgage or charge, the order is one which comes within the purview of O. XXI, r. 62, and if it is not set aside by a regular suit commenced under O. XXI, r. 63, the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies.

[Case-law referred to]

The mortgagee is not obliged to prefer any claim at all under O. XXI, r. 62, but if he chooses to take advantage of a summary procedure, he must suffer the disadvantages as well. 120 Ind. Cas. 679 (5), relied on.

In order to bring a case within the purview of O. XXI, r. 63, Civil P. C., the question as to whether the claim was investigated or not is immaterial and if an adverse order is made against the plaintiff in the claim proceeding, he is bound to institute a suit under O. XXI, r. 63, failing which the order becomes conclusive and final. 44 Ind. Cas. 265 (9), 15 Ind. Cas. 683 (10), 64 Ind. Cas. 713 (11) and 157 Ind. Cas. 688 (12), relied on.

A. from the appellate decree of the Additional District Judge, Alipore, dated April 29, 1937.

Messrs. Girija P. Sanyal and Kiran Ch. Lahiri, for the Appellant.

Messrs. Bireswar Bagchi and Bireswar Chatterjee, for the Respondents.

B. K. Mukherjee, J.—This is an appeal on behalf of the plaintiff and the suit was one for enforcement of a mortgage bond alleged to have been executed by defendant No. 1 by which certain land and machinery were hypothecated to secure an advance of Rs. 1,000. The mortgage bond is dated December 9, 1926. Defen-

dants Nos. 2 and 3, were impleaded as parties to the mortgage suit on the allegation that they had purchased portions of the mortgaged property subsequent to the execution of the mortgage bond. Defendant No. 1 did not appear and contest the suit and the case was compromised with defendant No. 2. Defendant No. 3 who were the transferees of the machinery comprised in the mortgage were the only contesting defendant and they contended *inter alia* that the mortgage deed was without consideration and that the suit was barred by limitation under Art. 11, Lim. Act. It being brought more than a year after an adverse decision was passed in a claim petition made by the plaintiff in respect of the machinery under O. XXI, r. 62, Civil P. C. The trial Court overruled these defences and passed a decree *ex parte* against defendant No. 1, and on contest against defendant No. 3. The suit was also decreed on the basis of the compromise as against defendant No. 2. Against this decree there was an appeal taken by defendant No. 3 alone, and the Additional District Judge who heard the appeal reversed the decision of the trial Court so far as defendant No. 3 were concerned and dismissed the plaintiff's suit as against them on the ground that it was barred by limitation under Art. 11, Lim. Act. The decree against the other two defendants was kept intact. It is against this decision that the present second appeal has been preferred, and the only point for our consideration is whether the suit was barred under Art. 11, Lim. Act. It appears that in the year 1933 a creditor who had obtained a money decree against defendant No. 1 started an execution case, in course of which, certain properties including the machinery which was included in the mortgage were attached and proclaimed for sale. On November 13, 1939, the plaintiff made an application which was headed as one under O. XXI, r. 62, Civil P. C. and he prayed that the machinery which was one of the items of the property attached by the decree-holder, might be notified for sale subject to the plaintiff's mortgage. This application was rejected on November 14, 1933, on account of the failure of the plaintiff to produce the mortgage bond which he was asked to produce and the machinery was sold to defendant No. 3 in the execution sale. The present suit which was instituted on April 16, 1935, is admittedly filed more than a year after the date of the order passed

on the plaintiff's claim petition. The lower Appellate Court was of opinion that it was incumbent upon the plaintiff to institute a suit after the adverse order was passed against him under O. XXI, r. 62, Civil P. C. within a year from the date of the order, and as he failed to do that, the summary order passed by the executing Court became final and conclusive and it would not be open to the plaintiff mortgagee to say that he had any subsisting mortgage in respect of the machinery.

Now the question, as to whether there is a mortgage on an attached property can be raised in two different ways in execution proceedings. It may be raised, in the first place, when the Court prepares the proclamation of sale under O. XXI, r. 66, Civil P. C. and it is the duty of the executing Court acting under that rule to state as fairly and accurately as possible after giving notice to the judgment-debtor and the decree-holder, any incumbrance to which the property is liable. At this stage apparently the Court cannot decide the question as to whether the mortgage is a valid and a subsisting mortgage and the information given in the sale proclamation constitutes a warning to the purchaser who purchases the property subject to all risks which this notice involves. It does not preclude him afterwards from questioning the validity of the mortgage in any subsequent suit or proceeding. Another way of raising this question of the mortgage or charge during the execution proceedings is by way of an application under the claim sections contained under O. XXI, Civil P. C. Order XXI, r. 62, is certainly an enabling provision and when the Court is satisfied that the attached property is subject to a mortgage or charge in favour of some person not in possession, it can direct the continuance of the attachment subject to such mortgage or charge. The order contemplated by this rule clearly indicates that this is a judicial determination, though in a summary way of the question as to whether there is a valid mortgage or charge existing upon the attached property and when the Court passes an order directing the continuance of the attachment subject to such charge, what is put up to sale is nothing more than the equity of redemption which the judgment-debtor has got in the attached property. The decree-holder or the purchaser cannot, in such cases, dispute the mortgage unless he brings a suit to set aside the summary order under O. XXI, r. 63, Civil

P. O. The question is whether the same principle applies when the Court does not pass an order directing the continuance of attachment subject to a mortgage but the mortgagee's application to have such a direction is dismissed or refused.

It was held by the Bombay High Court in *Ganesh Krishna v. Damoo Nathu* (1) under the old Code of 1882 that s. 282 (corresponding to O. XXI, r. 62 of the present Code) merely enables the Court to pass an order if it thinks proper that an attachment would continue subject to a lien or a mortgage. But the section does not contemplate an order refusing to acknowledge the mortgage or lien and the Court has no power to direct the continuance of attachment free from such charge. In fact, it was held by the Bombay High Court that the executing Court had no authority to declare a mortgage to be invalid, and in such circumstances, it could do nothing except to notify the incumbrance under O. XXI, r. 60, Civil P. O. On the other hand, it was pointed out by the Allahabad High Court in *Debi Das v. Rup Chand* (2) that the expression "where the Court is satisfied" would confer jurisdiction on the Court to come to a finding as to the existence of the mortgage. Without such finding of fact it can never be satisfied. Section 282 therefore in effect provides for two alternative and mutually exclusive orders. One is an order that as the mortgage exists, the attachment shall be continued subject to it and the other is that no mortgage shall be deemed to exist. The latter order, no less than the former, is an order contemplated by r. 63 or old s. 283. It seems to me that the view taken by the Allahabad High Court is sound. Whether the attachment on the property is directed to continue either subject to or free from the mortgage or charge, the order is one which comes within the purview of O. XXI, r. 62, Civil P. O. and if it is not set aside by a regular suit commenced under O. XXI, r. 63, the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies. This is supported by the decisions of the other High Courts in India and reference may be made in this connection to the decisions of the Madras, Lahore and Rangoon High Courts which are to be found in *Muthiah*

(1) 41 B 64; 36 Ind. Cas. 627; A I R 1916 Bom. 179; 18 Bom. L R 782.

(2) 49 A 903; 102 Ind. Cas. 792; A I R 1927 All. 593; 25 A L J 609.

Chetty v. Palaniapa Chetty (3), *Lakshmanan Chettiar v. Parasivan Pillai* (4), *Nawal Kishore v. Khyali* (5) and *Maung Aung My Myint v. Maung Tha Hmat* (6). The decision of the Bombay High Court in the case reported in *Ganesh Krishna v. Damoo Nathu* (1) referred to above can be distinguished not only on the ground that it was a decision under the old Code where the wording of s. 283 was different from that of O. XXI, r. 63 in the present Code but also on the ground, that on the facts actually found in that case, the application by the mortgagee was held to come under O. XXI, r. 66, Civil P. O. It may seem somewhat anomalous no doubt that the question affecting the validity of the mortgage should be inquired in a summary manner in course of an execution proceeding. But the mortgagee is not obliged to prefer any claim at all and I concur with the observations made by the Lahore High Court that if he chooses to take advantage of a summary procedure, he must suffer the disadvantages as well.

Mr. Sanyal who appears for the appellant has not disputed the correctness of the proposition stated above. His contention really is that the rule of law stated above does not affect his client and that on two-fold grounds: The first is that as the dismissal of the claim matter was one for non-prosecution and there was no investigation of the claim in its merits, the necessity of instituting a suit under O. XXI, r. 63, Civil P. O., does not arise. The second ground is that the application made by his client was neither a claim petition made under O. XXI, r. 58, nor under O. XXI, r. 62, Civil P. O. It was a mere application for insertion of an incumbrance in the sale proclamation under the provisions of O. XXI, r. 66, Civil P. O. In support of the first contention Mr. Sanyal has relied amongst others on certain decisions of this Court which are to be found in *Uma Charan v. Hiron Moyes Debi* (7) and *Sarat Chandra Basu v. Tarini Prasad* (8). These are decisions under the old Code and it is not disputed that there have been

(3) 45 M 90; 70 Ind. Cas. 432; A I R 1922 Mad. 447; 41 M L J 594; (1921) M W N 784; 15 L W 190.

(4) 37 M L J 129; 52 Ind. Cas. 720; A I R 1920 Mad. 936; (1919) M W N 653.

(5) 11 L 369; 120 Ind. Cas. 679; A I R 1929 Lah. 865; 11 Lah. L J 452; Ind. Rul. (1930) Lah. 135.

(6) 9 R 367; 134 Ind. Cas. 746; A I R 1931 Rang. 310; Ind. Rul. (1931) Rang. 314.

(7) 18 O W N 770; 26 Ind. Cas. 943; A I R 1915 Cal. 121.

(8) 34 C 491; 11 O W N 487.

changes introduced in the wording of the relevant sections in the present Code. Order XXI, r. 63, is differently and much more generally worded than the corresponding s. 283 in the Code of 1882. It scrupulously omits any reference to the earlier sections as were made under the old Code and provides in the most general manner that where a claim or an objection is preferred and an order rejecting or allowing the claim is passed, the party against whom the order is made is bound to institute a suit to establish the right which he claims to the property in dispute. There have been corresponding changes in the wording of Art. 11, Lim. Act, also. In the circumstances it seems to me that the conclusion is irresistible that in order to bring a case within the purview of O. XXI, r. 63, Civil P. O., the question as to whether the claim was investigated or not is immaterial and if an adverse order is made against the plaintiff in the claim proceeding, he is bound to institute a suit under O. XXI, r. 63, Civil P. O.; failing which the order becomes conclusive and final. This view has been accepted by this Court in *Nogendra Lal v. Fani Bhusan Das* (9), *Jugal Kishore v. Ambika Debi* (10), *Satindra Nath v. Shiva Prosad* (11) and *Abdul Latif Lashar v. Aklui Mia Laskar* (12). The first contention of Mr. Sanyal, therefore, must be overruled.

Now as regards the second point, we have been referred to the petition that was filed by the plaintiff on November 13, 1933. As I have stated above it was headed to be one under O. XXI, r. 62, Civil P. O., though that description is not by any means conclusive. The petition sets out the facts that long before the attachment was made by the decree-holder, the judgment-debtor by a registered deed executed in November, 1933, had mortgaged the machinery to the petitioner to secure an advance of Rs. 1,000 which carried interest at the rate of 24 per cent. per annum. It was stated further that the mortgage money now amounted to Rs. 3,400 and the petitioner prayed that the fact of the property attached being subject to a mortgage might be notified and proclaimed at the time when the sale took place. Mr. Sanyal has argued that really he did

not want that the property should be sold subject to the mortgage but the plain reading of the petition does not lead to any other conclusion. Obviously, it was not the time when the sale proclamation was being prepared and the petitioner also did not make any prayer whatsoever that the sale proclamation might be amended by mentioning the incumbrance upon the attached property or that a fresh sale proclamation might be issued and served in the locality. The object of his reciting in *extenso* the fact of the mortgage and the interest it carried seems to me to point to the conclusion that he wanted that the property should be sold subject to the mortgage. This is strengthened by the fact that the petition was headed under O. XXI, r. 62, Civil P. O. In these circumstances I concur with the lower Appellate Court in holding that it was really a claim petition made under O. XXI, r. 62, Civil P. O., and as this was dismissed by the executing Court on November 14, 1933, it was incumbent on the plaintiff to institute a suit within one year from that date. That not having been done it is not open to him now to put forward his rights as a mortgagee so far as the machinery is concerned. The result is that we affirm the decision of the lower Appellate Court and dismiss the appeal. There will be no order as to costs in this appeal.

Latifur Rahman, J.—I agree.

D.

Appeal dismissed.

RANGOON HIGH COURT

First Appeal No. 24 of 1939

May 17, 1939

ROBERTS, C. J. AND DUNKLEY, J.

GOVERNMENT OF BURMA AND ANOTHER

—DEFENDANTS—APPELLANTS

versus

ARUNACHALLAM AND OTHERS—

PLAINTIFFS—RESPONDENTS

Burma Municipal Act (III of 1898), s. 8—Rules under, r. 68-A—Government coming to conclusion that no proper election took place and ordering new election—Candidates declared elected in original election, if can get declaration that orders of Government were ultra vires.

Shortly after a Municipal Election a candidate brought a petition against those who were thought to have been the successful candidates and to have been elected upon the Municipal Committee, alleging many acts of irregularities. The consequence of this petition was that the irregularities came to the notice of the Govt. which held that the proceedings of the election were a farce and a fiasco. Consequently they proceeded under r. 68 made under s. 8, Burma

(9) 45 O W N 785; 44 Ind. Cas. 365; A I R 1919 Cal. 835; 23 O W N 375.

(10) 16 O W N 882; 15 Ind. Cas. 683.

(11) 26 O W N 126; 64 Ind. Cas. 713; A I R 1922 Cal. 166.

(12) 39 O W N 457; 157 Ind. Cas. 688; A I R 1935 Cal. 500, 61 O L J 5; 8 R O 125(3).

Municipal Act for the preparation and publication of the electoral roll for holding a proper election. The Judge who decided the petition held, reviewing all the matters, that the objections raised in the petition were valid, and he pointed out that all the criticisms made in regard to the electoral roll were correct. Upon that it was thought that the next four persons who were on the list in having received votes during these proceedings ought to be elected. The person so declared elected sued for a declaration that the orders of the Govt. and the electoral authority were *ultra vires* and that they were duly elected members of the Municipal Committee:

Held, that once an election had taken place the Govt. could not declare it to be void and hold a new one. But the authorities must make a decision upon the facts as represented to them and must make their decision in good faith. When they were apprised of the existence of facts as the result of an inquiry, in which evidence as to those facts was relevant, they might be assisted by the examination of the tribunal's opinion and the record of the evidence before it. No proper election having taken place, the candidates could not be declared elected and that the orders of the Govt. and the Electoral Authority were within powers. [p. 528, col. 1.]

F. A. from the decree of the District Court, Amherst, dated January 24, 1939.

Mr. U Thein Maung, Advocate-General, for the Appellants.

Mr. U E Maung (1), for the Respondents.

Roberts, C. J.—This appeal is brought by the Govt. of Burma and the Electoral Authority, Moulmein Municipal Election, from a decision of the learned District Judge of Amherst in which it was laid down that the order of the first defendants the Govt. of Burma, dated August 29, 1938, and the declaration of defendant No. 2, the Electoral Authority, dated September 3, 1938, were *ultra vires* and that the plaintiffs were elected members of the Municipal Committee of Moulmein and were entitled as such to exercise their duties and responsibilities during the lifetime of the Committee.

A purported election took place on November 4, 1937, and shortly afterwards respondent No. 1 in this case brought a petition, which was Civil Miscellaneous No. 53 of 1937, against those who were thought to have been the successful candidates and to have been elected upon the Municipal Committee, and stated *inter alia* that the poll was wrongly closed at various times, that the candidates and their agents were ordered to leave the enclosures by the supervisors, yet one of the agents, Ohidambaram, was for a time allowed inside, thus giving him a preference over the representatives of the other candidates and added that there was impersonation of a number of purely imaginary persons whose fictitious names appeared on the

electoral rolls. The consequence of this petition was, of course, that the present respondents, more than any other persons first brought to the notice of those in authority the fact that the proceedings which had taken place on November 4, 1937, at Moulmein, and which purported to have led to a faulty election, were a farce and a fiasco. The objection which was raised submitted that the election of the four respondents in the case, namely those four who were at the head of the poll, was void by reason of material irregularities in the election proceedings, and also by reason of bribery, impersonation and undue influence alleged to have been encouraged by them, and the Judge held, reviewing all the matters, that the objections raised in the petition were valid, and he pointed out that all the criticisms made in regard to the electoral roll were correct and that there were a number of roads in which more houses were given on the roll than actually existed, and all kinds of other mistakes in the roll, which showed that the figures which had been reached or could be reached in any election purported to have taken place upon that roll would be unsatisfactory and unsustainable. Upon that it was thought that the next four persons who were on the list in having received votes during these proceedings ought to be elected. This, of course, was a mistake. The position was that a report should have been made to Govt. and that the Govt. should have taken action as it was properly entitled to do.

By s. 8, Burma Municipal Act, the Govt. shall, for every municipality of which the system of election is introduced, make rules regulating a number of matters, including the system of representation and election, for which it may seem expedient to provide, the time of election and mode of recording votes, the registration of electors and so on: and the members of the Committee shall, under the section, be elected in accordance with the rules. When the Govt. received the report that the election had been such a fiasco, it proceeded to act under its own rules made under this section, and by r. 68, the Govt. may take any action which appears it to be necessary for the proper preparation or publication of the roll, that is the electoral roll, or for the proper holding of the election. There can, upon the present respondents' own showing, be no doubt whatever that the election has not been properly held because they have complained of a lot of individual acts and

wrong-doings on behalf of individual candidates, and of the closing of the poll during the hours in which it should have been open, and also of the entirely unsatisfactory nature of the roll which was the basis upon which the election was held.

Now, it is necessary, I think, to say that when one comes to look at these orders, although the order of defendant No. 1, the Govt. by no means needs criticism, the same, unfortunately, cannot be said of the order of defendant No. 2. The slip made, however, is one of a trivial nature. What has been declared is that the election of Dr. Mazumdar, Mr. R. K. S. Pathy, Mr. K. Arunachalam and Kola Dharmarao is void and they therefore ceased to be members of the Moulmein Municipal Committee. That, of course, is not accurate, the fact being that they never have been members of the Moulmein Municipal Committee although they have acted as such and no doubt, spoken and voted in good faith in the meetings of the Municipal Committee. The election having been void, however, it is not accurate to say that they ceased to be members of the body to which they have never in fact belonged.

Now, it is clear that once an election has taken place, the Govt. cannot declare it to be void and hold a new one. A fear that one decision might go to the length of holding, this was expressed by U E Maung; but there is really no ground for entertaining it. If the Govt. were to take such a course, it would be at the peril of incurring liabilities of an unsuccessful litigant when such a course was challenged in the Courts: but they must exercise their discretion in any particular case as to whether an election has been held or not. Supposing for example, a severe earthquake took place in the town after polling had begun and a number of polling boxes were saved and many destroyed; the argument presented to us by the respondents' Advocates would lead to this, that, though everyone would know that the election had been a complete failure, the Govt. could not take any action under r. 68, which appeared to be necessary, for holding a proper election. That would lead to a hopeless conclusion. The authorities must make a decision upon the facts as represented to them and must make their decision in good faith. When they are apprised of the existence of facts as the result of an inquiry, in which evidence as to those facts is relevant, they may be assisted by the examination of the Tribunal's opinion and the record of the

evidence before it. Although the only question before the District Judge related to the petition of the respondents, a number of other matters came to light. When it transpired that no satisfactory election was held, the Govt. immediately took prompt action, and hence this order. The respondents themselves, by the steps they took, challenged the validity of the whole election and the only conclusion to be arrived at from the finding is that no proper election was ever held. If they have come to the conclusion that the learned Judge's opinion was wrong and the evidence upon which they relied, and upon which the Govt. relied, was unreliable, they are, of course, entirely at liberty to file a suit for a declaration that they were duly elected as members of the Municipal Committee. That they have not done. They have chosen to challenge the orders issued by the Govt. and the Electoral Authority as being *ultra vires*, and for the appellants it has been conclusively proved that these orders were within the powers of each of the appellants. In my opinion, therefore, this appeal must be allowed, the judgment and decree of the learned District Judge set aside, and the suit of the respondents dismissed with costs in both Courts, Advocate's fee twenty gold mohurs in this Court.

Dunkley, J.—I am of the same opinion. It appears to me that, when r. 68 says that the Govt. may take any action for "the proper holding of the election," that expression must mean and include the holding of a proper election when no election has, in fact, been held. Moreover, the power to grant a declaratory decree which is conferred by s. 42, Specific Relief Act, is discretionary power. The relevant words of the section are:

"Any person entitled to any legal character may institute a suit against any person denying his title to such character and the Court may, in its discretion, make therein a declaration that he is so entitled."

It cannot be said that the learned District Judge exercised his discretion judicially and in accordance with established principles in granting a decree to the respondents in this case. He has held in his judgment that, on a petition properly brought by another candidate or by a body of voters, the respondents would have been unseated, and, furthermore, that the same consideration is applicable to each and everyone of the candidates at the so-called election of November 4, 1937, namely

that if any candidate had been declared under r. 67 by the Electoral Authority to be elected, that candidate could have been unseated by a petition properly brought. He has, in fact, held that the election of November 4 was entirely abortive and that in the ultimate event a fresh election would have had to be held. The order of the Govt. of Burma, directing that a fresh election shall be held, put an end to this anomalous position, and therefore it cannot be a proper exercise of judicial discretion to make a declaration the effect of which is to restore this anomaly. Consequently the learned District Judge ought not to have exercised his discretion in favour of the respondents.

D.

Appeal allowed.

PATNA HIGH COURT

Criminal Appeal No. 172 of 1938

and

Criminal Revision No. 110 of 1939

April 25, 1939

MOHAMAD NOOR AND DHAVLE, J.J.

AMBIKA THAKUR AND OTHERS—

APPELLANTS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 145, 423, 439—Party forbidden to disturb possession of successful party—If can plead that he is still in possession in spite of order under s. 145 or that he has been able to regain possession by force—Possession of successful party, whether can be put to an end by unsuccessful party by violence or surreptitious invasion—Fresh proceedings under s. 145, when can be started—Acquittal under ss. 302-149, Penal Code (Act XLV of 1860), whether can be converted into conviction—under ss. 336-149 under combined appellate and revisional powers of High Court—Application in revision by private party to convict accused of offences of which they are acquitted and to enhance sentences in alternative, when can be entertained—Penal Code (Act XLV of 1860), s. 149—Mob armed with deadly weapons going to achieve particular object by force—Inference that all members knew that grievous hurt is likely to be caused.

The whole object of s. 145, Criminal P. O., is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to coerce a Magistrate to proceed again under s. 145, Criminal P. O. This will be a definite encouragement to disobedience of orders

under the section. View of Odming, J., in 104 Ind. Cas. 443 (2); dissented from: [p. 536, col. 2; p. 537, col. 1.]

Though an order under s. 145, Criminal P. O., confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. The possession of the party which succeeds in proceedings under s. 145, Criminal P. O., cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion. Therefore, even if the unsuccessful party in proceedings under s. 145 is able on some occasions either surreptitiously or forcibly to cultivate the lands in possession of the successful party, these would be no more than isolated acts of trespass—and offences punishable under s. 188, I. P. O., but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under s. 145 in their favour. [p. 536, col. 1.]

Obiter.—Where in previous proceedings under s. 145, Criminal P. O., a party is declared to be entitled to possession, the Magistrate has jurisdiction to start fresh proceedings under s. 145, if the party to such proceedings was not a party to the previous one. 173 Ind. Cas. 107 (5), relied on.

Quaere.—Where accused charged under ss 302-149 and also under s. 147, I. P. O., are acquitted by the Sessions Judge of charge under ss 302-149 but are convicted under s. 147 and the accused prefer an appeal against the conviction and the complainant files a revision to convict the accused under ss 302-149 or in the alternative to enhance the sentences, whether the High Court under its combined appellate and revisional powers can convert the acquittal under ss. 302-149 into a conviction under ss. 336-149 and then pass a sentence where none is passed by the Sessions Judge for the latter offence. [p. 539, col. 1.]

[Case-law reviewed.]

High Court is, as a rule, loath in ordinary circumstances to entertain an application in revision from a private party asking the Court to convict the accused of offences of which they have been acquitted by the Sessions Judge and to enhance a sentence passed upon them. But where there are clear indications that the accused party has been defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past, such application should be entertained in revision.

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly know that grievous hurt, if not murder, is likely to be caused in prosecution of that object. [ibid.]

Or. A and Or. R. against a decision of the Additional Sessions Judge, Shahabad, dated July 26, 1938.

Sir M. N. Mukherji, Messrs. Naqui Imam, R. J. Bahadur and S. Mehdi Imam, for the Appellants.

Mr. C. P. Sinha, for the Crown.

Messrs. Mahabir Prasad and A. B. N. Sinha, for the Petitioner (Complainant.)

Judgment.—The appellants have been convicted by the Additional Sessions

Judge of Shahabad and sentenced as follows:

- | | |
|--|--|
| 1. Ambika Thakur; | } One and a half years' rigorous imprisonment under s. 147, I. P. O. |
| 2. Ramprasad Thakur; | |
| 3. Sheoprasad Thakur; | } One year's rigorous imprisonment under s. 147, I. P. O. |
| 4. Nawab Thakur; | |
| 5. Kuor Thakur; | |
| 6. Nagina Pandey; | |
| 7. Sheodahin Thakur; | |
| 8. Maina Thakur; | |
| 9. Beni Madho Thakur; | } One and a half years' rigorous imprisonment under s. 148, I. P. O. |
| 10. Lalchand Thakur; | |
| 11. Jagannath Thakur; | |
| 12. Chhabila Thakur; | } One and a half years' rigorous imprisonment under s. 148, I. P. O. |
| 13. Kawal Thakur <i>alias</i> Ramkawal Thakur; | |
| 14. Ohaman Thakur; | |
| 15. Rajdayal Thakur; | |
| 16. Jamuna Prasad Thakur; | |
| 17. Kawal Thakur; | |

Seven more persons tried along with the appellants were acquitted. Lalchand Thakur (No. 10 above) was also charged under s. 302, I. P. O. with causing the death of one Ramnarain, and the remaining appellants under s. 302-149, I. P. O., in respect of that murder. They were acquitted of these charges. Rajdayal Thakur who was further charged under s. 324, I. P. O., with causing simple hurt by a dangerous weapon to the same Ramnarain was acquitted of this charge. Beni Madho Thakur, Kawal Thakur *alias* Ram Kawal Thakur, Jamuna Prasad Thakur, Jagannath Thakur, and Ohaman Thakur were similarly charged under s. 324, I. P. O. the first three with causing simple hurt by dangerous weapons to one Lalchar Rai and the last two to one Ujagir Rai. All of them were acquitted of this charge.

One of the accused, Guraman Ahir (acquitted), was charged (among other sections) under s. 436, I. P. O., (arson) with setting fire to a hut, and Ambika Thakur and Rajdayal Thakur were charged with abetting that offence under s. 436-114, I. P. O. These charges were withdrawn during the trial. The trial commenced with five gentlemen as jurors in respect of the charges relating to arson and as assessors in respect of the remaining charges. When the charge of arson was withdrawn, the trial proceeded with the same gentlemen as assessors only. All of them were of opinion that the accused were not guilty of any offence. The first informant, Ramkewal Rai, has presented an applica-

tion in revision praying that the appellants be convicted of the offences of which they were acquitted by the learned Additional Sessions Judge or, in the alternative, that their sentences be enhanced. We postponed the passing of orders on this application till the appeal had been heard. Sir Manmatha Nath Mukherji who appeared on behalf of the appellants intimated to us that in case we decided to issue notice in the revision application, he would accept it so as to make it unnecessary to send out notices to the appellants personally. After the conclusion of the hearing of the appeal we called upon Mr. Naqui Imam, who was then appearing on behalf of the appellants, to take notice of the revision application and show cause, if any, why it should not be allowed. We heard Mr. Naqui Imam in this connection and will deal with that matter in this judgment after disposing of the appeal itself. The occurrence in question took place on the morning of February 5, 1938, over the possession of some Diara lands which had alluviated from the river Ganges. Such occurrences are not uncommon; when a large area of land alluviates, there is generally a struggle for possession; and all who can by any stretch of imagination do so lay claims to the land and riots attended with murder often take place. The present is one of a series of such riots between the parties.

Before we deal with the facts of the riot, it is necessary to describe the position of the disputed land. In doing so, we must clear up some confusion (which has been noticed before now) in the directions, (north, east, south, west) given by the witnesses and mentioned in a number of documents produced in the case. The general course of the river Ganges in the District of Shahabad is from west to east along the northern border of the district, but at the particular place where the present occurrence took place, the Ganges has taken a turn, and runs from north to south on the east of the lands involved in the case. Notwithstanding this, the Ganges is locally regarded as lying to the north; and the consequent shift is reproduced both in the oral and in the documentary evidence, the popular directions being 90 degrees ahead of the true or magnetic directions. The learned Additional Sessions Judge in his judgment has used the popular directions, with the result that his north is the magnetic east, his east the magnetic south, his south the magnetic west and his west

the magnetic north. We prefer to use the magnetic directions, which were followed in the cadastral survey map and are thus more convenient for our purposes. There are four *mouzas* lying one after another from north to south, to the west of the Ganges in this locality. The northernmost in Rajapur, a Govt. Khas Mahal, south of it is Dubha, next comes Gangauli, and the southernmost is Kharatanr, the last three belonging to the Maharaja of Dumraon. Each of these four *mauzas* has its *mal* lands, that is, lands which appertained to it from the beginning and, so far as Dubha, Gangauli and Kharatanr are concerned, were permanently settled with the Maharaja of Dumraon. Each of them also has *taufir* (accreted) lands which have become attached to the main lands of the *mauza* by alluvion. A portion of these *taufir* lands was surveyed at the time of the cadastral survey in 1908-09, doubtless because it had by then become firm and was under cultivation. The rest of the *taufir* lands were not surveyed then, and are known as "unsurveyed", though the lands of Dubha *taufir* have been surveyed in 1935, and a Record of Rights prepared. It is the *taufir* land of Dubha which is the subject-matter of the riot in the present case, that is, the land which accreted to the main lands of *Mauza* Dubha and was not surveyed in 1908-09. East of *Mauzas* Dubha, Gangauli and Kharatanr, we have Shivpur (or Sheopur) Diara lying in the District of Ballia in the United Provinces, some of the litigation, to which we shall have to refer, has thus been in that District.

The prosecution case is that under leases granted by the Maharaja of Dumraon 10 tenants of village Rajapur were in possession of all the unsurveyed portion of the Dubha *taufir* lands with the exception of 77 *bighas* (which have admittedly been in the possession of Lalmohar, deceased, father of the appellant Ambika and uncle of the appellant Nawab). They had grown crops on the land and erected a hut for the accommodation of those who were set to guard the crops. On the morning of February 5, 1938, about half a *ghari* after sunrise, some of the lessees and their relations and partners, in all 11 men, were in the said hut, when they heard shouts of "Mahabir ki jai." They came out of the hut and saw a mob of about 100 (including the appellants) with *lathis* and spears, at a distance of about 10 *bans* on the south (magnetic west) of the hut. The

appellant Ambika was riding a mare and had a whip in his hand. He and the appellant Rajdayal ordered assault and burning of the hut. All the occupants of the hut fled away, but Ramnarain, Lalmohan (P. W. No. 2) and Ujagir (P. W. No. 6) were surrounded. Ramnarain was hit in the chest with a spear by the appellant Lalchand and was killed. Lalmohar fell down unconscious, having been hit with spears by Ramkewal, Beni Madho and Jamuna, and with a *lathi* by Shiv Prasad. Ujagir also fell down senseless, having been hit by the spears of Jagannath, Chhabila and Chaman and by a *lathi* of Ramprasad. Thereafter Jurawan (acquitted) set fire to the hut. Then the mob proceeded towards Gangauli, the village where all the appellants lived. Ramnarain was removed from the place where he had fallen. Three cots were procured from the *basti* of Rajapur *taufir*; and on them the dead body of Ramnarain and the two injured persons were carried towards the Dumraon Police Station, 12 miles away. When the party reached a tank in Dumraon, they met the Sub-Inspector (P. W. No. 38) who was on his way to the place of occurrence on receipt of some information from the *chaukidar* of Gangauli. At that very spot, a short distance from the Police Station, the Sub-Inspector drew up the first information report on the statement of Ramkewal, one of the lease holders (P. W. No. 1). This was at about mid-day (12-15). The body of Ramnarain was sent for *post mortem* examination to Buxar, and the injured persons were also sent there for medical examination and treatment. After doing some preliminary investigation the Sub-Inspector deputed constables Agin Singh (P. W. No. 2), Muhammad Kifait (P. W. No. 17) and Pahlu Singh (P. W. No. 18) to the place of occurrence to keep a watch on it. He himself reached the spot at night. After investigation, the accused persons were sent up for their trial.

The defence is that all the Dubha *taufir* lands had all along been in the possession of Lalmohar Thakur (now dead) and are now in the possession of the members of his family. No part of them is directly in possession of the Maharaja of Dumraon or of any of his settlement holders. The appellants denied taking part in any occurrence whatsoever. Their case was that in the early hours of the morning of the day in question, several hours before the time of the occurrence given by the prosecu-

tion, an attempt was made by Ramnarain and other settlement-holders to put up a hut as a proof of their possession of the lands, and Gangauli guards (*rakhwaras*) who lived in another hut on the 77 *bigha* block, admittedly in the possession of the Gangauli Thakurs 'Lalmohar's family', saw this and went up to oppose, and a scuffle ensued in which some persons were injured at the hands of the *rakhwaras* and Ramnarain might have received his fatal injury. In other words, the appellants denied the possession of the other side and claimed to be in possession themselves and denied that there was any hut in existence at about the time of the occurrence and said that they had heard of an attempt to put up a new hut which was resisted by the men set to guard their crops and living in a hut in the 77 *bigha* block.

Both the parties have adduced documentary evidence in connection with the previous litigation in order to prove their respective possession. Sir Manmatha Nath Mukherji, who appeared on behalf of the appellants, has addressed us at great length and has asked us to hold that whatever might have been the decisions of the Courts from time to time (and we will refer to them later), the deceased Lalmohar and the members of his family had in actual fact been in uninterrupted possession of all the Dubha taufir lands up to the date of the present occurrence. In our opinion, this question of possession is important only for the purpose of appreciating the evidence of the occurrence as deposed to by the prosecution witnesses. If the prosecution case is believed, there is no case of a right of private defence, and the question of possession is not very important in relation to the charges framed against the appellants. Sir Manmatha, Mukherji, however contended that one of the common objects mentioned in the charges of rioting being "by means of criminal force to Ramnarain Rai and his party to take possession of the lands in Dubha taufir, Police Station Dumraon, held under the *pattas* granted by the Maharaja of Dumraon," these charges must fail if the prosecution fail to prove their possession. But there is another common object mentioned in the charge, namely "to assault Ramnarain Rai and others of the same party," which has little to do with actual possession. But the defence assertion of actual possession in the face of repeated decisions adverse to these Thakurs of Gangauli implies lawlessness, and we propose to examine the ques-

tion of possession in some detail, as we have come to the conclusion that it is high time they were bound over to keep the peace.

It is, however, not necessary for the purposes of even the first part of the charge, to decide whether all the unsurveyed lands of Dubha taufir were in the possession of the prosecution party on the day of occurrence. If they were in possession of some substantial area out of those lands, and the appellants went there in force to dispossess them, this part of the charges would be brought home to them. The learned Sessions Judge, has carefully detailed the previous litigation about these lands. It is therefore not necessary for us to give more than a short history in order to determine the question of possession. (After giving the history and certain evidence regarding possession the judgment proceeded). The facts stated above practically exhaust the documentary evidence of possession. The following appears clear from them:

The Thakurs of Gangauli were originally *raiya*s of lands in the Dubha as well as the Gangauli and Kharatanr taufirs. Their names were recorded as such in the Diara Survey Record of 1892. This is abundantly clear from the judgment (Ex. R) of the suit instituted by the Maharaja against the Thakurs of Gangauli for ejecting them from the 77 *bighas* of land. In this judgment reference has been made to the plaint of the Maharaja in Title Suit No. 193 of 1916 against the Shivpur Babus and to his written statements in Title Suit No. 247 of 1911 which Lalmohar had brought against the Shivpur Babus for recovery of 244 *bighas* of land. In both of them the *raiya* interest of Lalmohar and others in the Dubha taufir lands was admitted. The lands must have gone under water for some time thereafter, and most of them were not fit for cultivation during the cadastral Survey of 1908-09 as only 22-06 acres of taufir lands of Dubha were then cadastrally surveyed, and the rest only dealt with topographically. But some portion of these unsurveyed lands would appear to have become fit for cultivation as there was a scramble for possession between the old *raiya*s, the Thakurs of Gangauli, on the one hand and the Babus of Shivpur on the other, the latter claiming the lands as re-formation *in situ* of their old Shivpur lands in the District of

Ballia. In this fight the Thakurs of Gangauli lost all the Dubha taufir lands and the Babus of Shivpur got possession of them on November 30, 1913, after the civil suit of Lalmohar and others against them was dismissed by the Appellate Court. The Shivpur Babus not only succeeded in dispossessing the Gangauli Thakurs from the Dubha taufir lands, but by an order under s. 145, Criminal P. C., passed by the Magistrate of Buxar, they got possession of the taufir lands of Gangauli and Kharatanr as well. This was the situation when the Maharaja of Dumraon brought his title suit for recovery of possession of all the taufir lands of the three villages. Regarding the 244 *bighas* which, as we have said, later became known as 258 *bighas*, the Maharaja claimed *khas* possession as his *raiyats* Lalmohar and others had lost not only their possession but also whatever rights they had. Regarding the Gangauli and Kharatanr lands in which his *raiyats* had not lost their rights, he claimed possession through them. The suit of the Maharaja was reinforced by a suit on behalf of the Gangauli Thakurs in respect of Gangauli and Kharatanr lands only. Both the suits, as we have said, were decreed, and possession was given to the Maharaja according to his prayer on April 30, 1925.

Lalmohar and others who had lost all the taufir lands of the three villages and subsequently recovered possession of Gangauli and Kharatanr lands did not take any settlement from the Maharaja of the Dubha taufir lands which they had completely lost and which were only recovered through his efforts, but attempted to take possession of the lands by sheer force. In the meantime Lalmohar was declared to be in possession of a block of 77 *bighas* in another part of the Dubha taufir which was at that time believed to be a part of Rajapur; but this was in a domestic dispute between the members of his own family. Lalmohar then attempted to obtain possession of the 244 or 258 *bighas* of land which he had altogether lost, and this resulted in the first 145, Criminal P. C. case decided by the Sub-Divisional Officer, *Rai Sahib* Sukhdeo Narayan, on September 1, 1931. This Magistrate declared the Maharaja to be in possession of 258 *bighas* and Lalmohar Thakur in possession of the 77 *bighas*, and in order to decide the question of possession for our purposes we propose to start from this judgment of 1931. We may recall the

following dates :

Decision of the first 145 case ...	September 1, 1931.
Lands attached in the second 145 Criminal P. C. case ...	August 1, 1933.
Lands released from attachment ...	June 11, 1936.
Present occurrence ...	February 5, 1938.

The 335 *bighas* of land which formed the subject-matter of dispute in the 145, Criminal P. C. case decided by *Rai Sahib* Sukhdeo Narayan in 1931 lay in two blocks — one of 77 *bighas* north of a *chhaur* which ran east to west (magnetic) and the other of 158 *bighas* south of it. Lalmohar claimed to be in possession of all this area — of 77 *bighas* as the land over which his possession was maintained in the 145 Criminal P. C. case proceeding between him and Dadul Thakur, of 100 *bighas* as an accretion to that block and of 158 *bighas* as having all along been in his possession. We have said before that the learned Magistrate declared the possession of Lalmohar over the 77 *bighas* and of the Maharaja over the 100 *bighas* east of it and the 158 *bighas* south of the *chhaur* . He held that these 258 *bighas* were in fact the 244 *bighas*, of which the Maharaja had got *khas* possession from the Civil Court in his suit against the Shivpur Babus. The Building Sub-Inspector Abdus Shakur (P. W. No. 13), located signs of the destroyed hut and the place where Ujagar Rai and Lalmohar Rai were injured in survey plot No. 349 and the place where Ramnarain was killed and where his dead body was found in plot No. 350. According to the survey map prepared during the settlement operations, plot No. 350 is within the 100 *bighas*, the possession of which was declared to be with the Maharaja and plot No. 349 is just outside that area but within the lands found by the Settlement Authorities to be accretions to the 258 *bighas*. Neither of the two plots is in the 77 *bighas* the possession of which had been declared in favour of Lalmohar. The Record of Rights have been finally published and must be presumed to be correct unless the contrary is proved by evidence adduced. There is no such evidence. It is thus clear that the place where the occurrence took place and the lands near about it are unconnected with Lalmohar's block of 77 *bighas* but are either part of or connected with the area to the possession of which the Maharaja was declared to be entitled as far back as 1931, Lalmohar and his party being on that occasion prohibited from interfering with the

Maharaja's possession. That order is in full force till now.

It was, however, urged before us as in the lower Court that the lands of which possession was declared in favour of the Maharaja were unidentifiable and that the order of 1931 under s. 145 did not apply to any particular plot of land that the Maharaja and his lessees did not know the lands and therefore were never in possession of them and that Lalmohar and others continued in possession of them in spite of the order. This we cannot accept at all. It does not lie in the mouth of Lalmohar or his descendants and relatives to say that the 258 *bighas* of the Maharaja was unknown to them. These lands are the same as Lalmohar had lost in the 145 Criminal P. O. case against the Babus of Shivpur in the Court of the Magistrate of Ballia though at that time they were known as 244 *bighas*. It was for these very lands that Lalmohar had brought his civil suit against the Shivpur Babus and lost. These very lands were also included in the subject-matter of the 145 Criminal P. O. case before the Magistrate of Buxar (*Rai Sahib Sukhdeo Narayan*). Lalmohar never alleged in that case that these lands were unidentifiable. He filed a written statement and claimed 100 *bighas* of them as accretions to his 77 *bighas* and also claimed possession of the remaining 158 *bighas* which lay just north of the surveyed Dubha taufir lands. He himself supplied the boundaries of the disputed lands. In his revision application also to this Court he asserted his possession and did not allege that the lands were unknown.

Stress is laid on behalf of the appellants on an order of this Court passed by James, J. in the second 145 Criminal P. O. case in which it was ordered that the lands should be identified and on the fact that when in pursuance of this order an *amin* and a *kanungo* were deputed to identify the land, they were unable to do so. But this was due to the fact that full materials were not placed before the Court. Without permanent marks for miles and miles as happens in Dharas, it is not easy to locate a particular plot unless it can be fixed from a scientifically prepared survey map or unless scientific measurements from fixed points far away from the scene are available; and the work is always difficult and requires skill and much labour. But in the present case as has been pointed out by the Settlement Authorities who decided the dispute at the attestation stage

and heard the objections under s. 103-A, Ben. Ten. Act, there was no difficulty in finding out at least the 100 *bighas* north of the *chhaur*. The block of 77 *bighas* in the possession of Lalmohar was all along known to him and his family. He had been declared to be in possession of it in the proceeding under s. 145, Criminal P. O. against Dadul Thakur and had also won in Dadul's civil suit. His possession over this land was also declared by *Rai Sahib Sukhdeo Narayan*. With this block known, there could be no difficulty in finding out the 100 *bighas* which, as is clear from the judgment of *Rai Sahib Sukhdeo Narayan*, lay just east of it; and it was thus that when survey and settlement was ordered by the Government, the officers of that Department had no difficulty in locating the area of 100 *bighas*. We are not concerned with whether others knew this area or not. Lalmohar knew it all along, and *Rai Sahib Sukhdeo Narayan's* order prohibited him from going upon it. Sir Manmatha Nath Mukherji has, however, argued that the Maharaja and his lessees did not know the lands as they would otherwise have been able to point them out to the various officers. We are not prepared to accept this argument. In the second 145 Criminal P. O. case it was strenuously contended on behalf of the Maharaja that the area, for which the proceeding was started, included the 258 *bighas* of which possession had already been declared in his favour. It appears that Lalmohar held a much stronger position in the locality so far as force was concerned, and that the terrified lessees of the Maharaja were probably unable to point out the lands with exactitude as there were no ridges and the extent of the plots could not be ascertained without measurements which they were in a position to carry out. Great stress has been laid on the somewhat confused boundaries given by *Rai Sahib Sukhdeo Narayan* at the end of his judgment though he had very clearly specified the lands of the two blocks of 177 *bighas* and 158 *bighas* earlier in that judgment. As has been clearly pointed out by the officers of the Settlement Department, this confusion was due to the fact that at some places he gave the popular directions and at others the magnetic directions. However, as we have indicated above, for the purposes of this case, we are not really concerned with all the lands in dispute between the parties. It is quite clear from the survey map and the location

of the place of occurrence by the Building Sub-Inspector that the occurrence took place away from Lalmohur's 77 *bighas* and for the most part within the 100 *bighas*, the possession of which was declared by the Magistrate to have been with the Maharaja so far back as 1931; and this is sufficient for our purposes.

Sir Manmatha Nath Mukherji, relying upon map No. I attached to the decision of the attestation officer, contended that according to the identification of the lands by the Maharaja and his lessees, the place of occurrence is outside the 258 *bighas*. He also contended that the survey map is wrong as the position of the 158 *bighas* south of the *chhaur* differs from its position as included in the earlier map of 241 *bighas* prepared for the Maharaja's suit against the Shivpur Babus. Map No. I is a comparative map and shows the positions of the land according to the later claim of the Maharaja and his lessees and also according to the earlier map. When the suits of the Maharaja and of Lalmohur and others against the Shivpur Babus were pending in the Civil Court, one Misri Lall, Amin, was deputed by the Court to measure the lands. He prepared a map which is depicted on map No. I attached to the judgment of the attestation officer. This map has been found to be inaccurate by the officers of the Settlement Department who carried out a complete survey of the locality. Misri Lall has shown the 158 *bighas* of land just to the south of the 100 *bighas*, the two together forming one trapezium, while according to the Settlement Department, the 158 *bighas* is south of the 77 *bighas*. The two blocks of 100 and 153 *bighas* are shaped like two trapeziums, the south-western corner of the former meeting the north-eastern corner of the latter. We accept the findings of the Settlement Department, not only because their (map and records) were finally published and carry a statutory presumption of correctness; but also because the reasons given by those officers for their conclusions are sound. They examined the judgment of *Rai Sahib Sukhdeo Narayan*, and from the boundaries given there, they found that the 153 *bighas* was to the south of the 77 *bighas* of Lalmohar because the southern boundary of the 158 *bighas* was the surveyed Dubha taufir lands, though this was ignored in the map of Misri Lall who made the 258 *bighas* into one compact block.

Sir Manmatha Nath Mukherji then

argued, after placing this comparative map over the finally published map, that according to the claim of the Maharaja, as put forward before the Settlement Department, the place of occurrence is outside the 258 *bighas*. This is so, but the reason is that the Maharaja claimed on the basis of a wrong tri-junction and thus included some Rajapur taufir land in Dubha taufir, with the result that according to this claim, the north-eastern boundary of Dubha taufir was shifted towards the north-west with a corresponding shift of the 77 *bighas* of Lalmohar and consequently of the 100 *bighas* also. But, the officers of the Settlement Department carefully went into the matter and found that the boundary of Dubha taufir commenced somewhat north of the lands pointed out by the Maharaja. These mistakes are very common in Diaras where, as we have said before, no permanent marks are available at hand and the fields have no ridges.

Sir Manmatha Nath's argument, however, was that as the Maharaja and his lessees made a mistake in pointing out the boundary of Dubha taufir, they did not really know the lands of which the possession had been held in 1931 to be with the Maharaja. This must be conceded, but as we have already pointed out, their ignorance of the exact position correct down to a *bigha* is by no means inconsistent with their knowledge of a very large part of the locality with the additional areas that were being thrown up by the Ganges. Even if we take it that the place of occurrence is outside the land which the Maharaja and his lessees know to be within the land of which the possession was declared to be with them, this makes no difference on the charge of rioting. The place of occurrence, though it will be outside the 100 *bighas*, will still be in lands accreted to it and beyond any claim of accretion open to Lalmohur and others, for the latter's block of 77 *bighas* is surrounded on all sides by the lands of other people. On the north of it lies village Rajapur, waerever the boundary between them may be. On the east is the 100 *bigha* block of Dubha taufir over which the possession of the Maharaja was maintained, and as the Settlement Department found, the 77 *bigha* block has on the south the 158 *bighas*, the possession of which had been found by the Magistrate to be with the Maharaja. Any accretions on the east or south would thus go not to Lalmohur's 77 *bighas* but to the 100 or 153 *bighas* of the Maharaja and must,

therefore, be presumed to be in his possession and in that of his lessees. But we have definitely come to the conclusion that the place of occurrence and the lands near about it on which crops stood at the time are within the 100 *bighas* of which the possession was declared to be with the Maharaja, Lalmohur and others being prohibited by the order of 1931 from interfering with this possession.

In *Dinobundoo Chowdhurani v. Brojo Mohoni Chowdhurani* (1), their Lordships of the Judicial Committee held that though an order under s. 145, Criminal P. O., confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. Assuming, therefore, that after the order of 1931 Lalmohur and others were able on some occasions either surreptitiously or forcibly to cultivate the lands, these would be no more than isolated acts of trespass—and offences punishable under s. 188, I. P. O., but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period and give up the protection of the order under s. 145 in their favour. In our opinion the possession of the party which succeeds in proceedings under s. 145, Criminal P. O., cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion.

Sir Manmatha Nath Mukherji, however, drew our attention to the case in *Rakhai Dolui v. Makhan Lal Ghose*, 104 Ind. Cas. 443 (2), in support of the proposition that an order under s. 145, Criminal P. O., is only a piece of evidence to be taken into consideration when the question of possession arises between the parties on a subsequent occasion and that though it would go to show that the party in whose favour it was passed was in possession on the date of the order, it is open to the other party to prove that, in spite of the order, he was actually in possession or regained possession. In that case the party in whose favour an order under s. 145, Criminal P. O. had been passed prosecuted the other party for the removal of crops. The trial Court held the complainant to be in possession not only on the basis of the order under s. 145, Criminal P. O. but also

on the evidence in the case. On appeal, the Additional Sessions Judge declined to go into the evidence of possession and maintained the conviction on the basis of the order under s. 145, Criminal P. O. Cuming, J. was of opinion that the question of actual possession ought to have been gone into, and accordingly ordered a remand, observing that an order under s. 145 was merely a piece of evidence to be taken into consideration in determining who is in possession. This judgment of Cuming, J. appears to have been given in Court without much consultation with his colleague Graham, J. who on that date observed as follows :

"With great respect for my learned brother's opinion as to the effect of the order under s. 145, Criminal P. O. I feel at present some doubt upon the point. I propose, therefore, to reserve my judgment. As Monday and Tuesday next will be holidays, I propose to deliver my judgment on Wednesday next."

This doubt of the learned Judge continued, but as his colleague wanted to remand the appeal for re-hearing, Graham, J. did not stand in the way and said as follows :

"I have further considered this case and speaking for myself, I must confess that I feel considerable doubt as to the effect of the order under s. 145, Criminal P. O., and as to whether in all the circumstances the possession claimed by the accused in this case can be said to have been lawful possession, or possession which the Court could in any way recognize as a defence to the charges. As the order which my learned brother proposes to make, however, is to send the case back for re-hearing the appeal, and as it appears from the judgment of the trial Court that there is evidence as to possession apart from the order under s. 145, Criminal P. O., I do not feel disposed to deliver a dissenting judgment, and I concur in the order which has been made."

With all respect to Cuming, J., we are unable to agree in his view of an order under s. 145. The whole object of the section is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction, in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to coerce a Magistrate to proceed again under s. 145, Criminal P. O. This will be a defi-

(1) 29 I A 24; 29 O 167; 8 Sar. 224; 6 O W N 386; 4 Bom. L R 167; 12 M L J 83 (P O)

(2) 104 Ind. Cas. 443; A I R 1927 Cal. 701; 28 Cr. L J 827; 31 O W N 984.

nite encouragement to disobedience of orders under the section.

There has been some difference of opinion as to whether once the possession of a party has been declared under s. 145, Criminal P. O. a second proceeding under the section is permissible. It was held by Jwala Prasad, J. in *Raghunandan Pandey v. Kishin Mohan Singh* (3), that an order under s. 145, Criminal P. O., is binding on everybody, whether he was a party to the proceeding or not, and that a Magistrate has no jurisdiction to start a second proceeding. A similar view was taken by Wort, J. in *Jainath Pati v. Ramlakhan Prasad* (4). It was, however, held by one of us in *Indradeo Singh v. Keso Singh* (5), that a Magistrate has jurisdiction to start a fresh proceeding, but whether he should do so or not will depend upon the circumstances. In the last mentioned case, the previous proceeding under s. 145, Criminal P. O., was between one Indradeo Singh as the first party and the servants of the junior Rani of Deo as the second party, and the former was declared to be entitled to possession. Then there was second a proceeding under s. 145, Criminal P. O. between three parties. The junior Rani and her servants were one party, the senior Rani another and Indradeo the third party. Indradeo was ordered not to go over the land in dispute. The District Magistrate of Gaya referred the case to this Court, and it was held that the proceeding was not without jurisdiction.

Though both of us agree in the view taken in this last case, the general principle which we have enunciated above remains the same. A third party, not bound by the order in a proceeding under the section is in a different position from a party who has been definitely prohibited from disturbing the possession of the successful party. It may also be that the position of the parties to s. 145 proceeding has changed since the passing of order under the section. For instance, if in a proceeding under the section A was prohibited from interfering with the possession of B who was held to be in possession, and A afterwards comes forward with the allegation that he has since then obtained possession under, say, a lease or a purchase from B, this may be a good ground for

the Magistrate to start a second 145 Criminal P. O. proceeding in case there be apprehension of a breach of the peace. But the party prohibited from interfering with the possession of another party cannot, in our opinion, be heard to say against that party that he has disobeyed the order and has thus been able to retain or obtain possession. To allow such a plea will be to defeat the object of the Legislature in enacting s. 145, Criminal P. O. There will be no end to disputes and apprehensions of breach of the peace which the section is designed to stop.

In the present case there has been no change in the position of the parties since the order of 1931, and the contention of the defence comes to this, that they ignored the order of the Magistrate passed in 1931, and in spite of it continued in possession, and that we should find their actual possession. This, in our opinion, cannot be allowed. Let us however see how far the allegation of the defence that in spite of the order under s. 145, they continued in possession of all the Dubha taufir lands is true. (Their Lordships then examined certain evidence and concluded). To sum up, our conclusions are that the order under s. 145, Criminal P. O., passed by *Rai Sahib Sukhdeo Narayan* in 1931 is still in force and by virtue of that order the Maharaja, and thereafter his lessees, must have been and in any case must be held to have been in possession of at least the 258 *bighas* of land which formed part of the subject-matter of that proceeding. Out of this area, a block of 100 *bighas* was always easily identifiable on account of its contiguity to the 77 *bigha* block in the unquestioned possession of the appellants and the members of their family. The situation of this 77 *bigha* block was neither doubtful nor in dispute; and therefore there could be no real difficulty in locating the 100 *bighas* at least which lay just east. Since the order of *Rai Sahib Sukhdeo Narayan* in September 1931, excluding the period when the lands were under attachment, the lessees of the Maharaja must be in possession. It is true that occasionally the Gangauli Thakurs (the appellant's party) were able to disturb their possession. In one year they looted the crops. In the cultivation season of 1937-38 they must, in spite of the denials of the prosecution, have cultivated some portion of the lands. But we are satisfied that a large area in the neighbourhood of the 77 *bighas* was actually cultivated and

(3) 10 P. L. T. 685; 77 Ind. Cas. 1005; A. I. R. 1922 Pat. 210; 25 Or. L. J. 541.

(4) 10 P. L. T. 689; 117 Ind. Cas. 643; A. I. R. 1927 Pat. 505; (1929) Or. Cas. 265; 30 Or. L. J. 840; Ind. Rul. (1929) Pat. 451.

(5) 18 P. L. T. 886; 173 Ind. Cas. 107; A. I. R. 1938 Pat. 1; 39 Or. L. J. 268; 4 B. R. 211; 10 R. P. 372.

shown by the prosecution party; and the present occurrence took place in respect of it. The documentary evidence, the decrees of the Civil Courts and the orders of the Criminal Courts are in favour of the prosecution, and last but not least, there is the statutory presumption of correctness attaching to the Record of Rights in their favour, which has not been rebutted. This disposes of the question of possession, which was very elaborately argued before us by Sir Manmatha Nath Mukherji.

Comparatively little argument has been addressed to us on the question of the occurrence itself. The principal comments made on this part of the prosecution story were: that the hut alleged by the prosecution to have been burnt was not even constructed; that its dimensions as given are so small that 11 persons could not have been sleeping in it; that in the neighbourhood there was no mark of habitation in the hut. Witnesses have made contradictory statements about the time when the hut was constructed and as to the place from where the materials for its construction were brought. No hoof-marks of the mare on which Ambika Singh is said to have been riding were found at the place where they ought to have been found; and it was urged that what was found was due to the pony of the *ekka* on which the Sub-Inspector reached the spot. We have looked into the evidence in the light of these comments, and do not consider it desirable to prolong this judgment by dealing with them in detail, as has been done by the learned Additional Sessions Judge. It is sufficient to say that we see no reason to differ from his conclusions on these points. There is no dispute that an occurrence took place in which Ramnarain was killed and Lalmohur and Ujagir were wounded. The explanation of the defence that when the prosecution party was stealthily attempting to put up a hut, they were seen by their *rakhwaras* (guard), who were occupying the hut of Gangauli Thakurs on 77 *bighas* of land, and that a fight took place between the prosecution party and these *rakhwaras* cannot be accepted. The hut in the 77 *bighas* of land was by no means close to the scene of the occurrence, and it is far from probable that in the dead of night the *rakhwaras* (of whom none has been produced) noticed the alleged erection of the hut and went up to interfere. In our opinion, the view of the learned Additional Sessions Judge is right that the occurrence

took place in the manner deposed to by the prosecution witnesses.

The question of participation by individual, accused in the *raiyat* has received very careful consideration at the hands of the learned Additional Sessions Judge. We have also looked into this question and are of opinion that the learned Additional Sessions Judge has come to the correct conclusions. There is therefore, no merit in the appeal. We now take up the application in revision in which the first informant asks us to convict the appellants of the offences of which they have been acquitted by the Additional Sessions Judge and to enhance the sentences passed upon them. This Court is as a rule loath to entertain such applications from private parties in ordinary circumstances. But there are in this case (as we have said before) clear indications that the accused party has been defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past. We therefore decided to entertain the application in revision. The circumstances are such that even without the application we should have felt it our duty *quo motu* to consider whether the sentences are adequate, if not also whether the appellants were not wrongly acquitted of some of the more serious charges.

We agree with the learned Judge below that on the evidence on record, the conviction of Lalchand Thakur under s. 302 and of the other appellants under ss. 302-149 was not possible. The learned Judge has referred to the discrepancies in the evidence about the weapons used, and pointed out that the eye-witnesses could not really have seen the actual assault which took place at some distance from them. He is similarly right in acquitting Jagannath Thakur, Kawal Thakur, Ohaman Thakur, Rajdayal Thakur and Jamuna Prasad Thakur of the specific charges under s. 324, I. P. O. The evidence in this connection comes only from the victims Ujagir and Lalmohur and is not free from contradictions and other difficulties. We do not, however, see any good reason why the learned Judge did not convict all the appellants (excepting Lalchand Thakur) under ss. 326-149, I. P. O., as included in the actual charge under ss. 302-149 framed against them. The reason given by him for not applying s. 149 to the murder is that the murder was not committed in the prosecution of the common object of the unlawful assembly. In our

opinion it was. But even if the contrary were to be held, attention must be paid to the second part of s. 149, I. P. C., which we underline (italicized) below:

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly know that grievous hurt, if not murder, is likely to be caused in prosecution of that object. The murder and the assaults in the present case were not isolated acts committed by individual members of the assembly independently of the common object. It is obvious from the manner in which the riot was committed that the members of the unlawful assembly were out to terrorize the prosecution party by destroying their hut and beating them in order to deter them from remaining on the land. Among the two objects mentioned in the charge, one was to commit assault, and assaults were committed in prosecution of that object. Even if it could be properly held that the murder was not committed in prosecution of the common object of the assembly, the liability under s. 149 would remain in so far as the members of the assembly knew that at least grievous hurt would be caused in the riot. We are therefore clearly of opinion that the appellants were wrongly acquitted of the charges under s. 149 altogether. But we do not propose to convict them under ss. 326-149 for reasons which will now be stated.

The question arises whether this Court under its combined appellate and revisional powers can convert the acquittal under ss. 302-149 into a conviction (under ss. 326-149) and then pass a sentence where none was passed by the lower Court. Two propositions are now settled by decisions of their Lordships of the Judicial Committee. In *Chunbidya v. Emperor* (6) their Lordships held that in the exercise of its revisional powers under s. 439, Criminal P. C., 1891, a High Court upon having

(6) 62 I. A. 36; 153 Ind. Cas. 936; A. I. R. 1935 P. O. 35; (1935) Cr. Cas. 199; 36 Cr. L. J. 482; 57 A. 156; 7 R. P. O. 129; 68 M. L. J. 166; 41 L. W. 188; 37 Bom. L. R. 160; (1935) M. W. N. 177; 16 P. L. T. 181; 39 O. W. N. 350; 60 C. L. J. 598; (1935) A. L. J. 602; 1935 O. L. R. 127; 1935 O. W. N. 205; 1935 A. L. R. 160; 1 B. R. 315 (P. C.)

the record of a criminal proceeding brought to its notice on an appeal from the conviction therein, can call upon the appellant to show cause why the sentence should not be enhanced, and having heard and dismissed the appeal, can forthwith enhance the sentence under that revisional power although precluded by s. 423 from doing so in the appeal. In *Kishan Singh v. Emperor* (7), they held that a High Court cannot, while exercising its revisional power under s. 439, Criminal P. C., convert a finding of acquittal into one of conviction and then enhance the sentence. In this case their Lordships referred to the case in *In re Bali Reddi* (8) and pointed out that the view taken in that case, as regards s. 439 (4), was not accepted in Allahabad in *Emperor v. Sheodarsan Singh* (9) and in Bombay in *Emperor v. Shivaputraya Durdundaya* (10). The view taken in these last two cases was approved, but their Lordships after referring to the fact that in the Madras case there was an appeal by the accused, besides a Rule issued in revision by the High Court, considered it unnecessary to express any opinion whether the facts would justify the Madras decision. They were, however, definitely unable to agree that s. 439 (4), refers to cases ending in a complete acquittal and not to cases ending in conviction of a minor offence included in the offence charged. These two decisions, however, do not directly touch the question before us, viz. whether, while dealing with an appeal of a convicted person, his acquittal of some charges can be set aside and he can be convicted of them and sentenced. Since the decision of their Lordships in *Kishan Singh v. Emperor* (7), there have been two Indian decisions, one in Allahabad and the other in Lahore, which seem to be conflicting.

In *Sarada Prasad v. Emperor*, 168 Ind. Cas. 17 (11), the learned Judges of the Allahabad High Court held that a Court of Appeal cannot under s. 423 (1) (b), Criminal P. C., set aside an express order of acquittal, nor

(7) 50 A. 722; 111 Ind. Cas. 332; A. I. R. 1928 P. O. 254; 29 Cr. L. J. 828; 55 I. A. 390; 5 O. W. N. 911; 28 L. W. 396; (1928) M. W. N. 749; 29 P. L. R. 575; 33 O. W. N. 138; O. L. J. 397; 30 Bom. L. R. 1572; 55 M. L. J. 786; 26 A. L. J. 1099 (P. C.).

(8) 37 M. 119; 22 Ind. Cas. 756; A. I. R. 1914 Mad. 258; 15 Cr. L. J. 180.

(9) 44 A. 332; 65 Ind. Cas. 858; A. I. R. 1922 All. 487; 23 Cr. L. J. 202; 20 A. L. J. 180.

(10) 48 B. 310; 86 Ind. Cas. 478; A. I. R. 1924 Bom. 456; 26 Cr. L. J. 830; 28 Bom. L. R. 433.

(11) 168 Ind. Cas. 17; A. I. R. 1937 All. 240; 38 Cr. L. J. 521; (1937) A. L. J. 143; 1937 A. L. R. 309; 9 R. A.

can the High Court do so in revision; having regard to s. 439 (4). The alteration of a finding within the former section was in their opinion not the same as reversal. They referred to the decision of their Lordships of the Judicial Committee in *Kishen Singh v. Emperor* (7) and concluded that neither an Appellate Court nor a revisional Court has power to reverse the finding of acquittal and convert it into one of conviction, and that where an accused, is charged with two separate offences and the trial Court convicts him of one and acquits him of the other, and the Court of Session on appeal differs from the trial Court on both points, the case must be referred to the High Court which has an unrestricted power in revision to order a re-trial.

As we have said, however, their Lordships of the Judicial Committee in *Kishen Singh v. Emperor* (7), left open the question of the power of a High Court to alter findings in an appeal from a conviction. In *Mehdi v. Emperor* (12), it was held that under the combined provisions of ss. 423 and 439, Criminal P. O., a High Court has power to alter a conviction under s. 326, I. P. O., to one under s. 302, I. P. O. This is directly opposed to the Allahabad view in *Sarada Prasad v. Emperor*, 168 Ind. Cas. 17 (11). The learned Judges referred to the decision of their Lordships of the Privy Council in *Kishen Singh v. Emperor* (7), and observed that in that case their Lordships had expressly stated that they did not decide the point as to the combined powers of the High Court under the two sections as decided in *In re Bali Reddi* (8). As in our opinion also, their Lordships of the Privy Council have not decided the matter, it is necessary to examine the position in some detail. In *On Shwe v. Emperor* (13), it was held that in an appeal from a conviction under s. 304, I. P. O. (the accused person having been committed to stand his trial under s. 302, I. P. O.) where in addition the High Court takes seisin of the case also in its revisional jurisdiction, the conviction for the lesser offence can be converted into one under s. 302, I. P. O. and the sentence can be enhanced accordingly, under the combined provisions of ss. 423 and 439, Criminal P. O. This case was, however, decided before the decision of their Lordships of the Privy Council in

(12) A I R 1933 Lah. 661; 146 Ind. Cas. 949; 1933) Cr. Cas. 883; 35 Cr. L J 250; 35 P L R 236; 6 R L 291.

(13) I R 436; 76 Ind. Cas. 711; A I R 1924 Rang. 93; 25 Cr. L J 247.

Kishen Singh v. Emperor (7). We are not aware of any later decision of the Rangoon High Court on the point. And in the present case the appellants have been convicted of rioting—a conviction which we must affirm so that there is here no question of merely altering a finding under s. 423 (1) (b) (2) and then enhancing the sentence.

In the Madras High Court the earliest relevant case which has come to our notice is *Appana v P. Mahalakshmi* (14). In this case the High Court held that under s. 423 (1) (b) (2), Criminal P. O., the Appellate Court may alter the finding maintaining the sentence and that there is nothing to restrict the finding which may be altered to a finding of conviction. In the later case in *In re Bali Reddi* (8), already referred to, the view was taken that the acquittal referred to in s. 439 is a complete acquittal, but this was expressly disapproved by the Privy Council in *Kishen Singh v. Emperor* (7). It is also held that in an appeal from a conviction, the finding can be so altered as to convict the accused of an offence of which he has been acquitted by the trial Court. The correctness of this view seems to have been left open in *Kishen Singh v. Emperor* (7). But the same High Court in *In re Subba Chukli* (15) seems to have dissented from this view. It is true that this was a case in revision and not an appeal, but the express dissent from *In re Bali Reddi* (8), is to be noted, being prior to the Privy Council decision in *Kishen Singh v. Emperor* (7).

A number of Calcutta cases were placed before us, but only two of them are of some help in this case. One is *Queen-Empress v. Jabanulla* (16), where it was held that the Appellate Court can under s. 423, Criminal P. O., in an appeal from a conviction, alter the finding of the lower Court and find the appellant guilty of an offence of which he was acquitted by that Court; there was, however, no question of enhancing the sentence or passing an additional sentence in respect of this conviction. In *Hanuman Sarma v. Emperor* (17), where an accused charged under s. 376 and s. 354, I. P. O., was acquitted of the

(14) 34 M 545; 7 Ind. Cas. 861; (1910) M W N 474; 8 M L T 313; 11 Cr. L J 531.

(15) 60 M 259; 100 Ind. Cas. 1053; A I R 1927 Mad. 582; 28 Cr. L J 397; 52 M L J 707; 38 M L T 379.

(16) 23 O 975.

(17) 36 O W N 1152; 141 Ind. Cas. 622; A I R 1932 Cal. 723; (1932) Cr. Cas. 728; 34 Cr. L J 177; 60 O 179; Ind. Rul. (1933) Cal. 148.

former offence and convicted of the latter, the High Court altered the conviction to one under ss. 376-511, I. P. O., Mallik, J. held that the acquittal under s. 376, I. P. O. did not constitute acquittal under ss. 376-511, I. P. O. while Remfry, J. was of opinion that in spite of the acquittal the High Court could, under s. 423 (b), Criminal P. O. convert and alter the finding of acquittal into one of conviction. All the cases which we have referred to above are cases in which a conviction of a lesser offence was converted into one of a graver offence or a conviction of one offence was substituted for a conviction of another offence, though the trial Court had recorded an acquittal on the former. None of them is a case in which while a conviction of one offence was maintained, the Appellate Court added a conviction of another offence of which the appellant had been acquitted by the trial Court.

We now come to Patna cases. Here again there is practically no case, which directly touches the question before us. The nearest case which can be found in *Wazir Kunjra v. Emperor* (18). In this case the accused Wazir Kunjra was acquitted by a Magistrate of an offence under s. 326, I. P. O. and convicted under s. 148, I. P. O. only. On a reference made by the Sessions Judge, the High Court convicted him under s. 326 and awarded sentence in addition to the sentence imposed by the trial Court under s. 148, I. P. O. This was done in March, 1928, under the revisional powers of the Court, and can no longer be regarded as good law after the later Privy Council decision in *Kishen Singh v. Emperor* (7). Other cases need not be referred to in detail, as they all relate to replacing one conviction by another, as for instance, *Mahangu Singh v. Emperor* (19). In view of the divergence of judicial opinion before and after the Privy Council decision in *Kishen Singh v. Emperor* (7), we have considered whether it would not be desirable to refer this case to a larger Bench for an authoritative pronouncement on the point. But in the circumstances of this case the point is relatively unimportant; the appellants have already been subjected to the cost of one long hearing and we feel that they can be adequately dealt with without pursuing this aspect of the revisional application any further.

That application will, therefore, be allowed only in respect of the sentences on the charges of which the appellants have been found guilty.

The appellants' repeated defiance of the orders of various Courts, both Civil and Criminal, of which we must take notice, can be appropriately dealt with under s. 106, Criminal P. O. In affirming their convictions on the charges of rioting we consider that the sentences passed by the lower Court are not altogether adequate and that the following sentences will suffice to meet the ends of justice:

- | | |
|---|---|
| 1. Ambika Thakur; | Under s. 147, I. P. O. two years' rigorous imprisonment and a fine of Rs. 200 (rupees two hundred) with six months' rigorous imprisonment in default. |
| 2. Ram Prasad Thakur; | Under s. 147, I. P. O. One and half years' rigorous imprisonment and a fine of Rs. 50 each, |
| 3. Sheo Prasad Thakur; | with six months' rigorous imprisonment in default. |
| 4. Kuar Thakur; | Under s. 147, I. P. O. two years' rigorous imprisonment and a fine of Rs. 100 with three months' rigorous imprisonment in default. |
| 5. Nagina Pandey; | Under s. 148, I. P. O. two and a half years' rigorous imprisonment and a fine of Rs. 50 each |
| 6. Sheodahin Thakur; | with three months' further rigorous imprisonment in default. |
| 7. Mahia Thakur. | |
| 8. Nawab Takur. | |
| 9. Beni Madho Thakur; | |
| 10. Lal Chand Thakur; | |
| 11. Jagannath Thakur; | |
| 12. Ohhabila Thakur; | |
| 13. Kawal Thakur alias Ramkawal Thakur; | |
| 14. Ohaman Thakur; | |
| 15. Rajdeyal Thakur; | |
| 16. Jamuna Prasad Thakur. | |

We enhance the sentences as above, and direct that out of the fines, if realized, Rs. 500 be paid to the lessees of the Maharaja through the first informant. We further under s. 106, Criminal P. O. order that the appellants do each of them execute a bond with sureties, as specified below, to keep the peace for a period of three years, from the dates of their release from jail. Ambika Thakur and Nawab Thakur to execute bonds of Rs. 500 each with two sureties of Rs. 250 each, and the remaining appellants to execute bonds of Rs. 200 each with two sureties of Rs. 100 each. In case any appellant or appellants fail to execute the bonds with sureties as specified above, the defaulter or defaulters will suffer simple imprisonment for the same period (three years) from the dates from which they would otherwise be due for their release from jail.

s.

Order accordingly.

(18) 7 Pat. 579; 116 Ind. Cas. 768; A I R 1929 Pat. 139; 30 Or. L J 673; Ind. Rul. (1929) Pat. 336.

(19) 3 P L J 565; 46 Ind. Cas. 416; A I R 1918 Pat. 257; 19 Or. L J 735.

BOMBAY HIGH COURT

Civil Revision Application No. 355 of 1938

January 25, 1939

BRAUMONT, C. J.

JEHANGIR OURSETJI MISTRI—

DEFENDANT—APPLICANT

versus

KASTUR PANNAJI OSWAL—PLAINTIFF—
OPPONENT

Insolvency—Order of discharge on condition that insolvent would remain liable to debts incurred before insolvency, whether amounts to refusal to grant discharge—Provincial Insolvency Act (V of 1920), s. 28 (2)—No leave of Court obtained—Suit must be dismissed.

The object of an adjudication in insolvency is to free the debtor from the claims of his existing creditors, which are to be satisfied out of the property of the debtor which the Court takes possession of and distributes among the creditors; and for the Court to discharge the insolvent but to leave him liable to debts incurred before insolvency, defeats the object of the adjudication. Such conditional discharge amounts to a refusal to grant discharge.

Prohibition in s. 28 (2), Provincial Insolvency Act imposes a condition precedent to the commencement of the suit, and if the leave of the Court is not obtained, the suit must necessarily be dismissed. 31 Ind. Cas. 948 (2) and 138 Ind. Cas. 788 (3), followed. 138 Ind. Cas. 824 (1), not followed.

C. R. App. against an order of the Judge of the Court of Small Causes, Poona, in Sm. C. C. Suit No. 914 of 1938.

Mr. Moropant, for the Applicant.

Mr. G. R. Madbhavi, for the Opponent.

Order.—In the two suits, out of which these revision applications arise, the plaintiff sued the defendant on money claims in the Small Cause Court at Poona, the suits having been commenced on February 2, 1938. The defence in each case was that, as the defendant had been adjudicated insolvent in August 1935, the plaintiff's suit did not lie, since he had not obtained leave to sue under s. 28 (2), Provincial Insolvency Act. The answer to that defence was that the insolvency had been brought to an end, subject to a condition which allowed the creditors to sue. The material facts relating to the insolvency are that the adjudication took place in 1935, and certain sums were paid into Court by the insolvent. Subsequently, he applied for his discharge, and the learned Subordinate Judge at Poona, before whom the application came, was of opinion that the debtor had not paid eight annas in the rupee, and therefore ought not to be given an unconditional discharge, and he made the following order:

"I do not grant an absolute order of discharge but grant a conditional one, the condition being that the creditors may recover their dues, if within time, until they become irrecoverable."

That seems to me to be a very singular order to make in insolvency. It destroys the whole effect of the insolvency. The object of an adjudication in insolvency is to free the debtor from the claims of his existing creditors, which are to be satisfied out of the property of the debtor which the Court takes possession of and distributes among the creditors; and for the Court to discharge the insolvent but to leave him liable to debts incurred before insolvency defeats the object of the adjudication. The order is sought to be justified under s. 41 (2) (c), Provincial Insolvency Act. That section provides that the Court may grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the insolvent, or with respect to his after-acquired property. It is clear that the condition imposed by the learned Judge has nothing to do with the future earnings or income or with after-acquired property, and in my opinion, the condition is invalid in law. The question then arises as to the meaning and effect of the order. It is an order of discharge subject to a void condition or is it an order refusing discharge? Taking the words of the order as a whole and having regard to the statement therein that the learned Judge was not prepared to grant an unconditional discharge, I think I must take the order as amounting to a refusal to grant discharge. If the order amounts to an absolute discharge, the plaintiff's debt is released under s. 44 (2). But if the order amounts, as I hold that it does, to a refusal of discharge, then the question arises as to what is the effect of the plaintiff having failed to obtain leave from the Court under s. 28 (2).

It was held by Tyabji, J. in *Bhimaji Bhimbhutam v. Chunilal Javerchand* (1), that where a suit was commenced against an insolvent without obtaining leave, the suit need not be dismissed but might be stayed. Therein he differed from a previous decision of Davar, J. in *In re Dwarkadas Tejchand* (2), which had been followed by Blackwell, J. in *Maya Okeda v. Kuverji* (3), though the latter decision was not apparently brought to the attention of Tyabji, J. There being conflicting decisions of Courts of co-ordinate jurisdiction, I have to determine which of them should be followed, and I have no hesitation in following the

(1) 57 B 623; 138 Ind. Cas. 824; A I R 1932 Bom. 344; 34 Bom. L R 683; Ind. Rul. (1932) Bom. 451.

(2) 40 B 235; 31 Ind. Cas. 948; A I R 1915 Bom. 134; 17 Bom. L R 295.

(3) 34 Bom. L R 649; 138 Ind. Cas. 788; A I R 1932 Bom. 338; Ind. Rul. (1932) Bom. 442.

decisions of Davar and Blackwell, J.J. It seems to me that the language of s. 26 (2) is perfectly plain. It provides that after adjudication no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court. The prohibition seems to me to impose a condition precedent to the commencement of the suit, and if the leave of the Court is not obtained, the suit must necessarily be dismissed. I must make the Rule absolute with costs, and dismiss the plaintiff's suits with costs, but this is without prejudice to any right the plaintiff may have to prove for his debt in the insolvency.

D. Rule made absolute.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 112 of 1939

May 2, 1939

DAVIS, J. C. AND TYABJI, J.

EMPEROR—PROSECUTOR

versus

MAHANAND KHERAJMAL AND OTHERS—
ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 530 (g)—Magistrate trying offence under s. 4, Bombay Prevention Gambling Act (IV of 1887), summarily—S. 530 (g) if applies.

Trying an offender summarily under s. 530 (g), Criminal P. O., means trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused.

Where, therefore, a Magistrate tries an offence under s. 4, Bom. Gambling Act summarily, s. 530 (g), Criminal P. O. applies.

Or. Ref. made by the Additional Sessions Judge, Sukkur, dated April 3, 1939.

Mr. Partabrai D. Punwani, the Advocate-General, for the Crown.

Davis, J. C.—This is a reference by the learned Additional Sessions Judge at Sukkur in which he recommends that we quash the conviction and sentence passed upon seven persons convicted of offences under ss. 4 and 5, Bom. Gambling Act, on the ground that the offences were tried summarily and that by a recent amendment of the Act under s. 4 an offence is made punishable with seven months' imprisonment, so that offences under s. 4 are not now triable summarily. We think the

reference of the learned Additional Sessions Judge must be accepted. It was on the basis of two cases, *Emperor v. Ganu Sadu* (1) and *Emperor v. Atma Ram* (2), that it was suggested by the learned Advocate-General that s. 530 (g), Criminal P. O., applied as we have here a case of a Magistrate not empowered by law trying an offence summarily. It is arguable that reading s. 530, Criminal P. O., as a whole that section is designed to deal not with a case where no Magistrate can do what that section refers to, but a case where one Magistrate may lawfully do what that section refers to but another, the Magistrate in the particular case, cannot do, because he is not especially empowered. But we do not think that we can fairly put upon the section so restricted a meaning. It is, of course, not a matter of much importance, for, if any Magistrate tries a case summarily which he cannot under s. 260, Criminal P. O. do, he acts without jurisdiction, as was the view taken in the Calcutta case reported in *Bishu Shaik v. Saber Mollah* (3), and an illegality of such a nature, going to the root of the trial, clearly cannot be cured under s. 537, Criminal P. O. But the words of s. 530, Criminal P. O., are very wide. The section says:

"If any Magistrate not being empowered by law in this behalf does any of the following things, namely:—(g) tries an offender summarily, his proceedings shall be void."

In this case it is literally true that the Magistrate who tried this offence summarily, was not empowered by law to do so because of the provisions of s. 260, Criminal P. O. It is true that cl. (g) says "tries an offender summarily" and it may be said that as the Magistrate in this case is empowered to try an offender summarily under s. 260, Criminal P. O., s. 530 (g), Criminal P. O., will not apply to his proceedings. But trying an offender summarily under s. 530 (g), Criminal P. O., appears to us to mean trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused. The words "offender" and "offence" are not always used in the Criminal P. O., with great precision. For instance s. 530 (g), Criminal P. O. refers to "trying an offender summarily", and s. 260 refers to the trial of "offences". But we do not think this distinction is of any

(1) 52 B 254; 109 Ind. Cas. 220; A I R 1928 Bom. 142; 29 Or. L J 42; 30 Bom. L R 371.

(2) 46 A 447; 81 Ind. Cas. 438; A I R 1924 All. 338; 25 Or. L J 902; 22 A L J 249 (F B).

(3) 29 C 409; 6 O W N 713.

importance in the case before us. We think, therefore, that we must quash the conviction and sentence of the seven accused named in the order of the Subordinate Judge and First Class Magistrate, Rohri, and order their re-trial. The fines, if paid, must be refunded. The order forfeiting money to Govt. will also be set aside. Order accordingly.

D.

Conviction quashed.

MADRAS HIGH COURT

Appeal No. 317 of 1935

March 24, 1939

PANDRANG ROW AND ABDUR RAHMAN, JJ.
BOARD OF COMMISSIONERS FOR HINDU
RELIGIOUS ENDOWMENTS, MADRAS—

APPELLANT

versus

SRI VIDYARANGA SATCHIDANANDA
ABHINAVA SANKARA BHARATHI
SWAMULU VARU, TRUSTEE OF SRI
VIRUPAKSHASWAMI SWAMI, ETC.
TEMPLES AT HAMPI—RESPONDENT

Madras Hindu Religious Endowments Act (II of 1927 as amended by Act XII of 1935), s. 63 (2)—Appointment of additional or associate trustees and manager, whether ultra vires of Board.

The Amending Act XII of 1935 does not say that the amendment shall have retrospective effect or that the law must be deemed to have been always as laid down in the Amending Act. So the appointment of additional or associate trustees before the amendment is *ultra vires* of the Board. 156 Ind. Cas. 953 (1) followed.

The provisions in the scheme relating to the appointment of a manager by the Board and the allotment of important duties of management to him must be deemed to be *ultra vires* because they have the effect of placing the management of the institution in the hands of some one not appointed by the trustee and not responsible to him, and would thus in fact displace the trustee from the management of the affairs of the temple.

A. against the decree of the District Court Bellary, in O. S. No. 5 of 1934.

Mr. P. V. Rajamannar, for the Appellant.

Mr. P. Chandra Reddi, for the Respondent.

Pandrang Row, J.—This is an appeal by the Board of Commissioners for Hindu Religious Endowments, Madras, from the decree of the District Judge of Bellary dated February 18, 1935, in O. S. No. 5 of 1934, a suit by the trustee of Sri Virupaksheswaraswami, etc., temples at Hampi in Hospet taluk against the Board for cancelling or modifying a certain scheme framed by the Board on August 4, 1933. It was alleged in the plaint that the Board

had no power to frame the scheme and that in any case there was no justification for the framing of a scheme. This formed the subject-matter of Issue No. 1 in the suit. That allegation, however, was withdrawn at the trial and the Court below has found that a scheme was necessary and the need for a scheme is not now questioned before us on behalf of the respondent.

The appeal relates to two matters, namely the appointment of additional or associate trustees provided in the scheme and the appointment of a manager by the Board and the allotment of certain duties to him in the scheme. As regards these two matters, the learned District Judge was of opinion that the provisions in the scheme relating thereto were *ultra vires* of the Board and accordingly directed the deletion of those parts of the scheme which related to these matters. As regards the appointment of additional or associate trustees, though under the Act as amended by Act XII of 1935 such an appointment is allowed in terms, nevertheless, before the Act was amended, that is to say, when the scheme now under discussion was framed by the Board, no such power had been expressly conferred on the Board. On the other hand, in construing cl. 2 of s. 63 of the Act of 1927, a Bench of this Court held in *Naranna Naidu v. Venkataramayya* (1) that the Board had no power to appoint additional or associate trustees. We see no reason to differ from that decision as regards the interpretation of this particular provision of the law in question as it stood before the Act was amended. The Amending Act does not say that the amendment shall have retrospective effect or that the law must be deemed to have been always as laid down in the Amending Act. It was perfectly open to the Legislature to have declared its intention to make the new provision retrospective if it had that intention. The Amending Act does not, however, disclose any such intention and we are unable to see any reason for departing from the general rule against giving retrospective effect to legislation. The learned District Judge was, therefore, right in coming to the conclusion that the appointment of additional or associate trustees is *ultra vires* of the Board. Though he does not quote the Bench decision above referred to, it is probable he had it in mind.

(1) 58 M 862; 156 Ind. Cas. 953; A I R 1935 Mad. 762; 68 M L J 722; (1935) M W N 382; 8 B M 91.

As regards the second point, the appointment of a manager by the Board and the allotment of certain important duties to him under the scheme, the provisions in the scheme are such that, if they are allowed to remain, the powers of the hereditary trustee could be practically set at naught and what could not be done directly would be allowed to be done indirectly by the appointment of a manager by the Board and entrusting all the most important duties of management to him under the scheme itself, he being removable only by the Board. These provisions would reduce the powers of the trustee to a cipher, or at least the provisions may be so worked as to produce this result and we are of opinion that in this view the provisions in the scheme relating to the appointment of a manager by the Board and the allotment of important duties of management to him must also be deemed to be *ultra vires* because they have the effect of placing the management of the institution in the hands of some one not appointed by the trustee and not responsible to him, and would thus in fact displace the trustee from the management of the affairs of the temple. Nevertheless, it is but right that we should express our view that the trustee would do well to see that an efficient man is appointed as local manager to look after the actual management of the affairs of the temple as it would appear that the trustee himself is not in a position to look after the management personally throughout, and we wish to make it clear that if there is any mismanagement of the affairs of the institution in future, the powers of the Board to rectify such mismanagement will remain unaffected by the result of this appeal. It follows from what we have said that the appeal must fail as both the points raised have to be decided against the appellant. The appeal is accordingly dismissed with costs.

N.D.

*Appeal dismissed.***NAGPUR HIGH COURT**Civil Revision Application No. 457 of 1938
September 11, 1939

GRUSE, J.

MOHAMMAD ABDUL SATTAR—
DECREE-HOLDER—APPELLANT

versus

Syed RAHIMUDDIN—JUDGMENT-DEBTOR—
OPPOSITE PARTY*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—*
Step-in-aid—Application in accordance with law—

185—69 & 70

Formal mistake about costs of previous application—Application, if not in accordance with law—Application rejected on this ground—If amounts to finding so as to act as res judicata—Res judicata.

A mistake in an execution application about the costs of the previous execution application in itself is no sufficient reason for holding that the application is not a step-in-aid of execution or is not made substantially in accordance with law. *Ramanandan Chettiv. Periatambi Shervai (1), Gopal Sah v. Janki Koer (2) and Gopal Chunder Manna v. Gosain Das Kalay (3)*, relied on.

Where an application is rejected, dismissed or struck off for mere formal defects or a *bona fide* mistake in furnishing details or on account of the decree-holder's absence, such an order cannot estop the decree-holder from showing that his application was not defective but in accordance with law. Rejection on the ground of decree-holder's absence and his failure to correct an unimportant inaccuracy in the costs does not amount to an express or implied finding that the application is not in accordance with law. Such a finding, therefore, cannot be *res judicata*. 134 Ind. Cas. 681 (4), 63 Ind. Cas. 971 (5) and 143 Ind. Cas. 762 (6), relied on.

C. R. App. of the order of the Court of the Additional Small Cause Court Judge, Nagpur, dated April 28, 1938.

Mr. R. R. Dandige, for the Applicant.

Dr. W. S. Barlingay, for the Opposite Party.

Order.—The Judge of the Additional Small Cause Court, Nagpur, has rejected the application in execution of the applicant, dated May 21, 1938, on the ground that it is barred by time. The reason appears more fully in the order-sheet of the preceding date April 6, 1938. There was a previous application for execution made on January 2, 1938, and the Judge has held that it was not a step-in-aid of execution, so that more than three years having elapsed from the first application, dated January 25, 1932, the present one is barred by time under Art. 182 of the Schedule to the Lim. Act. Order-sheets of the application, dated January 2, 1936, read as under :

January 1, 1936. Decree-holder by agent. Application found incorrect. Decree-holder wants some time to supply the information. Time granted till January 28, 1936.

January 29, 1936. Decree-holder absent. He is, however, awaited till February 13, 1936.

February 13, 1936. Decree-holder did not turn up though he was given one chance. Moreover, the information given by the applicant is wrong. Application is dismissed with costs.

It appears that the mistake in the application was about the costs of the previous execution application. The figure given, Rs. 2-8-0 was wrong and should have been larger. Such a mistake in itself is no sufficient reason for holding that the application was not a step-in-aid of execution or was not made substantially in accordance with law: see *Ramanandan Chetti v. Periatambi Sherai* (1), and *Obhrai* in his *Limitation and Prescription*, Vol. III, para. 2578 where under Art. 182 (5) cases dealing with technical errors are collected. It has been held that a mere misstatement of the amount of the decretal money in a lesser sum or the date of the decree wrongly shown, would be an immaterial irregularity not affecting the validity of the application: *Gopal Sah v. Janki Koer* (2), *Gopal Chunder Manna v. Gosain Das Kalay* (3).

The non-applicant, however, argues that the order of the lower Court rejecting the application amounts to a finding that it is not in accordance with law, and this finding not being challenged, has become final. This question was dealt with by a Full Bench of the Judicial Commissioner's Court in *Gulamali v. Rajkumar Chatterji* (4), where the dictum in the previous case *Meghraj v. Abdul Majid Khan* (5), was found to be defective. The Bench laid down that where the order rejecting the application amounts to a finding that the application was not in accordance with law, the application is ineffectual to stay the running of limitation: if not, the Court must look to the application itself to see whether it is in accordance with law or not. Niyogi, A. J. O., elaborated the point and declared that where an application is rejected, dismissed or struck off for mere formal defects or a *bona fide* mistake in furnishing details or on account of the decree-holder's absence, such an order cannot estop the decree-holder from showing that his application was not defective but in accordance with law. In the present case the application is rejected because of decree-holder's absence and his failure to correct an unimportant inaccuracy in the costs. This does not amount to an express or implied finding that the application is not in accordance with law. I therefore think that the

finding is not *res judicata*. In *Gulam Ali v. Rajkumar* (6), which is a case practically on all fours, it was held that a finding that an application is incorrect cannot be taken to imply a finding that it is not in accordance with law; and hence is sufficient to save limitation. I find that in spite of the understatement of costs, the application of 1936 was in accordance with law and thus limitation was saved.

The order, dated April 28, 1938, is set aside and execution will proceed. Costs of this application on the non-applicant. Counsel's fee Rs. 15.

D. Application allowed.

(6) A I R 1934 Nag. 117; 143 Ind. Cas. 762; 16 N L J 47; Ind. Rul. (1933) Nag. 138.

CALCUTTA HIGH COURT

Civil Rules Nos. 14 to 16 of 1939

March 7, 1939

DERBYSHIRE, C. J. AND NASIM ALI, J.

GOVERNMENT OF BENGAL—

PETITIONER

versus

CORPORATION OF CALCUTTA—

OPPOSITE PARTY

Calcutta Municipal Act (III of 1923), ss. 139, 141—Jurisdiction of Small Cause Court to hear objection as to liability to assessment.

The word "valuation" in s. 139, Calcutta Municipal Act, may mean: (1) the estimated value; (2) the act or process of valuing. There is nothing in this section to limit the meaning of the word "valuation" to the quantum of valuation only. It includes the whole process of valuing as well. Consequently, objections not merely as to quantum of assessment but as to liability to assessment also, can be heard by Small Cause Court Judge. *Corporation of Calcutta v. Bhupati Roy Choudhury* (3) and *Secretary of State v. Balchambers* (4), relied on.

O. Rules issued from the order of the Judge, Small Cause Court, Sealdah (24 Parganas), dated December 12 and 13, 1938.

Sir A. K. Roy (Advocate-General), Dr. Radha Binode Pal and Mr. Syamapada Majumdar, for the Petitioner.

Messrs. S. C. Bose, Santosh K. Basu and Balaram Basu, for the Opposite Party.

Derbyshire, C. J.—In these matters, on January 6, 1939, Rules were issued at the instance of the Govt. of Bengal upon the Corporation of Calcutta to show cause why the orders complained of should not be set aside and the objections of the Govt. of Bengal decided. The matter arose in this way: There are three canals, first the Circular Canal which

(1) 6 M. 250.

(2) 23 O 217.

(3) 25 O 594 (F B).

(4) 28 N L R 7; 134 Ind. Cas. 681; 14 N L J 101; A I R 1931 Nag. 154; Ind. Rul. (1931) Nag. 169.

(5) 17 N L R 179; 63 Ind. Cas. 971.

begins at the Hooghly in the northern part of Calcutta and continues in an easterly and southerly directions through the area in which Calcutta lies until it joins the Beliaghata Canal which continues in an easterly direction towards the salt lakes. From it, near the northern end, branches the new canal. The Circular Canal was formerly the boundary between the old Municipality of Calcutta and the Municipalities of Cossipur and Maniktola previous to the incorporation of the two last-mentioned Municipalities within the Municipality of Calcutta, about 1922. It is stated that this Circular Canal does not lie within any of the wards of the Municipality of Calcutta as specified in the Calcutta Municipal Act, 1923. The three canals in question are owned by the Govt. of Bengal and over them pass boats and barges which are said to pay tolls to the Govt. Hitherto, these canals have not been rated by the Municipality and have not paid Municipal rates. On or about March 16, 1932, Govt. received from the Corporation a notice, purporting to be under s. 138, Calcutta Municipal Act, 1923, in which (I. refer now to the Circular Canal but the same consideration applies to the other two) for the first time the canal in question was given an annual valuation under s. 131 of the Act. The canal was given an annual valuation of Rs. 1,05,600 and the rate sought to be charged was Rs. 2 per catta per mensem with effect from the first quarter of the year 1932-33. In all, a consolidated rate of Rs. 20,592 per year was sought to be imposed.

The Govt. filed a written notice of objections under s. 139 of the Act objecting that the canal was not assessable at all under the Act on the ground, firstly, that it was Crown property, and secondly, that it did not lie within one of the wards and so could not be assessed under the provisions of s. 131 or any other section; further, the Govt. objected to the quantum of the valuation and the consolidated rate. The Deputy Executive Officer of the Calcutta Corporation heard the Govt. objections and on May 21, 1938, confirmed the assessment. Thereupon, the Govt. preferred an appeal to the Court of Small Causes at Sealdah under s. 141, Calcutta Municipal Act, and took the same grounds in the appeal that they had urged before the Deputy Executive Officer. The appeal was registered as Municipal Appeal No. 6 of 1938, and the Govt. paid court-fees, Rs. 1,230, as on a plaint for the same valuation. On

December 10, 1938, the Small Cause Court Judge dealt with the matter. He held that he had jurisdiction to deal with the quantum of the assessment but not to deal with the question of liability to assessment. The Govt. of Bengal obtained a rule in respect of that decision as set out above, contending that the Small Cause Court Judge had jurisdiction to hear the whole of their objections not merely as to quantum but as to liability. Section 124, Calcutta Municipal Act, provides that

"consolidated rates not exceeding 23 per cent. on the annual valuation determined under this Chapter (i. e. Chap. X of the Act) may be imposed by the Corporation upon all lands and buildings in Calcutta for the purposes of this Act."

Section 126 provides that certain buildings and lands "shall be exempt from the consolidated rate" and that the Corporation may exempt certain other lands and buildings "either wholly or partially" from the rates. Section 127 provides for calculating the annual value of lands or buildings for the purposes of this Act. Section 131 provides for the carrying on, until further valuation, of the valuation of any land or building situated in the several wards, and by sub-s. 2 (b) it is provided that

"any land or building, the valuation of which has been cancelled on the ground of irregularity, or which for any other reason has no annual value assigned to it under this Act, may be valued by the Executive Officer at any time during the currency of the period prescribed in respect of such land or building by sub-s. (1), and such valuation shall remain in force, and the consolidated rate shall be levied according to it, for the unexpired portion of such period."

It is under that section and sub-section we are told, that the canals in question were valued. Section 139 (1) provides:

"Any person who is dissatisfied with a valuation made under this Chapter may deliver at the Municipal Office a written notice stating the grounds of his objection to such valuation."

Section 140 (1), provides:

"All such objections shall be entered in a register to be maintained for the purpose and, on receipt of any objection, notice shall be given to the objector of a time and place at which his objection will be investigated."

(2) At the said time and place, the Executive Officer or a Deputy Executive Officer shall hear the objection, in the presence of the objector or his agent if he appears, or may, for reasonable cause, adjourn the investigation.

(3) When the objection has been determined, the order passed shall be recorded in the said register, together with the date of such order."

Section 141 (1) provides:

"Any person dissatisfied with the order passed on his objection may appeal to the Court of Small Causes having jurisdiction in the place where the land or building, to the valuation of which the objection was made, is situated."

(2) Such appeal shall be presented to such Court of Small Causes within thirty days from the date of the order passed under s. 140, and shall be accompanied by an extract from the register of objections containing the order objected to.

(3) The provisions of Parts II and III, Lim. Act, relating to the appeals shall apply to every appeal preferred under this section.

(4) No appeal shall be admitted under this section unless an objection has first been determined under s. 140."

Section 142 (1) provides that:

"Every valuation made by the Executive Officer under s. 131 shall, subject to the provisions of ss. 139, 140 and 141, be final.

(2) Every order passed by the Executive Officer or Deputy Executive Officer under s. 140 shall, subject to the provisions of s. 141, be final.

(3) An appeal from a decision made by the Court of Small Causes under s. 141 shall lie to the High Court."

I may mention in passing that the last provision, that an appeal shall lie to the High Court, is new in the Municipal Acts of Calcutta relating to rating. Section 146 (1) provides that in certain events the Executive Officer has power to amend the assessment book:

"By inserting any land or building which is, in his opinion, liable to the consolidated rate, or by inserting a valuation when the land or building liable to be valued has not been valued."

Sub-section (2) of the same section provides that the provisions of ss. 139 to 142 shall, with all necessary modifications, be deemed to apply to an objection which is made against the Executive Officer's order for the amendment of the assessment book under s. 146. The learned Judge of the Small Cause Court has based his decision upon some words which are found in the judgment of Panckridge, J. in *Garrison Engineer of Fort Williams v. Corporation of Calcutta* (1). In that case the military authorities objected to pay rates in respect of the Presidency Military Hospital for the year 1937. The assessment in respect of which the rate was claimed had been made some years previously and rates had been paid down to July 23, when the military authorities alleged that they are not liable to be rated at all in respect of the hospital, because it lay within the boundary of the fort and was thereby excluded from the provisions of the Calcutta Municipal Act, 1923. The military authorities proceeded under s. 45, Specific Relief Act, and obtained a rule calling upon the Chief Executive Officer to show cause why the assessment on the hospital should not be cancelled on the grounds set out above. The learned Judge on a consideration of the facts of the case found that the hospital did not lie within the boundaries of

(1) 42 O W N 789.

Fort William but lay within the Calcutta Municipal boundaries. From a consideration of the facts of the case it will appear that it was too late there for the military authorities to object to the valuation under s. 139. The only course open to them appears to have been the one they took. During the course of the argument which the Corporation put forward against the military authorities' contentions, it was alleged that the procedure under s. 45, Specific Relief Act was not open to the military authorities, and in dealing with it the learned Judge, considering ss. 139 to 142, said:

"In my opinion these sections have no application to the circumstances of the present case for they presuppose that the land and buildings which are the subject-matter of the valuation are assessable to the consolidated rate. In other words, they have reference to those cases where the liability to assessment and valuation is admitted, and the objection is to the quantum of the valuation, or the method in which it has been carried out."

It is on those words that the learned Judge of the Small Cause Court has based his decision. In my opinion, those words were not necessary to the decision. Mr. Justice Panckridge gave. He decided the matter on the facts and it was clear that the military authorities were too late to take advantage of ss. 139 to 142. I must regard those words, though they are entitled to great respect, as being *obiter*. To decide whether the learned Judge of the Small Cause Court was right, I must look at the provisions of the relevant sections themselves. It is clear that a person dissatisfied with the valuation may object to it under s. 139 that the Executive Officer or his Deputy must hear the objection, determine the matter and pass an order upon it under s. 140. Then under s. 141, if the objector is dissatisfied, he may appeal to the Small Cause Court. Now I see nothing in those sub-sections limiting the grounds of objection to the valuation. When the objections have been determined against the objectors under s. 140, I see nothing limiting the rate-payers' right to have the full order, made by the Executive Officer or his Deputy, considered with all the grounds of objection on appeal to the Small Cause Court.

There is an appeal from the Small Cause Court to the High Court. It has been held in *Corporation of Calcutta v. Manik Lal De* (2) that in an appeal under s. 141, the Small Cause Court Judge must record evidence in such a way that the High Court may

(2) 33 O W N 1173; 126 Ind. Cas. 131; A I R 1930 Cal. 306; Ind. Rul. (1930) Cal. 675.

on appeal, come to its own conclusion as to whether the decision of the Judge was right or wrong on the evidence. Thus a scheme is set out in the Act whereby any person, who is dissatisfied with the valuation, which is the indispensable preliminary to his being rated, shall urge his objection first to those who make the valuation, then to a local tribunal whose duty it is to take evidence and hear and determine the matter according to law with an appeal to this Court. There is full provision made for safeguarding the rights of the owner or occupier of land or buildings in Calcutta. The procedure is, it seems to me, analogous to that which obtains in rating appeals in England where there is an appeal against an item of the valuation list to the Assessment Committee, from the Assessment Committee to the Quarter Sessions who may deal with questions of fact and law then and to the High Court, which may determine the matter finally according to law. I can see no reason for holding that the learned Judge of the Small Cause Court is confined to the question of quantum of valuation only. If that were so, questions of liability would fall to be determined in another Court which would mean multiplicity of legal proceedings, vexatious and costly to the rate-payer and a hindrance to the Corporation in its collection of rates. It seems to me that the Act was designed to provide a chain of tribunals, the Executive Officer or his Deputy, the Small Cause Court and the High Court, to determine the rights and the liabilities both of the Corporation and of those whom it is sought to levy rates upon. In these circumstances it seems to me that the learned Judge was wrong in the decision that he gave, and the Rules issued in this matter should be made absolute. The result is that the Rules are made absolute and the cases sent back to the Court of Small Causes to be dealt with in accordance with the provisions of the law in the light of the observations made above. The petitioner is entitled to costs—a consolidated hearing-fee being assessed at fifteen gold mohurs.

Nasim Ali, J.—I agree with my Lord the Chief Justice that these Rules should be made absolute. The word "valuation" in s. 139, Calcutta Municipal Act, may mean: (1) the estimated value, (2) the act or process of valuing. (Oxford Dictionary). I see nothing in this section to limit the meaning of the word "valuation"

to the quantum of valuation only. It includes the whole process of valuing as well: *Corporation of Calcutta v. Bhupati Roy Choudhury* (3) and *Secretary of State v. Belchambers*, (4). The grounds of objection to the valuation before the Small Cause Court Judge under s. 139 therefore would be to the process of valuing as well. If the process is bad, the amount of valuation in its entirety or in part will be bad. The case of the petitioner is that the entire process of valuing is bad inasmuch as it contravened the provisions of Chap. X Calcutta Municipal Act, relating to the valuation of land or buildings. It appears from the grounds of objection filed by the petitioner before the Small Cause Court Judge that his case is that the valuation in its entirety is bad, and the property valued is not "land" within the meaning of s. 127 or land within a ward of the Calcutta Municipality, as contemplated by s. 131 of the Act. If a rate-payer is entitled to object to the over-valuation, I see no reason why he cannot object to the valuation in its entirety. The grounds of objection as contemplated by s. 139, therefore, may relate not only to a part of the estimated value but to the whole of it.

D.

Rules made absolute.

(3) 26 O 74; 3 O W N 70.

(4) 3 O L J 169; 33 O 398; 10 O W N 289.

PRIVY COUNCIL

Appeal from the Calcutta High Court

November 10, 1939

LORD THANKERTON, SIR GEORGE RANKIN AND

SIR PHILIP MACDONELL

ERROL MACKAY AND OTHERS—

APPELLANTS

VERSUS

OSWALD FORBES—RESPONDENT

Government of India Act 1933, (25 & 26 Geo. V, Ch. 42), s. 205—Duty of High Court to consider, determine and record in every case the granting or withholding of certificate—No such determination by High Court—Appeal held should be dismissed.

Section 205, Govt of India Act, 1935, imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but—a matter of equal importance—also for the certification of the Judicial Committee and the Federal Court as to their jurisdiction to entertain an appeal.

Where in a case the plaintiff sought an order for appointment of the Official Trustee of Bengal to be trustee of the estate of a deceased under the provisions of s. 10 of the Official Trustees Act which was amended by the Govt. of India (Adaptation of Indian Laws) Order, 1937, and the High Court in appeal did not record the determination of the question whether the appeal involved the granting or withholding of a certificate:

Held, that in the absence of certificate the appeal could not be entertained.

Messrs. *L. P. E. Pugh, K. C.* and *W. W. K. Page*, for the Appellants.

Mr. J. Nissim, for the Respondent.

Lord Thankerton—This is an appeal from a judgment and order of the High Court of Judicature at Fort William in Bengal, in its civil appellate jurisdiction dated April 11, 1938, which allowed in part the appeal of the present respondent from the judgment and order of the said High Court, in its original jurisdiction, made by Panckridge, J. on July 22, 1937.

The respondent raises a preliminary point as to the jurisdiction of this Board to entertain this appeal in view of the provisions of s. 205 of the Govt. of India Act, 1935, which provides as follows:—

"205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act, or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

This section imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but—a matter of equal importance—also for the certification of this Board and the Federal Court as to their jurisdiction to entertain an appeal. No such record appears in the present case nor is there anything to suggest that the

matter was considered by the High Court Bench which delivered the judgment and order of April 11, 1938. The same is true of the High Court Bench which certified this case as a fit one for appeal to His Majesty in Council on June 15, 1938, and which was differently constituted. But, as their Lordships have already indicated, the statutory duty fell to be discharged by the Bench which delivered the judgment, and order of April 11, 1938.

In the present suit the appellants seek an order for appointment of the Official Trustee of Bengal to be trustee of the estate of one Alexander John Forbes deceased under the provisions of s. 10 of the Official Trustees Act (Act II of 1931), or, alternatively, for appointment of the said Official Trustee under s. 35 of the Indian Trustees Act, 1866. The estate of the deceased consisted partly of immovable property situate outside the Division of Bengal.

The Official Trustees Act, 1913, was amended by the Govt. of India (Adaptation of Indian Laws) Order, 1937, which was made by virtue of s. 293 of the Govt. of India Act, 1935, and came into force on April 1, 1937. The present writ of summons was taken out on May 5, 1937. Panckridge, J., who made the order of July 22, 1937, did not consider the Order in Council of 1937, but it was fully considered by the Appellate Bench (Costello and Lord Williams, JJ.) and it will be sufficient to quote some short passages from their judgment:—

"We are quite satisfied that had the attention of the learned Judge been drawn to the alteration effected by means of the Order in Council his decision would, in all probability, have been otherwise than what it was. The question whether the Court can appoint the Official Trustee of Bengal as trustee over properties outside the Province seems to depend upon the provisions of s. 3 as amended by the Order in Council and s. 10 of the Official Trustees Act. In other words, we think that, under the provisions of the Act as it now stands, this Court is not entitled to stretch its arms, if I may use the expression, beyond the territorial limits of its jurisdiction. The result is that we think that the order made by Mr. Justice Panckridge cannot stand in so far as it relates to any property not lying or not situate within the territorial jurisdiction of the Court. Mr. Banerji sought to argue that there is ample power in the Court under the general provisions of the Indian Trustees Act. I do not think it necessary to consider that aspect of the matter. This petition was essentially and primarily concerned with the appointment of the Official Trustee as such and the matter is one which quite clearly falls to be decided under the provisions of the Official Trustees Act and that Act alone."

Section 205 of the Govt. of India Act is not referred to in the judgment. Counsel for the appellants suggested that the

Court may have considered this section and decided to withhold a certificate, though that decision is not expressed. The passages quoted above make this unlikely, and in the absence of a certificate their Lordships think that the appeal should be dismissed with costs. If, however, the High Court should hereafter make an order withholding a certificate under s. 205, the appellants are to be at liberty to apply to His Majesty in Council to have the present appeal restored. Their Lordships will humbly advise His Majesty accordingly.

With reference to the costs of a petition by the respondent which by the Board's order of May 18, 1939, were directed to be paid by him in any event, these will be taxed and set off against the costs that the appellants are by this judgment ordered to pay.

s. Order accordingly.

Solicitors for the Appellants :—Messrs. Morgan Price Marley & Kugg.

Solicitors for the Respondent :—Messrs. Ashurst Morris Crips & Co.

LAHORE HIGH COURT

Civil Revision Petition No. 118 of 1938

December 13, 1938

SKEMP, J.

O. FLEMING—INSOLVENT—PETITIONER
versus

OFFICIAL RECEIVER, FEROZEPORE
DISTRICT AND OTHERS—CREDITORS—
RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 42—Word assets, meaning of—Insolvent not guilty of misconduct specified in s. 42 (b) to (h) and paying eight annas in rupee. Absolute order of discharge, whether must be passed—Order suspending discharge till scheduled debts are fully paid up—Validity.

If the word "assets" used in relation to insolvency proceedings is not qualified in any way, as in the expression "future assets", it is generally understood to mean the amount actually in existence available for division among the creditors of the insolvency.

The effect of s. 42 of the Pro. Insolv. Act is such that the Court must grant an absolute order of discharge, provided, that the insolvent pays eight annas in the rupee and is not guilty of the misconduct specified in s. 42 (b) to (h). An order directing that the insolvent's discharge should be suspended until such time as his scheduled debts are fully paid is one without jurisdiction. 109 Ind. Cas. 633 (1) and *Is re Kuinar* (2), relied on.

O. R. P. from an order of the District Judge, Ferozepore, dated October 23, 1937.

Mr. C. L. Gulati, for the Petitioner.

Mr. R. P. Khosla, for the Respondents.

Order.—The petitioner in this case is Mr. O. Fleming, a driver on the N. W. Rly. He applied on October 14, 1933, to be adjudicated insolvent and was so adjudged on April 21, 1935, being ordered to apply for discharge within a year. In his application for insolvency he showed debts amounting to about Rs. 6,700 as due to five creditors. Two only were scheduled: Bulaqi Mal for Rs. 4,334, Ram Das for Rs. 1,551-8 0. To these creditors a dividend at the rate of 6 annas 4 pies in the rupee has been paid giving Rs. 1,725 odd to Bulaqi Mal and Rs. 617 odd to Ram Das. At this stage the insolvent applied for discharge. The learned Insolvency Judge very briefly ordered without giving reasons that the insolvent's discharge should be suspended until such time as his scheduled debts were fully paid. The insolvent appealed to the District Judge who rejected the appeal because

"his property was not attached nor was half his pay attached because originally he agreed to pay the whole of his liabilities in the course of five or six years.....He wrote to the Official Receiver that he was prepared to pay the whole of the debts provided his pay was not attached to the extent of more than Rs. 60.....The creditors are in any case not getting any interest on their amounts."

Mr. Fleming has come here on revision under s. 75 of the Act through Mr. C. L. Gulati. Mr. Gulati's argument is that according to the theory and ideal administration of insolvency, the insolvent's property should be realized and distributed among his creditors and he should then become a free man within a reasonable time, whereas Mr. Fleming, who has already been before the Insolvency Court for more than five years and was actually adjudicated more than three years ago, is to be kept insolvent for several years more. He urges that the order of the Courts below is illegal, not being one of those permitted under s. 41 of the Act and that the effect of s. 42 of the Act is such that the Court must grant an absolute order of discharge, provided that the insolvent pays eight annas in the rupee and is not guilty of the misconduct specified in s. 42 (b) to (h). In the present case there is no allegation or evidence that the petitioner has been guilty of any misconduct and he is willing to pay eight annas in the rupee. Mr. Khosla on behalf of the Official Receiver, while admitting the force of these arguments, relies on the statement made by Mr. Fleming before the Insolvency Judge on October 17, 1935

"I must have at least one-third of my pay for the maintenance of my family. At first time half

of it was cut. Now I cannot make both ends meet. The claims of the scheduled creditors can be satisfied in full if the case is being proceeded to an end. I will have no objection."

On this the Advocate representing the creditors said they had no objection if the salary cut were reduced from one half to one-third and their debts were paid in full and the debtor not discharged till then. The Court then passed an order that according to the statements of the parties the salary cut should be reduced from one-half to one-third. Apparently, Mr. Khosla relies on this statement as an estoppel although he does not say so very definitely, apparently recognizing that no estoppel can be pleaded against a statute. He also relies on the terms of s. 41 and s. 42 (1) (a) of the Act dealing with the insolvent's assets and argues that his future salary will in time be sufficient to satisfy the debts in full. The expression is "assets," not "future assets." "Assets" are defined in Wharton's Law Lexicon as "the property of any person, with reference to bankruptcy, available for division amongst his creditors." If the expression is not qualified in any way, as in the expression "future assets," it is generally understood to mean the amount actually in existence available for division among the creditors. *Nand Lal v. Girdhari Lal* 109 Ind. Cas. 633 (1), is a case almost exactly on all fours with the present. The District Judge on appeal had directed the petitioner to continue an insolvent and to continue payments until he liquidated the total amount of his debts or could show that he was no longer in a position to make payments. A Division Bench of the Oudh Chief Court relying on *In re Kutner* (2), held that

"when an insolvent in India, whose case is governed by the provisions of the Pro. Insol. Act of 1920, has paid up eight annas in the rupee, he is entitled to be free from the disabilities of an insolvent unless it can be established that his case falls under the provisions of s. 42 (b) to (e) of the Act."

In re Kutner (2), is very similar in principle and the Oudh Chief Court relied upon it because of the similarity between the provisions of the Pro. Insol. Act and s. 26 of the English Bankruptcy Act, 1914. The Court of Appeal held that an order made by the Registrar in Bankruptcy suspending the discharge of the debtor until he had paid 15s. in the pound was an order made without jurisdiction. Younger, L. J.

(1) 109 Ind. Cas. 633; A I R 1928 Oudh 263; 3 Luck 588; 5 O W N 317

(2) (1921) 3 K B 93; 90 L J K B 1264; (1921) B & Cr. 113; 125 L T 458; 65 S J 604; 37 T L R 667

said :

"To give such a power to the Court (to suspend the discharge until a larger dividend had been paid), and thus, in effect compel the debtor to work for his creditors to an extent beyond the prescribed sum as a condition of his discharge, is not in my judgment to be implied from the statute."

I accept Mr. Gulati's excellent argument and relying on the terms of s. 42 and on *Nand Lal v. Girdhari*, 109 Ind. Cas. 633 (1), I accept the revision against the order of the learned District Judge as being not made in accordance with law. It was said in Court that the amount paid by Mr. Fleming to the scheduled creditors was about Rs. 200 less than eight annas in the rupee. In accepting the petition, I direct that his discharge be suspended until he has paid eight annas in the rupee. The cut of Rs. 60 on his salary which was suspended during the hearing of this revision is re-imposed until the amount of eight annas in the rupee is paid and Mr. Fleming shall then be discharged. There will be no order as to costs in this petition for revision.

s.

Petition allowed.

RANGOON HIGH COURT

Civil Revision No. 257 of 1938
January 6, 1939

BAGULRY, J.

BOOMIAH—APPLICANT

versus

R. M. N. R. M. CHETTYAR FIRM
—RESPONDENT

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Time, when runs—Final order on execution application committing judgment-debtor to civil prison—Judgment-debtor subsequently released for non-payment of subsistence allowance—Time, when runs—Execution, if pending when judgment-debtor was in prison—Sending of money order—If application to proper Court.

Before the Lim. Act was amended in 1927, the starting point for limitation was the date of an application made to a Court for execution of a decree or order. But after the amendment, the limitation runs from the final order passed by a Court on an application for execution or to take some step-in-aid of execution of decree or order.

Where final order on an application for execution is passed committing the judgment-debtor to civil prison, but the judgment-debtor is released subsequently for non-payment of subsistence allowance, the date from which the limitation runs is the date of the final order committing the judgment-debtor to civil prison and the execution proceedings cannot be said to be pending till the judgment-debtor was in prison. 140 Ind. Cas. 498 (1) and 98 Ind. Cas. 166 (4), disallowed, *Malukchand Ratanchand v. Bechkar Natha* (2) and 117 Ind. Cas. 578 (3), distinguished.

Obiter.—Sending a money-order from a post office.

for a subsistence allowance of a judgment-debtor cannot be held to constitute an application to a Court within the meaning of Art. 182 (5), Lim. Act. 140 Ind. Cas. 498 (1), dissented from.

O. R. from the order of the Third Small Cause Court Judge, Rangoon, in Civil Execution No. 12601 of 1937.

Mr. Kalyanwalla, for the Applicant.

Mr. Bharadvaj, for the Respondent.

Order.—This application raises a very simple point of limitation about which, however, there is very considerable conflict of opinion and a marked lack of authority. The plaintiff obtained his decree on January 19, 1932. He filed an application for execution on January 14, 1933. The proceedings ended with a diary order dated February 16, 1933:

"Decree-holder in person and judgment-debtor in custody. There is no settlement. Judgment-debtor is committed."

The judgment-debtor went to the civil jail; his subsistence money was paid in month by month until he was released on July 1, 1933, for non-payment of subsistence. The next application for execution was filed on May 18, 1936, but was summarily rejected the next day as time-barred. A further application was filed ten days later on May 29, 1936. Notice, which was issued, was never served and on June 26, the diary order says the case is closed by request.

He now comes with the present application for execution. This was filed on December 12, 1937. A point was raised that limitation had prevented further execution of the decree, more than three years having lapsed from February 16, 1933, the date of the final order passed by the Court on the first application for execution before any further application for execution was made to the Court. To decide the case, it is first necessary to find exactly what the law says, as I fear, it must be acknowledged that some Courts have never ascertained this. Limitation with regard to execution of the decree is given in Art. 182. In the ordinary books all these Articles appear one below the other with commentaries in between, the Articles themselves being in three columns and so voluminous are the commentaries that the headings of these columns were separated by enormous distances from the Articles themselves. In my edition of Rustomji the schedule containing the Articles starts on p. 533 and Art. 182 is more than a thousand pages later. In consequence it is quite common to omit to look up the beginning

of the schedule and see what is at the top of any particular column. The heading of col. 3 is "time from which period begins to run" and the relevant portion of Art. 182 reads in col. 3 under this heading

"(Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

Apart from the brackets, there is one comma in the whole of this article and to understand what that comma means, one has to look back at the heading of the column and see that the whole sentence must refer to some landmark of time. Now, taking the first portion of the quotation,

"the date of the final order passed on an application made in accordance with law to the proper Court for execution,"

it is quite understandable and there is no trouble at all. The period of limitation runs from this particular time, namely the date of the final order. I am asked to hold that this comma and the word "or" are completely disjunctive and the alternative period is "to take some step-in-aid of execution of the decree or order" but "to take some step-in-aid" is no landmark of time, and any meaning attached to the second part of the sentence must show a point of time. Except for the fact that it has given difficulty, I am unable to understand how any difficulty can arise. Applications are made to the Court for execution by attachment, arrest, the appointment of receiver and so on; again applications may be made to the Court to take some step-in-aid of execution by transferring a decree to another Court, by adding legal representatives, etc. and, in my opinion, this portion, of Art. 182 must be read "(where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or the date of the final order passed on an application made in accordance with law to the proper Court to take some step-in-aid of execution of the decree or order." Reading it in this way involves no strain on the English, it gives two landmarks of time from which the period of limitation can run, and is perfectly simple—and it runs smoothly and grammatically. I have been referred to *Raja of Ramnad v. Kuppuswami Pillai* (1), in which it is held that:

"a remittance by money-order to the Jail Superin-

(1) 56 M 320; 140 Ind. Cas. 498; A I R 1933 Mad. 83; 63 M L J 793; (1933) M W N 1198; 36 L W 738; Ind. Rul. (1933) Mad. 9.

tendant of subsistence allowance necessary for the detention of a judgment-debtor in prison is an application to a Court within the meaning of Art 182 (5) Lim. Act and is a step-in-aid of execution."

This ruling I can dismiss by saying that it has been passed under the former Lim. Act as the facts which gave rise to it occurred in 1923, the present Act dating from 1927. The reasoning, however, which is contained in the judgment as it stands, I am entirely unable to accept. How sending a money order from a post office can be held to have constituted an application to a Court I am entirely unable to understand. The post office is not a proper Court to which a decree-holder can make an application for execution of a decree. To my mind it is so obvious that it is difficult to explain or to give reasons for it. I was referred to a still older case, *Malukchand Rotanchand v. Bechhar Natha* (2), but that is also, of course, not under the present Act, and under the old Acts the starting point for limitation was the date of an application made to a Court to take a step-in-aid of execution and the Courts frequently allowed various acts done to be constructively regarded as application to Court. The dates on which applications are made to a Court now are of no interest. What we are concerned is the date of the final order passed on the application and that is usually quite easy to determine. I would refer in passing, however, to two other cases which were mentioned, *Somasundaram Chettyar v. Ma Shree Thit* (3), which dealt with matters earlier than 1927 and is under the old Act, is therefore obsolete. I would also refer to a passage in *Pitambar Jana v. Damodar Gachit* (4), beginning at p. 677:

"It is, of course, beyond controversy that where a decree-holder deliberately withdraws or invites the Court to dismiss his application, he cannot afterwards rely upon that application for the purpose of saving limitation in respect of a subsequent application for execution."

With respect, I must say that I can find nothing in the Lim. Act which gives anything to support this proposition of the law said to be beyond controversy. As the Lim. Act says nothing about this, I am unable to accept this purely *ex cathedra* statement. In the present case an application for execution was made on January 14, 1933. The final order passed on the application is to be found in the diary

(2) 25 B 639; 3 Bom. L. R. 275.

(3) 7 R 152; 117 Ind. Cas. 578; A I R 1929 Rang. 152; Ind. Rul. (1929) Rang. 210.

(4) 53 C. 664 at p. 677; 98 Ind. Cas. 166; A I R 1926 Cal. 1077; 45 C. L. J. 86; 30 C. W. N. 918.

order dated February 16, 1933. Therefore, in my opinion, that is the date from which limitation began to run. I am asked to hold that because the judgment-debtor was in jail till the end of June, 1933, the proceedings were still pending till then. I am unable to accept that view. If a man is sentenced to ten years' imprisonment in a criminal case, the proceedings can, in no way, be said to be kept pending for ten years. Later orders might have been made in the proceedings. For example, the decree-holder might have certified to the Court in full satisfaction and asked for the release of the judgment-debtor in which case, probably, there would have been a further order passed; but no such order was passed and the final order passed must be the last order, namely, "judgment-debtor is committed." Limitation therefore started on February 16, 1933, and on February 17, 1936, the decree had become time-barred. The application which was made in May 1936, could not revive the decree. This is an application against an order passed by the Judge refusing to cancel an order which he had made allowing execution to proceed. As I have pointed out, the decree is time-barred. The application is allowed and the order granting issue of warrant of arrest and detention of the applicant is set aside. Respondent to pay the applicant's costs, Advocate's fee three gold mohurs.

Application allowed.

MADRAS HIGH COURT.

Letters Patent Appeal No. 14 of 1937.

February 7, 1939.

LEACH, O. J. AND SOMAYYA, J.

KHAJI DODDA KHAJI SAHIB AND OTHERS

—DEFENDANTS—APPELLANTS

versus

OHIGAMALLA NANJAPPA AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Tort—Nuisance—Injunction—Muhammadans erecting mosque on site belonging to them—Hindus objecting—Injunction restraining Muhammadans, if can be granted.

The people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship provided that, in the performance of their worship, they do not cause material annoyance to their neighbours. That the Hindu community objects to the erection of a mosque on the site belonging to the Muhammadans and that acute feelings will be aroused, if the building is used as a mosque are not grounds which the law can recognize for the granting of the injunction. Where the Muhammadans of the village are admittedly the owners of the site and they wish

to utilize it for the purpose of a mosque, there is nothing unlawful in using this site for a mosque and therefore they are entitled to utilize it for the purpose. A man must enjoy his own property in a manner which will not do injury to others, but the erection of a mosque on land owned by Muhammadans cannot be regarded as constituting an injury in law to persons of another creed. 169 Ind. Cas. 358 reversed.

L. P. A. against the judgment and decree of Mr Justice Varadachariar, reported in 169 Ind. Cas. 358.

Messrs. V. S. Narasimhachar and Basheer Ahmed Sayyed, for the Appellants.

Mr. K. Umamaheswaran, for the Respondents.

Leach, C. J.—The Muhammadan community of the village of Kunchur, Bellary District, owns a piece of land in the Hindu quarter of the village. Some years ago they proposed to erect on this land a Jumma Musjid, notwithstanding that there were already two mosques in the village. The proposal was greatly resented by the Hindus of the village, and in 1929 they filed a suit in the Court of the District Munsif of Hospet for an injunction restraining the defendants, who represented the Muhammadan community, from erecting the Musjid and a declaration of the unrestricted rights of the Hindus to hold religious, social, public and private processions "attended with music" along the route on which the proposed Jumma Musjid was to be built. The suit was strenuously contested. The defendants set up a contention that a mosque had been erected on the site in 1910 but this had been demolished with a view to the construction of a new mosque. The District Munsif found that although the Muhammadans of the village had occasionally used the site for the purpose of offering prayers, there had never been a mosque on the site, and that it had never been intended that a mosque should be built thereon. In view of the feeling between the two communities, he considered that it was not desirable that there should be a mosque on the site and although he allowed the construction of the new building to proceed, he issued an injunction restraining the defendants from using it as a mosque. At the same time he granted a declaration that the plaintiffs were entitled to take processions along this particular street. The defendants appealed to the District Judge, who by a judgment dated March 7, 1932, upheld the decision of the District Munsif. The de-

fendants then appealed to this Court. The appeal was heard by Varadachariar, J. who confirmed the decrees of the lower Courts but granted a certificate under cl. 15 of the Letters Patent permitting an appeal to a Bench. The appellants do not complain of the declaration granted by the District Munsif to the respondents, but they object to the injunction restraining them from using the building as a mosque.

That the Hindu community of Kunchur objects to the erection of a mosque on the site and that acute feelings will be aroused if the building is used as a mosque are not grounds which the law can recognize for the granting of the injunction. The Muhammadans of the village are admittedly the owners of the site and they wish to utilize it for the purpose of a mosque. There is nothing unlawful in using this site for a mosque and therefore they are entitled to utilize it for the purpose. The right in the appellants to use this site for a mosque is so clear that authority is hardly necessary, but there is authority and authority of this Court. In *Sesha Iyengar v. Sesha Iyengar* (1). Turner, C. J. and Forbes, J. held that in this country, where there is a great diversity of creeds, it would be intolerable if the members of a sect were not at liberty to erect a place of worship on their own property, because it was more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The Court pointed out that the people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship provided that, in the performance of their worship, they do not cause material annoyance to their neighbours. A decision to the same effect was given by the learned Chief Justice and Muttusami Iyer, J. in *Parthasarathy v. Chinnakrishnan* (2). In *Kasim Ali Khan v. Brij Kishore* (3) (a case decided by the High Court, North-West Provinces when Turner, C. J. was officiating as the Chief Justice of that Court) the learned Chief Justice observed:

"The land on which the temple is erected is the property of the respondents, and they are at liberty to build what structure they please upon it. Nor can the Courts by anticipation grant a decree prohibiting them against annoying the appellants. It must be shown that some substantial annoyance and one which the Court can recognize, has been actually committed, before the Court will interfere."

(1) 2 M 143.

(2) 5 M 304.

(3) 2 N.W.P 182.

These authorities were quoted to Varadachariar, J. but he did not consider that he was justified in interfering with the injunction which had been granted. In the course of his judgment he referred to the maxim *sic uteri tuo ut alienum non lædas*, but this maxim can have no application here. A man must enjoy his own property in a manner which will not do injury to others but the erection of a mosque on land owned by Muhammadans cannot be regarded as constituting an injury in law to persons of another creed. Of course, if the Muhammadan community utilizes the building in a manner which does in fact create a nuisance, then the law will interfere, but it cannot be said that the use of a building as a mosque will amount to a nuisance. Much has been said in argument with regard to the right of the Hindu community to hold processions along the street and it is said that if a mosque is erected, attempts will be made to interfere with this right. This argument is really without foundation because the respondents have already obtained a declaration in their favour. The appellants have not challenged the respondents' right to this declaration and it is binding upon them. The case has to be decided from the point of view of legal right and there can be no doubt that the injunction which has been granted does infringe the rights of the appellants. It must, therefore, be dissolved. I would, however add this. The new building which has been erected on the site has up to now been used as a school. This is the result of the injunction granted by the District Munsif. The continuance of the use of the building as a school is a matter which the Muhammadan community of Kunchur might very well consider. They have, as I have already pointed out, two mosques in the village and it has not been suggested that these two mosques are insufficient for the Muhammadan community of Kunchur. The Court can, of course, give no direction in the matter. It can only suggest that the matter should receive the further consideration of the appellants, and in the interests of good feeling between the two communities, we trust, that it will. The decree of the District Munsif will be varied by the omission of the injunction, but the declaration in favour of the respondents will stand. The appellants having succeeded with regard to the injunction are entitled to their costs in this Court and in the District Court. So far as the first Court

is concerned, the parties will pay their own costs.

N.-D.

Injunction dissolved.

BOMBAY HIGH COURT

Civil Application No. 872 of 1933

April 14, 1939

BRAUMONT, O. J. AND B. J. WADIA, J.

CENTRAL TALKIES CIRCUIT—

PETITIONER

versus

COMMISSIONER OF INCOME-TAX,

BOMBAY

Income Tax Act (XI of 1922), s. 66 (3)—Costs—Application by assessee under s. 66 (3), asking Court to direct Commissioner to state case—Costs of application should follow event.

Whereupon the refusal of the Commissioner of Income-tax to state a case under s. 66 (2), Income Tax Act, on the ground that no point of law arose, the assessee applied to the Court under s. 66 (3), asking the Court to direct the Commissioner to state a case and the question arose as to whether the costs of the application to state a case should follow the event, or should be costs in the reference:

Held, that the right rule was that the costs should follow the event. The ultimate decision upon the point of law, whether for or against the Commissioner, could have no bearing on the question whether there was a point of law upon which a case should have been stated.

Mr. K. A. Somjee, for the Petitioners.

Mr. M. C. Setalvad, Advocate General, for the Commissioner of Income-tax.

Beaumont, C. J.—This application raises a short point of practice relating to costs, and it is desirable that points of practice relating to costs should be settled one way or the other. The question which arises is this. The assessee asked the Commissioner of Income-tax to state a case under s. 66 (2), Income Tax Act, and the Commissioner took the view that no point of law arose and refused to state a case. Thereupon the assessee applied to the Court under s. 66 (3), asking the Court to direct the Commissioner to state a case. The Court took the view that there was a point of law and that the Commissioner ought to state a case, and directed him to do so accordingly. The question is whether in those circumstances the costs of the application to state a case should follow the event, that is to say, be paid by the Commissioner who failed to establish his view that there was no point of law, or should be costs in the reference. We stood the matter over in order to ascertain whether there was any settled practice, but it appears that the point has not been considered, though there are some cases in which such costs have

been made costs in the reference, but apparently without argument. We think that the right rule is that the costs should follow the event. The ultimate decision upon the point of law, whether for or against the Commissioner, can have no bearing on the question whether there was a point of law upon which a case should have been stated. We think that costs of an application to direct the Commissioner to state a case ought, in the absence of special circumstances, to follow the event. We therefore direct the Commissioner to pay costs of the application on the Original Side scale including costs of to-day.

s. *Order accordingly.*

PATNA HIGH COURT

Appeal No. 456 of 1937

July 26, 1939

ROWLAND AND CHATTERJI, JJ.

SUKHDEO PANDEY AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

RAMESHWAR PRASAD AGARWALA

AND OTHERS—PLAINTIFFS—

RESPONDENTS

Bengal Tenancy Act (VIII of 1885), s. 22 (3)—Status and rights of co-sharer landlord purchasing occupancy holding—His interest passes to transferee on his transferring of proprietary interest—Such transferee can sub-let it to another who then becomes raiyat of holding—Lessor and lessee—Priority of estate between lessor and lessee's assignee, when arises.

The status of a co-sharer landlord who has purchased an occupancy holding is not the status of a raiyat but a peculiar status, his right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the rent. The status is a peculiar status which attaches to the co-sharer so long as he remains a co-sharer. If he ceases to be a co-sharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. The person who has acquired such interest is entitled to sub-let the same to another person who thereupon becomes a raiyat of the holding. 89 Ind. Cas. 232, (2) and 102 Ind. Cas. 386 (3), followed 65 Ind. Cas. 281 (1), distinguished. [p. 559, col. 1.]

Privity of estate between the lessor and the lessee's assignee can hardly be said to arise except where the interest of the lessee has been transferred in whole to an assignee. [p. 559, col. 2.]

A. from appellate decree of the Additional District Judge, Shahabad, dated March 31, 1937.

Messrs. B. P. Sinha and Brahmdeo Narayan, for the Appellants.

Mr. S. N. Bose, for the Respondents.

Rowland, J.—This appeal though valued at under Rs. 100 has given rise to

a question of title and was referred to a Division Bench by the Single Judge before whom it at first came for hearing. The suit was instituted as a title suit, the prayers in the plaint being in the first instance to have a declaration that the land in suit is the *kasht* land of defendants Nos. 1 to 3 of which the rent is Rs. 24-3-6 plus cess; that the plaintiffs are landlords of this holding to the extent of 2/3rds share and are entitled to 2/3rds of the rent. The other 5 annas 4 pies co-sharers are the defendants who are impleaded as *pro forma* defendants. In accordance with the declaration claimed above, the plaintiffs ask for a decree for the sum due, Rs. 72-14-0, against the defendants first party and defendants second party and for an order for recovery of costs from either defendants first party or defendants second party. The nature of the title set up by the parties will appear from the history of the land. The suit refers to plot No. 303 in *Khata* No. 2 in *Tauzi* No. 56 in village Nargada. Its area is 7 *bighas* 15 *kathas* and the rent as alleged by the plaintiffs is Rs. 24-3-6. The proprietors of this *Tauzi* No. 56 were at one time three brothers Ram Autar, Bankey Behari and Radha Raman holding in equal 1/3rd shares. Within it there was a *bhaulti* holding of 23 *bighas* 16 *kathas* of one Mahant Ramgir. This included the rent-claimed land. The holding was put to sale on February 6, 1904, and was purchased by Ramnagina and it was described as *kasht* land and delivery of possession was taken on May 5, 1904. Out of this, Ramnagina sold 11 *bighas* 16 *kathas* on July 2, 1904, to Bisesarnath. This area included the rent claimed land which is still described as *kasht*. The above Bisesarnath transferred 7 *bighas* 13 *kathas* out of his purchased land on January 3, 1905 to Bankey Behari, one of the three proprietors. This 7 *bighas* 15 *kathas* is the exact area now in suit. The land was described as *kasht* land and it is stated that after this transfer its rent was commuted to *nagdi* rent at Rs. 24-3-6 and apparently it has been found by the Courts below that this was so. On May 19, 1905, Bankey Behari gave this plot No. 303 in usufructuary mortgage to one Basdeo as security for an advance of Rs. 2,000. The land is still described as *kasht* land. Thereafter there was a dispute between the three proprietors resulting in an award dated December 28, 1903.

In pursuance of this award Bankey

Behari sold the disputed plot, 7 *bighas* 15 *kathas* to Ramautar, another of the three proprietors on January 12, 1909. The land is described as *kasht* land bearing a rent of Rs. 24-3-6. This acquisition by Ramautar must have been subject to the lien of Basdeo for his advance of Rs. 2,000. On October 23, 1909, Ramautar raised a loan of Rs. 2,995 from the defendant second party on a usufructuary mortgage of this same plot. Of the consideration, Rs. 2,000 was left with defendants second party for payment to the previous creditor Basdeo and this was paid off. In this document the land is described as Ramautar's *zerat* land. The next event affecting the history of the land is the revisional survey Record of Rights prepared in 1911. Here the plot in question is shown in *bakasht* Khata No. 2 of the proprietors and as belonging to Ramautar with defendants second party as *rehandars* in possession. Ramautar seems to have created a simple mortgage on his entire 5 annas 4 pies share in the *tauzi*. At any rate a mortgage decree was obtained against him and in execution this entire share was put up to sale and was purchased on May 12, 1920, by Nand Bahadur, predecessor of defendants third party of the present suit. It is the case of the defendants second party who are appellants here that by this execution purchase defendants third party took along with the 5 annas 4 pies share in the *milkaat* all rights of Ramautar in this plot No. 303.

Then on September 30, 1921, Nand Bahadur gave a *mokarrari* lease to defendants second party in respect of the rent-claimed land. The premium for the lease was fixed at Rs. 2,995 which was set off against the previous dues of these defendants under the *rehan* of October 23, 1909, and the rent payable to Nand Bahadur for the land was fixed at Rs. 8-10-0 in perpetuity. On the other hand, Ramautar on November 1, 1921 (as if the sale of his 5 annas 4 pies share had not affected his right to hold the rent-claimed land as a tenant) sold or purported to sell that tenancy right in the rent-claimed land to defendant first party, defendants Nos. 1 to 3, on a consideration of Rs. 4,000 of which Rs. 2,995 was left with the purchasers for the purpose of paying off the *rehan* of 1909 in favour of the defendants second party. In this document the land is described as *kasht* land of Ramautar. Ramautar's other co-sharers in the *tauzi* transferred their shares to the plaintiffs in

1922. At present therefore the proprietary interest in the *tauzi* is held to the extent of 2/3rds by the plaintiffs and to the extent of 1/3rd by defendants third party. The whole appeal turns on the question whether after May 12, 1920, a tenancy subsisted in Ramautar which he could transfer to defendants first party or whether from May 12, 1920, onwards Nand Bahadur had succeeded along with his purchase of the *tauzi* in general to a right of the nature contemplated by s. 22, Ben. Ten. Act, that is to say, a right to hold this plot No. 303, a plot the rent of which was Rs. 24-3-6, subject to payment to his co-sharers of 2/3rds of this rent. The Munsif held that the land had become *bakasht* and that Ramautar had no interest in it on November 1, 1921. Therefore the defendants first party did not acquire any interest in it by virtue of their purchase. He also expressed an opinion that the rental of the holding now is Rs. 8-10-0 only. On this view he dismissed the suit.

In appeal the Additional District Judge took the opposite view regarding the rights which Ramautar had in the suit land while he was proprietor and as to the effect on these rights of the auction sale in favour of Nand Bahadur. The District Judge thought that first Bankey Behari and then Ramautar each of them as a 5 annas 4 pies proprietor of the village acquired by their purchase of the *raiya* right of Mahant Ramgir, the right to hold it not only during the subsistence of their right as co-sharer proprietor, but also after they lost that right on its transfer to others, not as *bakasht* but as tenants independently of their proprietary right with liability to pay the proportionate rent to the other co-sharer landlords under s. 22 (2), Ben. Ten. Act, before its amendment in 1907. For this proposition he relied on *Basudeo Narain v. Radha Kisan* (1) and two other similar decisions; but the point for decision in those cases was not the same as here. Undoubtedly, it is a correct proposition of law that when a co-sharer proprietor acquires the holding of an occupancy *raiya*, the holding does not cease to exist. In *Basudeo Narain v. Radha Kisan* (1) the Court was considering the results which followed when there was a subsequent partition in the *tauzi* and the land fell within the share of another co-sharer. It was held in the result that the right to hold the land still continued and

the other co-sharer would receive in future the rent of the holding from that proprietor who had acquired the right to hold the land. But the question in the present case is a different one. The position we have to consider is that in which Ramautar having acquired a holding has parted by sale with his proprietary interest in the *tauzi*. The question is whether the land which he holds within the *tauzi* will pass to the purchaser along with Ramautar's share in the *tauzi*.

This specific point was considered in this Court in *Bambahadur Lal v. Gungra Kuer* (2). In this case it was pointed out by Kulwant Sahay, J. that the status of a co-sharer landlord who has purchased an occupancy holding is not the status of *raiyat* but a peculiar status. His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the rent. The status is a peculiar status which attaches to the co-sharer so long as he remains a co-sharer. If he ceases to be a co-sharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. That decision is directly in point and in my view we are bound to follow it. In *Gopi Singh v. Jagdeo Singh* (3) Dawson Miller, O. J., again stated the law applicable where the occupancy right of a tenant is transferred to a fractional proprietor. In this case his Lordship said:

"Although no occupancy right can vest in the fractional proprietor he still acquires a separate interest in the *raiyat* holding paying to his co-proprietors their share of the rent. This interest passes to his transferee with the transfer of the proprietary interest and the holder can sub-let the same to another who thereupon becomes a *raiyat* of the holding."

These two decisions in my opinion are sufficient authority for holding that, by Nand Bahadur's purchase on September 30, 1921, the right passed to hold plot No. 303 subject to payment by Nand Bahadur of 2/3rds of the rent to his co-sharer proprietors. According to the observation in the latter of these decisions, Nand Bahadur was entitled to sub-let the same to another person who thereupon becomes a *raiyat* of the holding and on that view the *mukarrari patta* in favour of the defendant second party would be valid; they are tenants

under Nand Bahadur and not under the plaintiffs. As for Ramautar, nothing would be left in him which he could transfer to any person by purporting to execute a sale deed dated November 1, 1921. The defendants first party took nothing and have not become tenants of anybody.

Before leaving this appeal I think it should be observed that the plaintiffs have not made any claim of rent against defendants third party and the question of their right to recover it from those defendants cannot be decided in this appeal so as to be binding between the plaintiffs and those defendants. Similarly, the question of the right of defendants third party to recover rent from defendants second party at Rs. 8-10-0 is a matter not directly in issue between those parties in this appeal and whatever we may say about it will not be binding between those parties. It has been necessary to make some observations as to the title of these parties for the purpose of determining the appeal as between the plaintiffs and the defendants first and second parties and for determining the result of this appeal. It follows from what I have said that the plaintiffs are not entitled to recover any rent from defendants second party or defendants first party. What I have said above, is I think sufficient for the disposal of the appeal; but I may refer to another objection preferred by the appellants to the District Judge's decree and that is that defendants second party were in any case not tenants under the plaintiffs. They were mortgagees in possession from Ramautar up till 1921 when they obtained the *mukarrari patta* from Nand Bahadur and if that *mukarrari patta* was of no effect, they are still mortgagees in possession. As such, there is no privity of contract between them and the plaintiffs. It was suggested for the respondents that it was not a question of privity of contract but of privity of the estate; but privity of estate between the lessor and the lessee's assignee can hardly be said to arise except where the interest of the lessee has been transferred in whole to an assignee. The respondents have attempted to escape to the conclusion that Ramautar's interest passed on the ground that the decision in *Bambahadur Lal v. Gungra Kuer* (2) was a case referring to transfers after the amendment of the Ben. Ten. Act in 1907. I do not see why this should make any substantial difference so far as the point that we are considering is concerned. In the other case in *Gopi Singh v. Jagdeo Singh* (3) the pur-

(2) 7 P. L. T. 87; 89 Ind. Cas. 232; A. I. R. 1925 Pat. 547.

(3) 8 P. L. T. 69; 102 Ind. Cas. 386; A. I. R. 1927 Pat. 172.

chase, the effect of which was being considered, was actually made before the amendment of the Ben. Ten Act.

In the result, I would allow the appeal with costs of this Court and of the lower Appellate Court, set aside the decree and judgment of the District Judge and restore the decree of the Munsif.

Chatterji, J.—I agree.

S.

Appeal allowed.

CALCUTTA HIGH COURT

Civil Appeals Nos. 676 and 677 of 1937

May 2, 1939

EDGLEY, J.

KANTI CHANDRA GHOSAL—PLAINTIFF—
APPELLANT

versus

SUCHITRA SUNDARI DASSI AND ANOTHER
—DEFENDANTS—RESPONDENTS

Bengal Village Chaulkidari Act (VI of 1870), ss. 54, 55—Fixing date from which sale is to take effect—Entry in sale certificate that such date is the day on which requisition under s. 54 was received by Collector—Onus of proving this date—Onus not discharged—Effect—Landlord and tenant—Rent—Record of Rights showing rate of rent—Burden of proving that rent is at reduced rate is on tenants.

The date to be mentioned by the Collector in the sale notification, which he is bound to publish under s. 55, Ben. Village Chaulkidari Act must be taken to correspond with the latest day of payment to which reference is made in s. 3 of Revenue Sales Land Act XI of 1859. The date with effect from which the purchase takes effect must be the day after that fixed for the last day of payment. This date cannot possibly be the date upon which the requisition for sale is sent to the Collector by the collecting member of the *panchayat* under s. 54, Village Chaulkidari Act. Consequently, if there is any entry in the sale certificate that the sale will take effect from the date on which the requisition under s. 54 was sent to the Collector, such an entry being clearly wrong, the onus clearly lies upon the purchaser to show what this date on which the sale is to take effect is. Where he fails to discharge the onus, his title will accrue only from the date on which the sale is held. [p. 561, col. 1.]

Burden lies heavily upon the tenants to prove that they are liable to pay rent at a reduced rate, in respect of a certain holding where the Record of Rights contains an entry as regards the rate of rent payable in respect thereof. 8 Ind. Cas. 790 (1) and 116 Ind. Cas. 733 (2), referred to.

C. As. from the appellate decrees of the District Judge, Birbhum, dated November 30, 1936.

Mr. Biman Chandra Bose, for the Appellant.

Messrs. Gopendra Nath Das and Khetra-mohan Chatterjee, for the Respondents.

Judgment.—In the suits out of which these appeals arise, the plaintiff sought

to recover arrears of rent in respect of two separate holdings which he had purchased under s. 55, Village Chaulkidari Act (Act VI of 1870). Various pleas were urged on behalf of the defendants, but the only points raised by the defence with which we are concerned in these appeals are: (1) whether or not the plaintiff is entitled to recover the whole of the rent for 1341 B. S. or only for two *kists* for that year, and (2) whether the defendants are entitled to a reduction of rent. With regard to the first of these points, it appears that the first Court allowed the plaintiff to recover rent for the whole of 1341 as claimed in the plaint. The lower Appellate Court held, however, that as the sale took place on November 10, 1934, that is in *Agrahayan* 1341, the plaintiff was only entitled to recover rent for two *kists* of that year. In support of his case with reference to this point, the plaintiff relies upon the terms of the sale certificate granted to him which states that his purchase took effect from *Baisakh* 16, 1341 B. S. It is, however, contended on behalf of the defendants that, having regard to the clear provisions of the law, the date mentioned in the sale certificate must be a clear error, as the sale could not have taken effect until after the last day for payment of the assessment, which, according to the defendants, must be taken to have been the date mentioned for payment in the notice issued by the Collector under s. 55, Village Chaulkidari Act.

Under s. 52 of Act VI of 1870, it is provided that the assessment shall be a permanent yearly charge on the land and shall be payable to the collecting member of the *panchayat* yearly in advance on the first day of the year current in the village by the person for the time being entitled to recover the rents of such land from the occupier thereof. Section 54 provides that, when the assessment shall be in arrear for the space of fifteen days after it shall have become payable, the collecting member of the *panchayat* shall forward to the Collector of the District in which the land so assessed is situate notice of the amount of such arrear and the name of the person liable to pay such assessment in the form in Sch. D annexed to this Act. From these sections, it would appear that the *chaulkidari* assessment becomes an arrear corresponding to an "arrear" under s. 2 of the Revenue Sale Law if it is not paid on *Baisakh* 1, in each year. A period of grace of fifteen days is allowed

by s. 54 of the Act and if the requisite payment is not made within the period of grace, the Collector may be asked to sell the land under s. 55 of the Act. This section provides for the issue of a notification for sale under s. 6 of Act XI of 1859, and then goes on to say that unless the arrears be paid within the time mentioned in such notification, the Collector shall sell such land according to the provisions of the Revenue Sale Law. It is therefore necessary in the notification for the Collector to mention a date within which the arrears should be paid. In this connection, the last portion of s. 55 of the Act is important which provides that

"all provisions of the law for the time being in force with respect to the sale of such estates shall apply to the sale of such land, and every such sale shall have such and the same force and effect as if the same were a sale of an estate for arrears of its own revenue."

Having regard therefore to the provisions of this section read in the light of the corresponding provisions of the Revenue Sale Law it would appear that the date to be mentioned by the Collector in the sale notification, which he is bound to publish under s. 55, must be taken to correspond with the latest day of payment to which reference is made in s. 3 of Act XI of 1859. Section 28 of the latter Act provided that

"immediately upon a sale becoming final and conclusive, the Collector or other officer shall give to the purchaser a certificate of title in the form prescribed in Sch. A annexed to this Act."

It is clear from the form contained in Sch. A that the date with effect from which the purchase takes effect must be the day after that fixed for the last day of payment which would appear to be the date to which reference is made in s. 3 of the Revenue Sale Law. It follows therefore that inasmuch as the general provisions of the Revenue Sale Law must apply to sales held under Act VI of 1870, the date mentioned in the plaintiff's sale certificate should have been the date after the date fixed by the Collector under s. 55 for the payment of the arrears. It stands to reason that this date could not possibly have been *Baisakh* 16, which was the date upon which the requisition for sale was sent to the Collector by the collecting member of the *panchayat* under s. 54, Village Chaudidari Act. Clearly, the date in question must have been considerably later than *Baisakh* 16. The onus clearly lay upon the plaintiff to show what this date was and as he has not discharged this onus, I think that the lower Appellate Court was justified in holding that the title of

the plaintiff accrued only from November 11, 1934, namely the date upon which the sale was held. In this view of the case it is clear that the plaintiff would only be entitled to recover two *kists* for the year 1341. As regards the other two *kists*, the defaulting landlord would be entitled to recover the arrears of rent due to him in view of the provisions of s. 55 of the Revenue Sale Law which provides that

"arrears of rent, which on the latest day of payment may be due to the defaulter from his under-tenants or *rai-yats* shall, in the event of a sale, be recoverable by him after the said latest day by any process except distraint which might have been used by him for that purpose on or before the said latest day."

It is urged on behalf of the appellant that considerable hardship will result to him by the decision of the lower Appellate Court. I am, however, not prepared to accept this argument. As regards the year 1341, it is clear that the plaintiff has no liability at all in respect of the payment of the *chaudidari* assessment as this liability has been met out of the sale proceeds under s. 56 of the Act and his liability as regards the assessment can only be held to have accrued on *Baisakh* 1, 1342. In my opinion the decision of the lower Appellate Court on this point is correct.

As regards the second point it has been held by the lower Appellate Court that the rent payable by the defendants had been reduced. The Record of Rights shows the rent payable in respect of these holdings at the rate claimed by the plaintiff. This being the case, the onus would, in my opinion, lie very heavily upon the defendants to show that they were liable to pay rent at a reduced rate. All that they have done for the purpose of discharging this onus is to examine a person named Golan Nabi who claims to have been a *gomasta* of the managing landlords. His evidence, however, is merely to the effect that he was authorized by two of these landlords to collect rent at a reduced rate. He states that the landlords who had given him this authority were managing the estate on behalf of the other landlords but there is no indication in his evidence to the effect that the other landlords had given the two managing landlords authority to reduce the rate of rent payable by the tenants nor does this witness state expressly that the reduction was of a permanent nature. In this connection it was pointed out by Gupta, J. in *Radha Raman v.*

Bhabani Prosad (1) that

"mere acceptance of a reduced rent, though it may amount to a full acquittance of rent for the particular year or years for which the rent was paid, cannot operate as a binding contract between the parties without proof of the agreement which formed the basis of the reduction granted."

Similarly, in *Lakshmi Charan v. Nabaduip Chandra Pandit* (2) Mitter, J. observed that

"it lay on the defendant to establish that there has been a permanent relinquishment of the right by the plaintiff to receive the higher rent. The fact of the non-realization of rent for a large number of years may be consistent with a temporary abatement although the temporary abatement might extend over a large number of years."

Having regard to the principles laid down in the two cases cited above, I do not think it can be said in this case that the defendants have succeeded in discharging the onus which clearly lay upon them to establish the permanent character of the reduction which they sought to prove. With regard to this point, therefore, I am of opinion that the decision of the lower Appellate Court is erroneous. The result, therefore, is that the appellant's suits will be decreed at the full rate of rent cess and damages claimed by him in respect of the last two *kists* of 1341 B. S. The decrees of the Appellate Court must be modified accordingly. I make no order with regard to the costs of these appeals.

D. Decree modified.

- (1) 12 O L J 439; 8 Ind. Cas. 790.
(2) 56 O 201; 116 Ind. Cas. 733; A I R 1929 Cal. 437; Ind. Rul. (1929) Cal. 509.

MADRAS HIGH COURT

Appeal No. 101 of 1935

January 10, 1939

VARADACHARIAR AND GENTLE, JJ.
DIRAVYAM PILLAI AND ANOTHER—

APPELLANTS

versus

VEERANAN AMBALAM AND OTHERS—
RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 28—Hindu father adjudicated insolvent—By some reason he losing power to sell son's interest—Conveyance by Official Receiver, effect of—Hindu Law—Debt—Sons' liability—Father selling son's interest in joint family property, whether merely exercising power of sale possessed by son himself—Father's power, if can be limited by s. 64, Civil Procedure Code (Act V of 1908)—Effect of s. 64—Son's interest attached in execution of decree against father—Father becoming insolvent—Official Receiver selling property in pursuance of contract, if sale entered into by father prior to attachment—Sale, if contrary to s. 64—Sale, if conveys son's interest—Hindu Law—Partition—Member's suit for

partition, withdrawn—Separation, if can be inferred from mere presentation of plaint.

If due to some reasons the insolvent father has lost the power to sell his son's interest in the joint Hindu family property for his antecedent debts the conveyance executed by the Official Receiver can have no greater effect the reason being that the Official Receiver has no greater power than the insolvent, 164 Ind. Cas 6 (19), relied on. [p. 565, col. 1.]

The recognition of the father's power to sell the son's interest for the discharge of his own debts is destructive of the principle of independent co-parcenary rights in the sons. To the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the son's co-parcenary rights in the family property. The father when he sells the family property for the discharge of his debts is not merely exercising the power of sale possessed by the son himself. The father's power cannot be limited by reason of the statutory disability imposed by s. 64, Civil P. C., upon the son as a result of the attachment of the son's interest. *Nanomi Babuasin v. Mohdun Mohun* (20), explained. 2 Ind. Cas. 268 (7), referred to. [p. 566, cols. 1 & 2.]

All that s. 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read s. 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of s. 64 is that such transfer shall not prejudice the rights of the attaching creditor. As recognized in s. 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchase money, if anything, remained due on the date of the attachment. [p. 567, col. 1.]

Consequently where son's interest had been attached in execution of a decree against father and the father had been adjudicated insolvent and the Official Receiver under orders of the Insolvency Court sold joint family property in pursuance of a contract of a sale entered into by the father prior to attachment:

Held, that the sale was not contrary to s. 64. The sale was effective to convey not merely the interest of the father but also of the son who continued to remain joint with his father.

[Case-law discussed.]

Held, further that when the Official Receiver executed the sale deed it was not in the capacity of the representatives of the general body of creditors or even in the exercise of the power possessed by him or by the insolvent to satisfy the general body of creditors that he acted. He was merely carrying out an obligation which prior to the insolvency had been incurred by the insolvent. There was no justification for holding that the order in the claim proceedings instituted by the Official Receiver precluded

the person claiming under the contract of sale that he was the owner of the property.

An attaching decree-holder attaches not the physical property but only the rights of the judgment-debtor in the property.

The plaint presented for partition even if withdrawn, would unless explained afford evidence that an intention to separate had been entertained. This can hardly be read as laying down any rule of law or even a presumption. It only suggests a possible inference of fact. Where a member instituted the suit at a time when he thought that he would get some benefit out of it, but when he found that there would be nothing left after payment of the debts due by the family, he did not think it worthwhile to proceed with the suit, there is no warrant for the conclusion that he became divided merely by the presentation of the plaint. 87 Ind. Cas. 333 (25), explained.

A. against the decree of the Sub-Judge, Madura, in O. S. No. 90 of 1932.

Messrs. T. M. Krishnaswamy Ayyar and N. Sivaramakrishna Ayyar, for the Appellants.

Messrs. V. Ramaswamy Ayyar, S. Kuppuswamy and A. Bhujanga Rao, for the Respondents.

Varadachariar, J.—This appeal arises out of a suit instituted by the predecessor-in-title of respondents Nos. 1 to 5 for obtaining a declaration that he was the full owner of the suit properties and for setting aside an order passed on September 14, 1931, dismissing a claim petition that he had filed. The suit properties belonged to a joint Hindu family which consisted of five brothers and the sons of four of them. Defendants Nos. 3, 4, 5 and 6 in the present suit are four of the brothers; another brother Sundararaja Iyer had died before suit. Defendants Nos. 7 to 12 are the sons of four of the brothers. The appellants who were defendants Nos. 1 and 2 in the lower Court had obtained a decree for money payable by the five brothers personally and from out of the properties of the joint family in the hands of the five brothers and their sons. In execution of that decree, the appellants attached the interests of the sons in the joint family properties. This attachment which was made on March 15, 1930, was advisedly limited to the interests of the sons, because in the meanwhile, the five brothers had been adjudicated insolvents and their interests were being administered in insolvency. The present plaintiffs' claim is against the attachment made by the appellants was based upon an alleged contract for the sale of the suit property to him for Rs. 30,000; it was stated that his contract had been entered into by

defendants Nos. 3 and 4 and the deceased brother on July 24, 1926. It was the plaintiff's case that in pursuance of this contract a sum of more than Rs. 28,000 had been paid to the vendors even before April 12, 1927, the date fixed for the completion of the contract, that after the expiry of the time fixed, the vendors had been delaying the execution of the sale deed on account of certain domestic reasons, that in June 1927, a creditor of the vendors presented a petition to adjudicate them insolvents, that accordingly the execution of the sale deed was further delayed and that finally under orders of the Insolvency Court passed on an application filed by the plaintiff claiming specific performance a sale deed was executed by the Official Receiver on November 6, 1931. The plaintiff further alleged that even before he became aware of the presentation of the insolvency petition, he had paid to the vendors the balance still remaining due, that he had already been put in possession of the property and had been in enjoyment thereof, that the moneys received by the vendors in pursuance of the contract of sale had been utilized by them for paying off family debts binding on the sons as well and that therefore the contract of sale and the sale deed subsequently executed by the Official Receiver were operative to vest in the plaintiff the whole interest of the joint family in the suit properties.

The appellants who were the contesting defendants disputed the truth of the alleged contract of sale and the payment of consideration therefor and the binding character of the sale as against the sons. This question of fact was made the subject of Issue No. 1 in the case. The appellants further contended that in any event the sale deed executed by the Official Receiver on November 6, 1931 could not affect the rights of defendants Nos. 7 to 12 and that the plaintiff could not accordingly object to the appellants' right to attach the interests of those defendants in the suit properties. This contention of law was raised by Issue No. 3 in the case. Two further questions arose in the course of the discussion of the rights of the parties in the lower Court, as to the exact position of defendants Nos. 7, 8 and 9 and their interests in the suit properties. Defendants Nos. 7 and 8 had been impleaded in the insolvency proceeding and the creditor sought to have them also adjudicated insolvents, but by a consent order they were exonerated on their agreeing that

their interests in the properties of the family might be vested in the Official Receiver appointed in the insolvency. The plaintiff contended that in any event the interests of defendants Nos. 7 and 8 must be held to have passed under the sale deed executed by the Official Receiver. Defendant No. 9 instituted a suit for partition in 1928, but subsequently withdrew it, though the papers relating to the withdrawal are not on record. It has been contended on behalf of the appellants that as a result of the filing of the plaint by defendant No. 9, he became separated in status from the rest of the family and that thereafter neither his father nor the Official Receiver in the insolvency had any right to convey his interest to the plaintiff. In answer to this contention, it had been urged that the admitted withdrawal of the partition suit must, in the circumstances, be deemed to have left defendant No. 9 a member of the joint Hindu family and that accordingly his interest was effectually conveyed by the Official Receiver. The learned Subordinate Judge upheld the plaintiff's contention on all the points above set out and passed a decree in the plaintiff's favour. Hence this appeal by defendants Nos. 1 and 2.

The question of fact raised by Issue No. 1 may be very briefly disposed of. The agreement of sale is evidenced by Ex. A which is a contract written in a notebook of the plaintiffs and signed by the three brothers. Before the lower Court, the contesting defendants took up the extreme position that no moneys had at all been paid by the plaintiffs to the brothers and that the entries in the insolvents' books acknowledging the receipt of such payments were fictitious entries made with a view to enable the insolvents to secrete moneys for their own benefit. The lower Court, on a careful examination of the evidence, overruled this contention and it has not been repeated before us. The learned Counsel for the appellants confined himself to the contention that the payments by the plaintiffs must have been made only as loans to the brothers and that the suggestion of the contract to sell was only an afterthought. In effect, the appellants impeach Ex. A, as a later fabrication. Beyond putting forward this contention, the learned Counsel for the appellants was not in a position to advance any serious argument against the correctness of the finding of the lower Court on this point. The direct evidence as well as the probabilities are clearly in favour of the truth of

the plaintiff's story. We accordingly confirm the finding of the lower Court on Issue No. 1.

The finding of the lower Court on Issue No. 3, was challenged by the learned Counsel for the appellants on the ground that according to a long course of decisions in this Court, the power of the brothers and of the Official Receiver as representing their estate to convey the interests of the sons in the joint family estate must be deemed to have come to an end, when the interests of the sons were attached by the present appellants in execution of their decree. In support of this contention, reliance was placed upon the decision in *Gopalakrishnayya v. Peyyath Gopalan* (1), *Official Receiver, Coimbatore v. Arunachalam Chettiar* (2), *Parameswaranma v. Venkataramayya* (3), *Palaniappa Chettiar v. Palani Goundan* (4), *Official Receiver, East Godavari v. Imperial Bank of India* (5) and the observations in an unreported judgment of Reddy and Ananthakrishna Ayyar, JJ. which has been filed as Ex. 24 in this case. Reference was also made to the decision of the Allahabad High Court in *Allahabad Bank, Ltd., Bareilly v. Bhagwan Das Johari* (6), of the Bombay High Court in *Subrayya v. Nagappa* (7) and of the Calcutta High Court in *Kamala Bala Dasi v. Surendranath Nath* (8). Before considering the effect of these decisions and the reasoning on which they rest, we may point out that the present case differs from all of them in one important respect, namely that there was in existence in this case, long prior to the attachment, a contract of sale entered into by the brothers at a time when the family was joint and they had the power to sell the full interest of the joint family in the suit properties. That this circumstance makes a very material dis-

(1) 51 M 342; 111 Ind. Cas. 505; A I R 1928 Mad. 479; 54 M L J 674; 27 L W 430.

(2) 66 M L J 412; 148 Ind. Cas. 787; A I R 1934 Mad. 217; (1934) M W N 113; 39 L W 339; 6 R M 538.

(3) 71 M L J 294; 164 Ind. Cas. 853; A I R 1936 Mad. 698; 44 L W 201; (1936) M W N 769; 9 R M 171.

(4) 71 M L J 541; 165 Ind. Cas. 664; A I R 1936 Mad. 948; 44 L W 615; (1936) M W N 1142; 9 R M 286.

(5) 59 M 295; 161 Ind. Cas. 726; A I R 1936 Mad. 193; 69 M L J 898; 43 L W 35; 8 R M 662; (1936) M W N 510.

(6) 48 A 343, 92 Ind. Cas. 309; A I R 1926 All. 262; 24 A L J 323.

(7) 33 B 264; 2 Ind. Cas. 268; 10 Bom. L R 1206.

(8) A I R 1937 Cal. 517; 172 Ind. Cas. 914; I L R (1937) 2 Cal. 675; 66 C L J 315; 41 O W N 1079; 10 R C 474.

inction will appear when the authorities are examined.

The rights of a promisee under a prior contract of sale as against a subsequent attachment and the rights of a Court auction-purchaser under that attachment have been considered in several decisions in this Court beginning as early as in *Savitri Ammal v. Ramaswami* (9) and going down to *Veerappa Tevar v. Venkatarama Iyer* (10). See also *Bipineedu v. Venkayya* (11), *Venkata Reddi v. Yellappa Chetty* (12), *Paparaju Veeraraghavayya v. Killaru Kamala Devi* (13), *Sitayya v. Mudaragaddi Sanyasi* (14). See also *Karalia Nanubhai v. Mansukhram* (15), *Madan Mohan Dey v. Rebati Mohan* (16), *Deoki Nandan Singh v. Jawad Hussain* (17) and *Lakshmanan v. Ramchandra* (18). It was contended by Mr. Krishnaswami Iyer, the learned Counsel for the appellants, that the course of decisions beginning with *Savitri Ammal v. Ramaswami* (9) cannot be regarded as laying down good law in view of recent pronouncements of the Judicial Committee as to the effect of the last paragraph of s. 54, T. P. Act. He also contended that if as laid down in the Madras decisions relating to the effect of the attachment on the father's power to sell the son's interest, the father's power was at an end, the decisions dealing with the effect of an antecedent contract to sell can have no bearing on the decision of the present case. It accordingly becomes necessary to examine at some length the two sets of authorities above referred to. Though the sale deed was executed by the Official Receiver in this case, it must be taken that he had no larger power than the insolvents themselves would have had, and if, for any reason, the insolvents had lost the

power to sell their sons' interests, the conveyance executed by the Official Receiver could have no greater effect; see *Sat Narain v. Sri Kishan Das* (19). The point for consideration therefore is whether as a result of the attachment placed by the appellants on March 15, 1930, on the interests of the sons, the power of the fathers to sell the joint family property including the sons' interests for the satisfaction of debts binding on the sons came to an end.

It may be conceded that in some of the Madras decisions very general language has been used which almost seems to lay down the proposition contended for by Mr. Krishnaswami Iyer; but on examination it will be found that in all those cases the question arose between the attaching creditor and the Official Receiver and all that was intended to be laid down by the learned Judges was that the attaching creditor was entitled to proceed to bring the sons' interest to sale and that the Official Receiver could not claim the proceeds of the sons' shares for the benefit of the general body of creditors. In *Gopalakrishnayya v. Peyyath Gopalan* (1) where this question was considered for the first time in this Court, the learned Judges referred to *Allahabad Bank, Ltd., Bareilly v. Bhagwan Das Johari* (6) as supporting their conclusion. The Allahabad decision only dealt with the question whether the interests of the sons in the joint family properties vested in the Official Receiver, on the insolvency of the father. The learned Judges did not address themselves to the question whether apart from the vesting of the sons' interest, the power to sell which the father has under the Hindu Law passed to the Official Receiver, and if so, what the effect on it was of the attachment of the sons' interest. In the later decisions of this Court which purported to follow *Gopalakrishnayya v. Peyyath Gopalan* (1) and repeated the language used in that case, reference has also been made to the decision of the Bombay High Court in *Subrayya v. Nagappa* (7), and we think we are justified in holding that the Madras decisions though using general language only intended to adopt the view laid down in *Subrayya v. Nagappa* (7).

The judgment of Chhandavarkar, J. in

(9) 8 M L J 266.
(10) 59 M L J 158 Ind. Cas. 940; A I R 1935 Mad. 872; 69 M L J 678; (1935) M W N 942; 42 L W 544; 8 R M 389.

(11) 8 M L J 197; 7 Ind. Cas. 795; 21 M L J 82; (1910) M W N 440.

(12) 5 L W 234; 38 Ind. Cas. 107; A I R 1917 Mad. 4.

(13) 68 M L J 67; 157 Ind. Cas. 1104; A I R 1935 Mad. 193; (1935) M W N 488; 41 L W 739; 8 R M 213.

(14) 46 M L J 361; 80 Ind. Cas. 388; A I R 1924 Mad. 610; 19 L W 455; 34 M L J 110, (1924) M W N 329.

(15) 24 B 400; 2 Bom. L R 220.

(16) 21 O W N 158; 34 Ind. Cas. 953; A I R 1916 Cal. 927; 23 O L J 115.

(17) A I R 1928 Pat. 199; 106 Ind. Cas. 356; 9 P L T 5.

(18) 34 Bom. L R 117; 139 Ind. Cas. 610; A I R 1932 Bom. 301; Ind. Rul. (1932) Bom. 524.

(19) 17 L 644; 164 Ind. Cas. 6; A I R 1936 P O 277; 63 I A 334; 1936 O L R 474; 9 R P O 62; 1936 O W N 681; 2 B R 757; 44 L W 417; 40 O W N 1382; 17 P L T 717; 64 O L J 80, 33 Bom. L R 1129; 1933 A L R 795; (1936) M W N 1204; 38 P L R 976; 71 M L J 812; (1937) A L J 414 (P O).

Subrayya v. Nagappa (7) was based upon the effect of s. 276 of the old Civil P. O., corresponding to s. 64 of the Code of 1908. The learned Judge observed that as the effect of the attachment was to prevent the sons from alienating their shares, it must also be held to prevent the father from alienating the sons' share for the satisfaction of the father's debts. With all respect, we venture to think that this reasoning is not reconcilable with the basis on which the father's power to sell joint family property for the discharge of his own proper debts is supported in the decisions of the Judicial Committee. Chanda-varkar, J. regarded the father in such cases as merely exercising the power of alienation which the sons would have exercised in the discharge of their pious duty which they owed to him. He went on to add that the father "is virtually alienating the property for them (the sons) and on their behalf" and it was on this view that he based the further proposition that as the attachment prevented the son from alienating his (son's) interest, it must equally be held to prevent the father from alienating the son's interest. The basis of the Privy Council decisions, if we may take *Nanomi Babuasin v. Modun Mohan* (20) as typical of them, seems to us to be somewhat different. They observed that the recognition of the father's power to sell the son's interest for the discharge of his own debts was destructive of the principle of independent co-parcenary rights in the sons; they then proceed to state the position to be that the sons cannot set up their rights in the family property as against the father's alienation for antecedent debt or against his creditors' remedies for their debts if not tainted with immorality. The proper interpretation of this statement of the rule seems to us to be, that to the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the son's co-parcenary rights in the family property. If this is the true view of the father's right, it seems to us, with all respect, open to question whether it can be said, as Chanda-varkar, J. said in the Bombay case, that the father when he sells the family property for the discharge of his debts is merely exercising the power of sale possessed by the son himself. Except on this theory, it will be difficult to limit the father's power by reason of the statutory disability imposed by s. 64, Civil P. O., upon the son

as a result of the attachment of the son's interest. We may also observe in this connection, that the provision in s. 53, Civil P. O., declaring that the property in the hands of a son which under the Hindu Law is liable for the payment of the debts of the deceased father shall be deemed to be the property of the deceased which has come to the hands of the son, is more consistent with the view we have above indicated as to the basis of the decisions of the Judicial Committee relating to the father's power to sell joint family property. It is not, however, necessary for the purposes of this case to decide whether the view enunciated in *Subrayya v. Nagappa* (7) is to be followed or not. We have therefore thought it unnecessary to refer the case to a Full Bench and we propose to deal with the case on the footing that *Subrayya v. Nagappa* (7) was rightly decided.

The result of the Bombay decision as well as of the decision of the Calcutta High Court in *Kamala Bala Dasi v. Surendra-nath Nath* (8) is only to impose on the father in a case like the present the disability imposed upon the son by s. 64, Civil P. O. We are not aware of any other rule of law which sets a limitation either on the son's power or on the father's power in circumstances like those of the present case. All that s. 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read s. 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the aliensee's title will be unassailable. The only effect of s. 64 is that such transfer shall not prejudice the rights of the attaching creditor.

If the above is the true position, the question arises whether when a sale is made in pursuance of a contract entered into prior to the attachment, such conveyance is one contrary to the terms of s. 64 at all. We cannot agree with Mr. Krishna-swami Ayyar that the uniform course of decisions on this point referred to already is in any way opposed to the recent decisions of the Privy Council as to the effect of s. 54, T. P. Act. The argument based on s. 54 has been considered in many of the cases referred to. The question is not whether any interest has passed under the contract to sell. An attaching decree-holder attaches not the

(20) 13 Q. 21; 13 I. A. 1; 4 Sar. 682; 10 Ind. Jur. 151 (P. O.).

Physical property but only the rights of the judgment-debtor in the property. As explained in the decisions and recognized in s. 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchase money if anything remained due on the date of the attachment.

Mr. Krishnaswami Ayyar relied on the observations of Sir D. F. Mulla in the notes to s. 40, T. P. Act, to the effect that the attaching decree-holder will not be bound by a conveyance even in pursuance of a pre-existing contract to sell; but the learned author draws a distinction between a conveyance voluntarily executed by the judgment-debtor in pursuance of pre-existing contract and a conveyance executed by him under an order of Court in pursuance of a pre-existing contract. In the latter case, the author seems to think that the attaching creditor cannot object to the conveyance. If this distinction is well founded, it is sufficient to support the decision of the lower Court in this case because the sale deed was executed in this case in pursuance of an order of the Court. But we are inclined to agree with Mr. Krishnaswami Ayyar that there really ought to be no distinction between the two classes of cases, because in both cases, the conveyance is really not voluntary but is only the fulfilment of an obligation already incurred; only we would also hold that such a conveyance is not in reality contrary to the attachment within the meaning of s. 64, Civil P. O.

Reliance was placed by the learned Counsel for the appellants on some observations of Cuming, J. in *Tarak Nath v. Sanat Kumar* (21). In one part of the judgment, the learned Judge seems to grant that the vendee will have a right to

claim specific performance as against the Court auction-purchaser. If that be the position, it is difficult to see the justification for his differing from the other decisions referred to already including the decision of the Calcutta High Court in *Madan Mohan Day v. Rebat Mohan* (16). With all respect, we prefer to adopt the view of Pearson, J., the other learned Judge who took part in *Tarak Nath v. Sant Kumar* (21), and that is in accordance with the weight of authority as we have already observed. Our attention was drawn by Mr. Krishnaswami Ayyar to the decision of the Judicial Committee in *Nur Mahomed Peerbhoy v. Dinshaw Hormasji Motiwala* (22). We do not find anything in that judgment to help the appellants. Their Lordships merely leave the question open and they have not given any indication that may be said even to throw doubt on the correctness of the decision of the several High Courts on the point.

In the view above stated, the position when the Official Receiver executed the sale deed in favour of the plaintiffs on November 6, 1931, was that he merely carried out the contract entered into by the brothers on July 24, 1926, that is more than three years before the date of the attachment, and as the sale deed was executed in pursuance of an order of Court which was in effect a decree for specific performance, though passed by the Insolvency Court, the weight of authority is clearly in favour of its having all the effects which a conveyance by the five brothers would have had. On the finding that the contract to sell was binding on the sons and that the consideration received for the sale had been utilized for the payment of antecedent debts, a sale by the five brothers would undoubtedly have been effective to convey the interest not merely of the brothers but also of all their sons who continued to remain joint with them. In view of the dates of the various proceedings taken by the plaintiffs, a further question may arise, whether the attachment placed by the appellants on March 15, 1930, could have any effect at all as against the plaintiff because though the sale deed was in fact executed on November 6, 1931, its execution was asked for by a petition dated December 21, 1928, and was ordered by the Court of first instance on December 2, 1929 (Ex. U). We are informed that the draft sale deed and

(21) 57 O 274; 122 Ind. Cas. 637; A I R 1929 Cal. 494; 33 O W N 805; Ind. Rul. (1930) Cal. 269.

(22) 45 M L J 770; 71 Ind. Cas. 625; A I R 1922 P Q 393; 33 M L T 241; 28 O W N 522 (P O).

the stamp paper for execution of the sale-deed in accordance with this order were produced in Court as early as in January 1930 but, that in consequence of an order of stay, the sale deed was not immediately executed and was executed only after the decision of the Appellate Court on February 9, 1931. The question arises whether on these facts, the sale deed should not be treated as one executed, if not on the date of the agreement, at least on the date of the presentation of the petition or in any event, on the date of the first Court's order. The respondent's Counsel relied in this connection on the observations in *Jaharlal Bhutra v. Bhupendranath Basu* (23) and *Bhaskar v. Shankar* (24). The learned Counsel for the appellants, however, rightly insisted that this point had not been raised in the lower Court and involved an examination of facts which do not appear on the record itself. We do not, therefore, pursue this question further.

We may here refer to one other contention of Mr. Krishnaswami Iyer. At one stage during the execution of the money decree obtained by the appellants, the Official Receiver intervened with a claim petition. He contended that the appellants were not entitled to appropriate the proceeds of the sale of the shares of defendants Nos. 6 to 12 but that he himself was entitled to deal with those shares or with the proceeds thereof. This claim was dismissed by the Subordinate Judge's Court (see Exs. 23 and 23-A) and that order was confirmed on appeal by this Court in Ex. 24. In the course of that judgment the learned Judges of this Court referring to a remark of the Subordinate Judge observed:

"If the learned Subordinate Judge means only that the Official Receiver's right of sale is extinguished, it is unobjectionable."

Mr. Krishnaswami Iyer contends that this decision of this Court precludes the plaintiff from contending to the contrary because the plaintiff's title was derived under a sale deed executed by the Official Receiver only subsequent to this date. We do not think that this contention is well-founded. In the proceedings above referred to, the Official Receiver cannot in any sense be said to have represented the present plaintiff. In those proceedings, he figured as representing the general body of creditors and claimed that the proceeds of the sons' shares should be made available for their benefit. The

present plaintiff on the other hand claimed under a contract which if held binding on the estate will be binding on the Official Receiver as well and include the whole interest in the suit items. Further, when the Official Receiver executed the sale deed it is not in the capacity of the representative of the general body of creditors or even in the exercise of the power possessed by him or by the insolvent to satisfy the general body of creditors that he acted. He was merely carrying out an obligation which prior to the insolvency had been incurred by the insolvents. We see no justification for holding that the order in the claim proceedings instituted by the Official Receiver precludes the present contention of the plaintiff. The effect of an order in claim proceedings is declared by O. XXI, r. 63, Civil P. O. There is no justification for giving any greater effect to such an order. In the above view, the decision of the learned Subordinate Judge on Issue No. 3 must be affirmed and it will not be necessary to discuss the position of defendants Nos. 7 and 8 separately. We may, however, add that even if a different view should be taken as to the power of the father or of the Official Receiver under the general law, it is no longer open to defendants Nos. 7 and 8, in view of the terms of the consent order, to assert that their interests in the family property did not vest in the Official Receiver. If they are precluded, the judgment-creditor who seeks to attach their supposed interests in the family property must be held to be equally precluded.

As regards the position of defendant No. 9, the learned Counsel for the appellants contended that the observations in para. 42 of the lower Court's judgment must really be understood to be in his favour and he argued that the lower Court had somehow failed to give effect to them in framing its decree. We are unable to agree with this interpretation of the lower Court's observations. It is true that the learned Subordinate Judge set out the observations of their Lordships of the Judicial Committee in *Palani Ammal v. Muthu Venkatachala Monigar* (25), but he was evidently of opinion that in the circumstances of this case, the effect of the institution of the suit and its ultimate withdrawal was to leave defendant No. 9 as a member of the joint Hindu family. It is

(23) 49 C 495; 67 Ind. Cas. 108; A I R 1922 Cal. 412; 34 C L J 79.

(24) 28 Bom. L R 418; 89 Ind. Cas. 453; A I R 1924 Bom. 467.

(25) 48 M 254; 87 Ind. Cas. 333; A I R 1925 P O 49; 52 I A 23; 6 P L T 133; 21 L W 439; (1925) M W N 330; 3 Pat. L R 126; 27 Bom. L R 735; 29 C W N 846; 23 A L J 746; L R 6 A (P O) 143 (P O).

unfortunate that we do not have the papers relating to the withdrawal. They were apparently not filed because the fact of withdrawal was not disputed. The appellant's learned Counsel argues that the observations in *Palani Ammal v. Muthu Venkatachala Monigar* (25), at pp. 258 and 259* throw on the plaintiff the onus of proving that the institution of the suit did not effect a severance and that as the plaintiff has adduced no explanation for the institution of the suit, defendant No. 9 must be held to have become divided in status. This seems to us to read too much into their Lordships' observations. Referring to *Kedar Nath v. Ratan Singh* (26), their Lordships said that they saw no reason to depart from the view there laid down and only added that the plaint so presented, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained. This can hardly be read as laying down any rule of law or even a presumption. It only seems to suggest a possible inference of fact. It is not unlikely as observed by the learned Subordinate Judge, that in this case defendant No. 9 instituted the suit at a time when he thought that he would get some benefit out of it, but that when he found that there would be nothing left after payment of the debts due by the family he did not think it worthwhile to proceed with the suit. These circumstances do not seem to us to warrant the conclusion that he became divided merely by the presentation of the plaint.

We agree with the findings of the lower Court on all the points raised and dismiss the appeal with costs of respondent Nos. 1 to 5.

N.D. *Appeal dismissed.*
(26) 32 A 415; 7 Ind. Cas. 648; 37 I A 181; 13 O O 332; 14 O W N 985; (1910) M W N 311; 8 M L T 193; 12 C L J 225; 12 Bom. L R 656; 20 M L J 900 (P.O.).

*Pages of 48 M.—[Ed.]

BOMBAY HIGH COURT

First Appeal No. 259 of 1937

February 16, 1939

BEAUMONT, C. J. AND N. J. WADIA, J.

PURUSHOTTAM DAMODAR

RAICHURKAR—DEFENDANT No. 1

—APPELLANT

versus

GANGADHAR KASHINATH SAKHARE

AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Alienation—Mortgage—by adoptive

mother for amount greater than required for legal necessity—Mortgagee can recover only portion required for legal necessity—Difference between sale and mortgage for legal necessity, explained.

The effect of a sale of property for a larger sum than immediate necessity requires, is not necessarily the same as the effect of a mortgage for a larger sum than is required, for, it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding. What the Court has to consider in the case of a sale is whether the sale should be set aside or not. The sale is either valid or invalid. A mortgage may, however, be valid for less than the whole amount advanced, or it may be valid for the whole amount against one defendant, and for part of the amount only against another defendant. In enforcing a mortgage the Court takes an account of what is due.

Where it is found that a mortgage executed by an adoptive mother was for a greater amount than was required for the legal necessity, the mortgagee is only entitled to that portion of the advance which was advanced for legal necessity. 100 Ind. Cas. 130 (1) and *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (2), explained, 156 Ind. Cas. 859 (3), relied on.

Mr. S. Y. Abhyankar, for the Appellant.

Mr. T. N. Walavalkar, for Respondent No. 1.

Beaumont, C. J.—This is an appeal against a judgment of the First Class Subordinate Judge of Sholapur. The plaintiffs are suing to enforce a mortgage passed on September 10, 1924, by the adoptive mother of defendant No. 1. Defendant No. 1 contends that the mortgage is not for legal necessity and therefore is not binding upon his interest in the mortgaged property. The learned Judge held that in respect of Rs. 3,200 out of the total sum of Rs. 4,000 advanced, the mortgage was for necessity, but he held that the remaining Rs. 800 was not for necessity, and he passed an order on defendant No. 1 to pay out of the mortgaged property the sum of Rs. 6,400 which was based on the view that the total principal sum secured was Rs. 3,200. On the facts, I think, there is no reason for challenging the learned Judge's finding, Rs. 3,000 was required by the adoptive mother of defendant No. 1 to pay off subsisting mortgages on the property, and the learned Judge held that a further Rs. 200 was also required for purposes of necessity. The balance, according to the allegation of the mortgagee, was required to pay off miscellaneous debts, and for the maintenance of the minor mortgagor. Admittedly, there was no evidence whatever that the adoptive mother had incurred any debt. The mortgagee merely took her word for it without any inquiry. I

think, therefore, the learned Judge, was right in holding that the mortgagee had not established that more than Rs. 3,200 was borrowed for legal necessity.

On those facts, Mr. Abhyankar for the appellants contends that the mortgage is good for the full amount purported to be secured, and for that he relies on the decision of the Privy Council in *Sri Krishan Das v. Nathu Ram* (1). In that case the Privy Council were dealing with a sale by a manager for Rs. 3,500 and it was proved that out of that sum Rs. 3,000 was required for legal necessity. The Privy Council held that, in the circumstances, the sale was for necessity and that it was not essential for the purchaser to prove that the whole of the purchase money had been applied for necessity. The particular passage on which Mr. Abhyankar relies for his contention that the principle of that case applies to the present case, which is one of mortgage, is at p. 84*. Their Lordships say :

"The learned Judges seem to have lost sight of the true question which falls to be answered in such cases—namely, whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited as the Bar in *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (2), decided by the Board in 1856. The case related to a charge upon property by way of mortgage, and not to a sale, but the principles to be applied appear to their Lordships to be the same as in the case of a sale of property."

I think Mr. Abhyankar's contention illustrates the danger of wresting a dictum from its context. All that their Lordships mean in the passage which I have read is that the principles to be applied in considering whether a sale is for legal necessity are the same as the principles to be applied in considering whether a mortgage is for legal necessity. But they do not, in my opinion, mean to suggest that the effect of a sale for a larger sum than immediate necessity requires is necessarily the same as the effect of a mortgage for a larger sum than is required. As their Lordships point out in that case

"it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding;"

and what the Court has to consider in the

case of a sale is whether the sale should be set aside or not. The sale is either valid or invalid. In the case of a mortgage the position of course is entirely different. A mortgage may be valid for less than the whole amount advanced, or it may be valid for the whole amount against one defendant, and for part of the amount only against another defendant. In enforcing a mortgage the Court takes an account of what is due, and on the taking of such account, I see no reason why a reversioner, against whom the mortgage is sought to be enforced, should not take the point that, as against his interest in the mortgaged property, the mortgage is good only for that part of the mortgage debt which was required for legal necessity. Certainly the case in *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (2), on which their Lordships relied in *Sri Krishan Das v. Nathu Ram* (1), is not an authority against the view which I have expressed, because in the actual report which their Lordships made to her Majesty they say (p. 425*) :

"And their Lordships are of opinion that the validity, force and effect of the bond, as to all and each of the sums, of which the sum of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the appellant, were respectively so advanced by him."

The question was also considered by a Bench of the Patna High Court in *Dwarka Ram v. Bakshi Parnaw Prasad Singh* (3). In that case the Bench came to the conclusion that it was always open in a suit to enforce a mortgage, for the defendant to contend that a part of the mortgage debt was not binding upon him or upon his share of the mortgaged property on the ground that it was not borrowed for legal necessity. I think that is the correct view. I have dealt with this point, which seems to me to be free from difficulty, rather more fully than I should normally have thought necessary, because I have had several cases recently in which the point has been raised. In my view, therefore, the decree which the learned Judge made allowing to the plaintiff only that portion of the principal which was advanced for legal necessity is correct. The appellant has also contended that the learned Judge was wrong in holding that defendant No. 1 is an agriculturist. But, as the defendant himself and one of his witnesses gave evidence that he lived by cultivating lands and there was

(3) 14 Pat. 595; 156 Ind. Cas. 859; A I R 1935 Pat. 178; 16 P L T 613; 8 R P 27.

(1) 54 I A 79; 100 Ind. Cas. 130; A I R 1927 P O 37; 49 A 149; 25 A L J 80; (1927) M W N 89; 38 M L T 18; 4 O W N 184; 8 P L T 210; 31 O W N 463; 29 Bom. L R 825; 45 C L J 386; 52 M L J 720 (P O).

(2) 6 M I A 393; 18 W R 81; 2 Suther. 29; 1 Sar. 52 (P O).

*Page of 54 I. A.—[Ed.]

*Page of 6 M I. A.—[Ed.]

no evidence to the contrary, I think the learned Judge was right in holding that the defendant was personally an agriculturist, and in directing accounts to be taken on the basis on which he did direct them. In my opinion, therefore, the appeal fails and must be dismissed with costs.

N. J. Wadia, J.—I agree.

B. *Appeal dismissed.*

PRIVY COUNCIL

Appeal from the Madras High Court
October 31, 1939

LORD THANKERTON, LORD ROMER AND
SIR GEORGE RANKIN

A. RANGANATHAM CHETTI AND OTHERS
—APPELLANTS

versus

M. ETHIRAJULU NAYUDU—

RESPONDENT

Madras City Tenants' Protection Act (III of 1922), ss. 1 (3), 2 (4), 3, 6, 12—Benefits of ss. 3, 6 and 12, when available—Tenancy held was not created before commencement of Act and Act did not apply.

The latter part of the definition of "tenant" in s. 2 (4), Mad. City Tenants' Protection Act, refers to persons who, without a tenancy title, continue in possession after the termination of the tenancy, and the benefit of the remaining sections including s. 12, cannot be of avail to tenants unless and until they have shown that the tenancy in question was created before the commencement of the Act within the meaning of s. 1 (3). [p. 572, col. 2.]

By lease dated October 18, 1912, A leased the plot of land in suit to B for a period of ten years from October 1, 1912, the tenant being at liberty to erect a superstructure on the land. Shortly before its expiry on September 30, 1922, there were negotiations which resulted in an agreement by A to give a fresh lease at an increased rent, in order that further building operations should go on. On February 1, 1923, the formal lease was executed, under which the plot of land was leased to B for a term of ten years from October 1, 1922, at an increased rent. It provided that the lessee should always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrendered possession of the land, either on the expiry of the lease thereby granted or any other future lease or at any time, and that the price should be fixed according to the market value of the buildings as at the time of ascertainment and payment. On the expiry of the lease the lessor claimed possession and offered the present value of the superstructure as it existed at the commencement of the lease. The lessee claimed the benefit of the Mad. City Tenants' Protection Act:

Held, that though the physical possession was continuous, the possession from October 1, 1922, was attributable to a new tenancy, which was formally embodied in the lease dated February 1, 1923. The tenancy in question was not therefore created before the commencement of the Act, and the Act did not apply.

Messrs. C. S. Rewcastle, K. C. and P. V. Subba Row, for the Appellants.

Mr. W. W. K. Page, for the Respondent.

Lord Thankerton.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras, in its civil appellate jurisdiction, dated March 31, 1937, which affirmed a judgment and decree of that Court, in its ordinary original civil jurisdiction, dated October 8, 1936.

In the suit, which was filed on January 25, 1933, the respondent, as plaintiff, seeks delivery of possession by the appellants of a plot of land in Mathiappan Street, Georgetown, Madras, and the superstructure thereon, mesne profits, and a declaration as to the amount payable to the appellants as the market value of the superstructure, in terms of a lease by the respondent to the appellants' father and predecessor-in-title for a term of ten years, which expired on September 30, 1932.

The only question in the appeal is whether the appellants' claim that the Mad. City Tenants' Protection Act, 1921 (Act III of 1922) is applicable in the present case is well-founded. Both Courts below have rejected this contention.

The respondent and his undivided brother, by lease dated October 18, 1912, leased the plot of land in suit to the appellants' father, for a period of ten years from October 1, 1912, the tenant being at liberty to erect a superstructure on the land. In fact there was already a superstructure thereon, erected by the previous lessee, from whom the appellants' father had bought it shortly before obtaining his own lease. The appellants' father improved the superstructure during his tenancy, and shortly before its expiry on September 30, 1922, there were negotiations which resulted in an agreement by the respondent who had become sole owner under a partition with his brother in 1917, to give a fresh lease at an increased rent, in order that further building operations should go on.

On February 1, 1923, the formal lease was executed, under which the plot of land was leased to the appellants' father for a term of ten years from October 1, 1922, at an increased rent of Rs. 100 per month, on the following recital:

"Whereas sometime prior to the expiry of the said lease the lessor agreed to grant the lessee a new lease of the said plot of land for a period of ten years commencing from October 1, 1922, upon terms and conditions hereinafter appearing, and whereas the lessee has built on the said plot of

and a substantial superstructure on the strength of the said agreement."

It was provided that the lessee should always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrendered possession of the land, either on the expiry of the lease thereby granted or any other future lease or at any time, and that the price should be fixed according to the market value of the buildings as at the time of ascertainment and payment. It appears that, on the strength of this agreement, the appellants' father had demolished the existing building and erected a substantial structure.

The appellants' father died in 1930, and the appellants became the tenants under the lease, which expired according to its terms on September 30, 1932. On October 9, 1932, the respondent sent a notice to the appellants claiming surrender of possession and offering the present value of the superstructure as it existed at the commencement of the lease, which was put by him at Rs 3,000. On November 7, the appellants replied claiming the benefit of the Mad. City Tenants' Protection Act, and disputing the valuation and the claim, and the present suit was thereafter filed by the respondent. It may be mentioned that the trial Judge held, against the respondent, that under the lease the respondent was bound to pay the value of the superstructure as it existed at the expiry of the lease, and that the respondent accepted that decision.

The Mad. City Tenants' Protection Act came into force on February 21, 1922, and by s. 1 (3) it is provided that the Act shall apply only to tenancies created before the commencement of the Act. Under s. 2 (4) "Tenant" is defined as meaning a tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy. The leading provision of the Act is to be found in s. 3, which provides:—

"3. Every tenant shall on ejection be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors-in-interest or by any person not in occupation at the time of the ejection who derived title from either of them, and for which compensation has not already been paid. A tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land."

Under s. 6 (1) a tenant who is entitled to compensation under s. 3 and against whom a suit in ejection has been in-

stituted, may apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. The appellants made an application under this section. By s. 12 it is provided that nothing in any contract made by a tenant shall take away or limit his rights under this Act, provided that nothing contained in the Act should affect any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they related to buildings erected after the date of the contract.

Their Lordships are of opinion that the latter part of the definition of 'tenant' in s. 2 (4) refers to persons who without a tenancy title continue in possession after the termination of the tenancy, and that the benefit of the remaining sections including s. 12, on which the appellants sought to rely, cannot be of avail to the appellants unless and until they have shown that the tenancy here in question was created before the commencement of the Act within the meaning of s. (3).

The appellants maintain that the tenancy which terminated on September 30, 1932, was created by the lease of 1912, the lease of 1923 being merely a continuation of the earlier lease, and they refer to the verbal agreement made before the expiry of the 1912 lease in support of this argument. But their Lordships are clearly of opinion that though the physical possession was continuous, the possession from October 1, 1922, was attributable to a new tenancy, which was formally embodied in the lease dated February 1, 1923, the increased rent thereby provided having been paid by them from October 1, 1922, in terms of the verbal agreement for a lease. Their Lordships, accordingly, concur in the view of both the Courts below, that the tenancy here in question was not created before the commencement of the Act, and that the Act does not apply.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, and that the judgments appealed from should be affirmed.

s. *Appeal dismissed.*

Solicitors of the Appellants.—Messrs. T. L. Wilson & Co.

Solicitors for the Respondent.—Messrs. Lambert & White.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 41 of 1936

September 14, 1938

DAVIS, J. C. AND TYABJI, J.

PEOPLES BANK OF NORTHERN INDIA,
LTD. (IN LIQUIDATION)—APPELLANTS

versus

NANIKRAM CHARATSING AND ANOTHER

—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 145—Liability accrued before dismissal of execution application—Surety, if can be proceeded against—Contract Act (IX of 1872), s. 128—Surety—Liability, extent of—Surety binding himself for due appearance of judgment-debtor in Court on date of hearing or as ordered by Court—Judgment-debtor absconding—Surety held liable.

There is nothing in s. 145, Civil P. O., or any other section to prevent the judgment-creditor proceeding against a surety in respect of a liability accrued before the execution application is dismissed. There is nothing in that section to suggest that the dismissal of the execution application has retrospective effect so as to excuse the surety from any liability incurred before the dismissal.

By a surety bond it was provided that the surety would secure the attendance of the judgment-debtor in Court on a particular day and thereafter when ordered by the Court to appear. The judgment-debtor appeared on some hearing and was informed about the next hearing date, when he did not appear before the Court so as to enable the Court to deal adequately with the execution application before it because the judgment-debtor absconded;

Held, that *prima facie* the surety was liable. *Lalji Sahoy v. Odoya Sunderi Mitra* (1), distinguished.

S. A. against an order of the Second Assistant Judge, Hyderabad, dated April 1, 1936.

Mr. Dingomal Narainsing, for the Appellants.

Mr. Fatehchand Assudomal, for the Respondents.

Davis, J. C.—This is an appeal against the judgment of the Second Assistant Judge of Hyderabad who confirmed an order of the Subordinate Judge at Hyderabad, dismissing the application of the appellants to execute against the surety of an absconding judgment-debtor a bond into which this surety had entered. Both the lower Courts were of the opinion that the appellants could not succeed in their application because, firstly, it had not been shown that there was any breach of any condition of the bond, and secondly, the execution application for which the bond was intended to secure the appearance of the judgment-debtor had been dismissed, and, therefore, as the proceedings in which this bond was taken and in which the judgment-

debtor had to appear were ended, so was the surety bond and the liability of the surety thereunder. The lower Courts relied on a case in *Lalji Sahoy v. Odoya Sunderi Mitra* (1) which, however, was under the old Act, and otherwise can clearly be distinguished from the case before us, for, there the application to proceed against the surety was made after the execution application was dismissed. Here the application was made before.

Now we think the appellants in this case should succeed. So far as the bond is concerned; it is provided that the surety shall secure the attendance of the judgment-debtor on December 20, 1932, and thereafter when ordered by the Court to appear. The judgment-debtor did not appear before the Court so as to enable the Court to deal adequately with the execution application before it because the judgment-debtor absconded. But the fact that the judgment-debtor absconds does not necessarily involve a breach of a condition of the bond that he should appear, if the bond provides, he should appear only when ordered by the Court, and if the Court has permitted him to absent himself, and he then absconds, the bond could not be enforced against the surety.

But looking at this case as we see it, it is perfectly clear that when the Court adjourned the case from time to time, it at the same time ordered, by necessary implication, if not expressly, the judgment-debtor to appear. For instance, on December 20, there is an order of the Court that "the judgment-debtor has appeared and has been informed of the next date." That the information to the judgment-debtor as to the next date was by necessary implication an order under the circumstances of this case to appear is clear from the fact that on the next hearing the judgment-debtor did appear even though he was ill and had to come to Court in a *gharry*. A similar order to the order of December 20, understood by the judgment-debtor as an order to him to appear, was passed on February 4, that is to say, the order was for adjournment, and by necessary implication, a clear intimation to him that he should appear on March 25, the date to which the case was adjourned, and on March 25, the judgment-debtor put in an application through his Pleader that he was ill, asked that his attendance might be excused and put in his medical certificate. His application that he might be

excused - personal attendance was granted but the application itself is an admission, he had been ordered to appear and an order was passed that the hearing was fixed on April 1, 1933, and it was clearly intended by the Court to convey, and it is clear it was so understood by the judgment-debtor's Advocate, that the judgment-debtor should appear on April 1. He did not do so and absconded, and he is now to be permitted, if the judgments of the lower Courts are allowed to stand, to take advantage of the fact that he did not appear through illness and his first default was excused, to justify his second default. So we have the strange argument, which apparently commended itself to the two lower Courts, that, if a judgment-debtor in the first instance disobeys the order to attend the Court, so no order can be given to him personally to attend again, he can thereafter abscond with impunity and take advantage of his own default. We do not think that such an argument can be taken seriously, nor do we think it should have commended itself to the two lower Courts. We think that construing this surety bond reasonably, construing reasonably the orders passed by the Court and the response of the judgment-debtor in the first instance to them, it is clear in this case that he had been within the meaning of the bond ordered to appear and he disobeyed that order. Therefore *prima facie* the surety is liable under the terms of his bond.

But then another argument was advanced which has commended itself to the lower Courts, and that is, that because the accused absconded and the proceedings against him became infructuous and the execution application was dismissed, so the surety is discharged from this liability under the bond, though the liability was incurred before the execution application was dismissed, and though before that execution application was dismissed, the appellants or judgment-creditors had made an application to the Court dated October 5 to proceed against the surety. The learned Judges have not found, and we think they would have difficulty in finding, a case which would support this order dismissing this execution application against the surety of the judgment-debtor who has absconded and their conclusion that as he has absconded, and the execution application was dismissed on that account, he will free the surety from a liability he had incurred before the order of dismissal

of the execution application was wrongly or rightly made. So far as we can see, there is nothing in s. 45, Civil P. C., or any other section to prevent the judgment-creditor proceeding against a surety in respect of a liability accrued before the execution application was dismissed, as is the case here. There is nothing in that section to suggest that the dismissal of the execution application has retrospective effect so as to excuse the surety from any liability incurred before the dismissal.

Mr. Dingomal has argued that the surety bond as worded in this case relates not only to this execution application, but to any further execution application that may be made in execution of this decree against the judgment-debtor, and that the surety for instance must be held bound for howsoever long execution proceedings may be taken against this judgment-debtor, for a period of years. We are not at present prepared to accept this proposition in all its amplitudes and it is not at present necessary for us to do so, nor is it necessary for us to give any decision upon this point because this is not the case we have to deal with. We have to deal with this particular application made in this particular proceeding upon the execution application dated October 5, 1933, and to that application and the proceedings based directly upon it, we limit this decision. We think, therefore, that the appeal should be allowed with costs throughout and the case sent back to the Court for the execution application to proceed against the surety according to law.

D.

Appeal allowed.

RANGOON HIGH COURT
Civil Revision No. 327 of 1938
January 31, 1939
MYA BU AND MOSLEY, JJ.
RAM OUDH—APPLICANT

*versus***GOVERNMENT OF BURMA**

Civil Procedure Code (Act V of 1908), s. 115—Revision on ground that evidence is being or will be rejected by lower Court, if maintainable—Mere error of law, whether ground for revision.

High Court will not entertain an application for revision on the ground that evidence is being or will be rejected by the trial Court. An interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. It is open to the party to question the decision in appeal which is the proper time at which the error, if any, should be remedied.

A mere error of law on a question which the Court has jurisdiction to decide will not in itself be a ground for interference in revision.

O. R. from an order of the Assistant District Court, Meiktila, in O. R. No. 5 of 1938.

Mr. K. C. Bose, for the Applicant

Mr. U Thin Maung, Advocate-General, for the Crown.

Mosely, J.—This is an application under ss. 115, Civil P. O., for revision of a decision of the learned Additional District Judge of Meiktila on a preliminary issue in a suit. The issue was in substance as follows:

"Whether the terms of tenancy as embodied in the deed of lease can in law be subject to a condition precedent that in reality the lease will be for ten years at a time and not for a period of five years as inserted in the deed of lease?"

The learned Additional District Judge said that no question of a condition precedent arose but that the oral agreement sought to be proved was not a matter on which the document was silent or inconsistent with its terms and could not be included under proviso (2). A preliminary objection by the learned Advocate-General is that this application for revision will not lie. I do not think that this Court or any other High Court has ever entertained an application for revision on the ground that evidence is being or will be rejected by the trial Court. A decision is quoted by the learned Advocate-General which is in exact point, *Isa Adam v. Bai Mariam* (1). No doubt an interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. It is open to the party to question the decision in appeal which is the proper time at which the error, if any, should be remedied. It cannot be said here either that the trial Court has not applied itself to the matter. A mere error of law on a question which the Court has jurisdiction to decide will not in itself be a ground for interference in revision. It is said for the petitioner that the plaintiff's case was really based on fraud and that if an issue were framed on fraud, this evidence will be admissible. That may or may not be so, but it is not a matter before this Court and it is not a matter decided by the trial Court. This application in revision must, therefore, be dismissed with costs—Advocate's fees, three gold mohurs.

Mya Bu, J.—I agree.

D. Application dismissed.

(1) 29 Bom. L. R. 304; 101 Ind. Cas. 385; AIR 1927 Bom. 664.

PRIVY COUNCIL

Appeal from the Calcutta High Court

November 10, 1939

LORD THANKERTON, SIR GEORGE RANKIN

AND SIR PHILIP MACDONELL

SUNIL KUMAR KERR—APPELLANT

versus

SISIR KUMAR KERR AND OTHERS—

RESPONDENTS

Privy Council—Practice—Question of fact not put in issue in lower Courts—Board not satisfied that evidence already taken establishes that facts if fully investigated would have supported plea—Such plea cannot be entertained by Board—Succession Act (XXXIX of 1925), s. 307—Parties dealing with executors, if have duty to enquire into facts outside will—Mortgage executed by executors held gave good title to mortgagees—Held on construction of will that no restriction was imposed on statutory power of disposal of executor.

The question of assent by the executors at the time of the mortgage of the property, regarding the trust of the mortgaged property is a question of fact, and when this question had not been put in issue or maintained in the Courts below and their Lordships are not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea, they cannot in accordance with the practice of the Board, entertain this plea at such a late stage. *Connecticut Fire Insurance Company v. Kavanagh* (1), referred to.

Much of the usefulness of the statutory power conferred by s. 307, Succession Act, on executors in India would be nullified, if a duty to enquire into facts outside the will as they existed immediately prior to the testators' death was imposed on parties dealing with executors.

A testator who was the owner of a printing, publishing and book-selling business which he had started and carried on, died leaving a will whereby he had appointed two of his sons executors and directed them to carry on the business among other things. The property contained among other properties some immovable property used as the family dwelling house and for printing press. The executors subsequently executed a mortgage of these properties. The mortgage deed made a reference to the will and the authority given to the executors to carry on the business and stated that the amount was required to fulfil the contract made with the Govt. for the exclusive licence to publish certain Govt. publications:

Held, on construction of the will that the will did not impose any restriction on the statutory power of disposal.

Held, further that it was necessary to assume, that, in a question between the executors and the beneficiaries, the executors were not entitled to use the immovable properties for the purposes of the business. But the mortgagees had no duty to enquire into facts outside the will as they existed immediately prior to the testator's death and they, therefore, got good title from the executors.

Messrs. L. P. E. Pugh, K. C. and S. P. Khambatta, for the Appellant.

Sir Herbert Cunliffe, K. C. and Mr. J. M. Pringle, for the Respondents.

Lord Thankerton.—The only question in this appeal is whether two mortgages

executed by the executors of Thakur Das Kerr are binding on the estate of Thakur Das Kerr and on the properties which are the subject of the mortgages. The issue arises in a suit filed by the appellant and respondents Nos. 1 and 2 on August 31, 1929, for construction of the will of Thakur Das Kerr and for certain declarations, including a declaration that the said mortgages are invalid, inoperative and nullities and do not in any way bind the estate of the testator. Respondents Nos. 5 and 6 who alone appear in the appeal, are the representatives of the mortgagee under the first of the two mortgages. This appeal is against the judgment and decree of the High Court of Judicature at Fort William in Bengal, in its appellate jurisdiction, dated December 7, 1934, which as regards the declaration in question, affirmed the judgment of the said High Court in its ordinary original civil jurisdiction, made by Ameer Ali, J. and dated January 18, 1932, which dismissed the suit as regards the said declaration.

The testator died on October 5, 1919, leaving a will dated December 16, 1917, and a codicil dated April 16, 1919, the latter of which is not material. He was survived by a widow, four sons and three grandsons. Respondents Nos. 3 and 4 are two of the sons, and are the executors of the will. The three grandsons are sons of respondent No. 4 and are the appellant and respondents Nos. 1 and 2.

At the time of his death, the testator was the owner of a printing, publishing and book-selling business which he had started and carried on successfully under the name of R. Cambray & Co. for about 25 years. In addition to a share in ancestral property in his village of Nalkorah, he died possessed of *zamindari* property outside Calcutta in Baraset and Bashirat Sub-Divisions, house property in Calcutta, Govt. Promissory Notes, War Stock, and shares in railways, banks and various companies, all of which he had acquired out of the profits of the business.

The house property in Calcutta consisted of,

(a) Nos. 11-A and 11-I Halder Lane, which were used as the family dwelling-house, and in which the printing was done until 1915.

(b) No. 3 Halder Lane, to which the printing press was transferred when it was acquired in 1915.

(c) Nos. 5 and 6 Halder Lane, which

were acquired in 1913 and 1911, respectively, and which were let.

The main business was carried on in hired premises in Hastings Street, with a branch in College Square.

The material provisions of the will are as follows:

"(2) I appoint my sons Dharendra Ohandra Kerr and Narendra Ohandra Kerr to be the executors of this my will with full authority to carry on the printing, publishing and book-selling business now carried on by me under the name and style of R. Cambray & Co.

(7) I will and direct that my sons with their respective families (if any) shall be entitled to reside in my said house at Bowbazar and at the ancestral house at Nalkorah in such manner as they may choose and to be maintained out of the income of my estate in the manner prevalent in my lifetime. If any of my sons or their widows do not reside in either of my said houses, he or she will not be entitled to maintenance out of my estate.

(8) I will and direct that my said sons Dharendra Ohandra Kerr and Narendra Ohandra Kerr shall receive a monthly sum or allowance of Rs. 52 and 50, respectively, as remuneration for looking after the management of my estate.

(10) I further will and direct that my executors shall be authorised in their absolute discretion to employ my sons Satyendra Ohandra Kerr and Sailendra Ohandra Kerr in the management of my estate and give each of them while so employed a salary or allowance of Rs. 15 rising to Rs. 30 a month according to ability. My said son *Sriman* Satyendra will not be entitled to any allowance if he refuses to be employed as aforesaid. My youngest son *Sriman* Sailendra besides the allowance provided herein being further entitled to a sum of Rs. 1,000 towards his marriage.

(15) I further declare it to be my express will and intention that after paying the annuities and meeting the expenses hereby directed as aforesaid, the residue of the income of my estate shall be invested in Govt. Promissory Notes or in purchasing profitable property in the vicinity of my said Bowbazar house or of my said ancestral house at Nalkorah and the said Govt. Promissory Notes or the property as the case may be shall form a part of my estate.

(16) I further declare it to be my express will and intention that the monthly sum or salary hereby directed to be paid to my sons shall on their respective deaths be payable to their respective male descendants then alive in equal shares if more than one.

(18) I lastly give devise and bequeath the rest and residue of my estate in equal shares to the male descendants of my sons living at the death of my last surviving son, those in whose descent from me a living ancestor shall intervene being excluded by the others."

The will was duly proved, and respondents Nos. 3 and 4, as executors, took possession of the estate and carried on the business.

On April 11, 1927, respondents Nos. 3 and 4, as executors, executed a mortgage in favour of *Sreemutty* Indira Ghosh, whom respondents Nos. 5 and 6 now represent, of the five properties in Halder Lane, to secure a sum of Rs. 65,000 with interest at

9 per cent. The mortgage, after a reference to the will, contained the following recital:—

"Whereas by the said will the testator authorised the said mortgagors to carry on the printing, publishing and book-selling business carried on by the testator in his lifetime under the name and style of R. Oambray & Co., in Calcutta and elsewhere, and whereas the said mortgagors are about to enter into contracts with the Governments of three Presidencies, namely, Bombay, Madras and Allahabad, and also Local Govt. for the exclusive licence to publish and issue verbatim reprint of the Indian Law Reports from the year 1921 to 1925 and whereas to fulfil the said contracts the mortgagors are in need of Rs. 65,000."

On September 3, 1927, the executors executed a first mortgage of the goodwill and connection of R. Oambray & Co. and the book debts outstanding and the stock in trade thereof and a second mortgage of the Halder Lane properties in favour of respondent No. 7, to secure a sum of Rs. 7,500 with interest at 10 per cent. This mortgage contained recitals similar to those in the first mortgage.

In fact, the printing and publishing of the reprints were carried out at a new branch at Madras, mainly owing to the cheaper cost of printing in Madras.

Both the Courts below have decided, on the terms of the will and the evidence, that these immovable properties were so connected with the business by the testator that the executors were entitled to mortgage them for the purposes of the business. It is true that Ameer Ali, J., lays stress rather on the terms of the will but the Appellate Court clearly relied on the evidence as to the testator's practice in treatment of his estate. Jack, J., in whose judgment Lord-Williams, J. concurred, said:—

"In this case the evidence shows that the testator pooled all his liquid funds together and mixed up the accounts of his property with those of his business, taking the expenses connected with both from the common fund. It is true that though he mortgaged promissory notes for the purposes of the business, he never mortgaged his immovable properties for that purpose. Except his ancestral properties, the remainder of his house properties including those in Calcutta, had been purchased from the profits of the business, and in one of the houses a printing press had been established. It is admitted that had funds been required for the protection of his house properties in an emergency, the executors would have been entitled to take them from the business. The beneficiaries of both the business and the house properties were the same and the executors were appointed managers of both. In these circumstances, it is difficult to say that the Calcutta house properties could be regarded as quite unconnected with the business so as not to be available in order to raise funds for the business when required."

These decisions settled not only that the

mortgagees got a good title, but that, in a question with the beneficiaries, the executors were entitled to mortgage the properties.

At the hearing before the Board, the appellant put forward a contention to the effect that, at the date of the mortgage, the executors had assented to the trusts as regards both the business and the immovable properties, which had thereby become vested in them as trustees, and that, accordingly, the powers conferred on executors by s. 307 of the Succession Act, 1925, were no longer available to them. Whether this consequence would result from assent need not here be determined. The question of assent, in such circumstances, is a question of fact, and this question had not been put in issue or maintained in the Courts below their Lordships are not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea, and therefore, in accordance with the practice of this Board they are unable to entertain this plea at this late stage. *Connecticut Fire Insurance Company v. Kavanagh* (1). It follows that when they granted these mortgages, the executors, in a question between the estate and the mortgagees, must be taken to have had the powers conferred by s. 307 of the Succession Act, and only two questions arise for consideration. Firstly, having regard to s. 307 (2) (i), was any restriction on the statutory power imposed by the will in this case, and, secondly, had the mortgagees constructive notice of any defect in the proposed exercise of the power, so as to put them in bad faith?

On the first point, their Lordships are unable to find in the will any restriction imposed on the statutory power of disposal. On the second point, it is necessary to assume, contrary to the judgments below that, in a question between the executors and the beneficiaries, the executors were not entitled to use the immovable properties for the purposes of the business. If so, did the mortgagees know, or were they so put on their enquiry that constructive knowledge must be imputed to them, that the executors were not so entitled?

There is no evidence that the mortgagees knew anything outside the terms of the will and the recital in the mortgage. These told them nothing as to the starting of a new branch at Madras, and nothing as to

(1) (1892) A O 473 at p 481; 61 L J P O 50; 67 LT 508; 67 J P 21.

the testator's practice, at the time of his death, with regard to treating the properties as connected with the business. Indeed, the will suggests that they are to be managed as one unit for the benefit of one set of beneficiaries. But, the question must be whether the proposed lenders had a duty to enquire into facts outside the will as they existed immediately prior to the testator's death. Their Lordships are unable to hold that the mortgagees had any such duty, and the nature of the enquiry held in the present case and the decisions below, show how impracticable it would be for any such enquiry to be made by an intending lender. In their Lordships' opinion, much of the usefulness of the statutory power conferred by s. 307 on executors in India would be nullified, if such a duty of enquiry was imposed on parties dealing with executors.

Their Lordships are therefore of opinion that the mortgagees got a good title from the executors and it becomes unnecessary to consider whether the ground of decision of the Courts below was justified, but their Lordships are not to be taken as indicating any contrary opinion.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs and that the judgments appealed from should be affirmed.

s. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. W. W. Young Sons & Ward.

Solicitors for the Respondents.—Messrs. A. J. Hunter & Co.

MADRAS HIGH COURT

Letters Patent Appeal No. 113 of 1936

January 18, 1939

LEACH, O. J. AND WADSWORTH, J.

A. VEERAN KUTTI—DEPENDANT—

APPELLANT

versus

P. P. KOYA KUTTI AND OTHERS—

RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 162 (2) —Mortgage suit—Preliminary decree passed—Appeal therefrom—Proceedings of lower Court not stayed and final decree passed—Preliminary decree confirmed—Limitation for execution—Starting point—Fresh application for final decree, necessity of.

The fact that an appeal is preferred against the preliminary decree in a mortgage suit does not prevent the Court from passing the final decree. Where no order staying proceedings pending the appeal is obtained, it is the duty of the trial Court to proceed to pass the final decree. That decree

remains binding and in full force until set aside. Where the Court passes the final decree and the preliminary decree is confirmed on appeal, the limitation for an application for execution of the final decree runs not from the date of the final decree but from the date of decree of the Appellate Court in appeal from the preliminary decree. 181 Ind. Cas. 491 (3), relied on.

The decree-holder can execute the final decree without obtaining a fresh final decree after the decision of the appeal against the preliminary decree. 42 Ind. Cas. 93 (4) and 98 Ind. Cas. 499 (5), distinguished.

L. P. A. against the judgment of Mr. Justice Venkataramana Rao, Reported in 171 Ind. Cas. 680.

Mr. K. Kuttikrishna Menon, for the Appellant.

Mr. K. P. Krishna Menon, for the Respondents.

Leach, C. J.—The appellant was the defendant in a suit on a mortgage filed in the Court of the District Munsif of Parapanangadi. A preliminary decree was passed against him on July 21, 1925, and he preferred an appeal. No stay of the proceedings in the trial Court was obtained pending the hearing of this appeal and on November 9, 1925, the District Munsif passed a final decree for sale. The appeal against the preliminary decree was dismissed on March 16, 1927. On March 15, 1930, the decree-holder respondents applied for the execution of the final decree. Objection was taken by the appellant on the ground that the application for execution was barred by the law of limitation, as it had been filed more than three years after the passing of the final decree. The District Munsif rejected this contention, but dismissed the application because defendant No. 2 had died and his legal representatives had not been brought on the record. The appellant appealed to the Subordinate Judge against the order dismissing the application and the Subordinate Judge sent the case back to the District Munsif for re-consideration. The District Munsif maintained the opinion that the application was within time; but as the legal representatives of defendant No. 2 had still not been brought on the record, he again dismissed the petition. The appellant filed an appeal against this order and the Subordinate Judge held that the application was barred by the law of limitation. The decree-holder appealed to this Court and Venkataramana Rao, J. allowed the appeal, agreeing with the view of the District Munsif that the application for execution was in time. A further point

was taken before the learned Judge, namely that the decree-holders were not entitled to execute the final decree obtained by them on November 9, 1925, and should have obtained a fresh final decree after the decision of the appeal against the preliminary decree. The learned Judge also decided this question against the present appellant.

When the appeal was before Venkataramana Rao, J., there was a conflict between a decision of this Court and a Bench decision of the Patna High Court. In *Ahmed Kutty v. Kottakkat Kuttu* (1) Madhavan Nair, J. held that where during the pendency of an appeal from a preliminary decree in a partition suit, the trial Court passes a final decree in the suit and there is no appeal, the period of limitation for execution of the final decree runs from the date of the final decree and not from the date of the decree of the Appellate Court in the appeal from the preliminary decree. In *Somar Singh v. Deonanda Prasad Singh* (2) the Patna High Court took the opposite view and Venkataramana Rao, J. accepted the Patna decision. It is not, however, necessary for us to consider whether he was right in so doing because the question has since been decided by a Bench of this Court consisting of King and Krishnaswami Ayyangar, JJ. in *Sriramachandra Rai v. Chintamanibhatla Venkateswara Rao* (3) where it was held that the period of limitation ran from the date of the appellate decree. In this case, there was an application to set aside an *ex parte* decree but this was dismissed. Against the order of dismissal the defendants appealed to the High Court which allowed the appeal, extending its benefits to the defendants who had not appealed on condition that they deposited the decree amount within three months. The deposit was not made and the *ex parte* decree therefore stood as against the defendants who had not appealed. The decree-holder filed his application more than five years after the date of the *ex parte* decree. It was held that it was in time because limitation ran from the date of the appellate decree. This decision governs this case and

the question must, therefore, be decided against the appellant.

With regard to the second contention, namely, that there can be no execution proceedings until a second final decree has been obtained, it falls to be observed that this objection was not taken in the Court of the District Munsif or in the Court of the Subordinate Judge, and as Venkataramana Rao, J. has pointed out, if the objection had been taken, it would have been open to the District Munsif to treat the application for execution as an application for a final decree and pass a final decree if it was necessary. Although it was not necessary in these circumstances for the learned Judge to decide the question, he did so and came to the conclusion that a fresh application for a final decree or amendment of the original decree was not necessary. With this conclusion we are in entire agreement. No authority has been quoted to the contrary. The learned Advocate for the appellant has relied on certain observations of Banerji, J. and of Tudball, J. in *Gajadhar Singh v. Kishen Jivan Lal* (4) approved of by their Lordships of the Privy Council in *Jowad Hussain v. Gendan Singh* (5) Banerji, J. said:

"It seems to me that this rule—i. e. the rule regulating application for final decree in mortgage actions—contemplates the passing of only one final decree in a suit for sale upon mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause."

Tudball, J. said:

"When the Munsif passed the decree, it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties."

The question now under consideration was not under consideration in those cases. The fact that an appeal was preferred against the preliminary decree did not prevent the Court from passing the final decree. As I have pointed out, no order staying proceedings was obtained and it was the duty of the trial Court to proceed to pass the final decree. That decree

(1) 56 M 458; 148 Ind. Cas. 58; A I R 1933 Mad. 315; 64 M L J 251; (1933) M W N 23, 37 L W 180; 6 R M 436.

(2) 6 Pat. 780; 102 Ind. Cas. 811; A I R 1927 Pat. 215; 8 P L T 379.

(3) (1938) 2 M L J 1048; 181 Ind. Cas. 491; A I R 1939 Mad. 157; I L R (1939) Mad. 252; 48 L W 751; (1938) M W N 1155; 11 R M 817.

(4) 39 A 611; 42 Ind. Cas. 93; A I R 1917 All. 163; 15 A L J 784 (S B).

(5) 6 Pat. 24; 98 Ind. Cas. 499; A I R 1926 P O 93; 53 I A 187; 24 A L J 765; (1926) M W N 591; 44 O L J 63; 3 O W N 690; 24 L W 391; 7 P L T 575; 31 O W N 58; 51 M L J 781, 28 Bom. L R 1395 (P O).

remains binding and in full force until set aside. The preliminary decree was confirmed on appeal and therefore did not affect the validity of the final decree which had been passed. For the reasons indicated, the appeal will be dismissed with costs.

N.-D.

Appeal dismissed.

NAGPUR HIGH COURT

Letters Patent Appeal No. 10 of 1937

March 16, 1939

STONE, C. J. AND BOSE, J.

TRIMPAK AND OTHERS—DEBENDANTS—
APPELLANTS

versus

Musammat BHAGU BAI—PLAINTIFF—

RESPONDENT

Hindu Law—Widow—Maintenance—Members agreeing to pay maintenance at certain rate—Rate, when subject to variation according to family fortunes—Method of obtaining variation—Deed of such agreement, construction of—Decree awarding maintenance—Practice of Courts—Manager's power to enter in agreement regarding granting of maintenance—Past and future maintenance—Decree—Variation—Practice.

Under the Hindu Law the widow's right to maintenance is dependent upon the family fortunes and so is liable to fluctuation both up and down in sympathy with them; and the parties concerned can contract themselves out of this and undertake to pay and receive a fixed and unvariable sum irrespective of the state of the family's finance at any given time. But they must say so in express terms. When they agree to a certain rate, and say nothing more, they are, merely reaching agreement on one question, namely the fair rate applicable to a given set of circumstances. They do not usually mean to abrogate the rest of the law which states that that rate shall be liable to variation if and when circumstances alter, and indeed, to cease altogether under certain conditions. An implied term has to be read into the contract that the agreement is subject to the usual incidents of Hindu Law and is to be read along with it and interpreted in that light. Variation is permissible only when the circumstances have altered to such an extent as to justify a variation of the figures agreed upon and they are altered before the accrual of the cause of action for maintenance. The only method of obtaining relief would be by showing that the agreement has ceased to subsist, or that the circumstances which, according to its implied meaning, will justify a variation, have come into play.

[Case-law referred to.]

The right to alter or rescind rate of maintenance fixed for payment to a widow does not rest in the hands of either one side or the other but depends upon external circumstances which apply equally to both. [p. 584, col. 2.]

A deed whereby it is agreed to pay maintenance to a Hindu widow must be construed in the light of the surrounding circumstances and with reference to the practice and usage in these matters: to do otherwise would result in an unjust conclusion. [p. 582, col. 1.]

In decrees where maintenance is awarded, Courts should insert words which would enable them on

application to set aside or modify their orders as circumstances might require, and in such cases, the remedy would be the more appropriate one by application under the leave reserved *Gopika Bai v. Dattatraya* (14), relied on. [p. 584, col. 2.]

The manager of a joint Hindu family has the right to settle maintenance claims. When he does so, he acts on behalf of the family as a whole; so it is bound by his action.

Ordinarily the questions regarding the payment of past and future maintenance would be separate and independent and so in the absence of an express statement to the contrary, it must be assumed that they were treated separately.

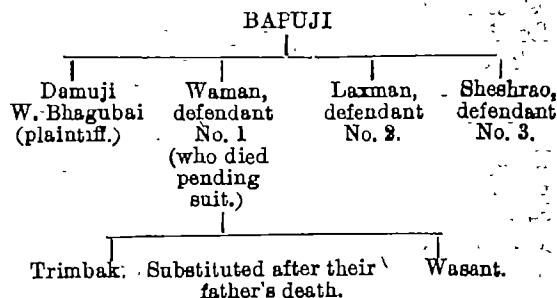
Obiter.—If a decree directs the doing of a certain thing, then that thing must be done unless and until the decree is altered or provides on the face of it for the limits of its own existence. It is not like a contract which can be varied by common consent and in which the law, recognizing the unwillingness of the average person to put into writing clauses which are too obvious to his mind to require mention, takes into consideration the surrounding circumstances. No such laxness can ordinarily be imputed to Judges. Their decrees can only be varied or altered by the Court itself and only in a particular way.

L. P. A. from the appellate decree of the High Court of Judicature at Nagpur (Single Bench) Mr. Justice R. E. Pollock, dated March 22, 1937 in Misc. Appeal No. 12-B of 1935, reversing the decree of the Court of the Additional District Judge, Yeotmal, dated December 21, 1934.

Mr. K. B. Tare with Mr. G. S. Brahmara-shas, for the Appellants.

Mr. M. R. Bobde, for the Respondent.

Judgment.—The plaintiff is a Hindu widow who is suing the members of her late husband's family for maintenance. The claim is founded on a deed, Ex. P-1, dated June 4, 1925, which was executed by Bapuji, the plaintiff's father-in-law who is now dead. The suit is against his sons. The following genealogical tree will show the relationship between the parties.



The deed, in so far as it is relevant for the purposes of this case, is in the following terms.

"I promise to give you Rs. 250 annually for your maintenance. I shall give you the above-mentioned rupees every year on the first of April. According

to that deed your first year of maintenance begins from the date—April 1, 1925. I promise to give you, your maintenance every year in advance that is as soon as the new year begins. I have already promised to give you Rs. 250 for the first year of your maintenance that is for the year 1925-26 before the registering officer. I shall give you Rs. 250 on the date—April 1, 1926, for your second year of maintenance, that is for the year 1926-27. Thus in this way I shall give you Rs. 250 every year for your maintenance until you are alive. I have got three sons at present. There has been no partition between them and myself. We are all one family. My eldest son died while we were a joint family. At present I am the *karta* of the family. I shall give you your maintenance amount as I have agreed till my life. But after my death all my sons must also give you Rs. 250 for your maintenance once every year as I have agreed. By this deed all my sons are bound to maintain you. A mutual understanding between you and me has been concluded for your past maintenance. I do not owe anything to you for your past maintenance."

It will be observed that the deed has three marked features. The first is that the maintenance is payable in advance: accordingly the suit which was filed on November 16, 1933, is in the main for the Rs. 250 due on April 1, 1933, for the year 1933-34. There is also a small claim for Rs. 2-8-0 on account of the previous year, the contention being that the amount paid for that year fell short of the Rs. 250 due by this sum of Rs. 2-8-0. The balance of Rs. 60 is for the interest which the plaintiff says she has made herself liable for on a loan which she was forced to borrow owing to the defendants' omission to pay the Rs. 250 for which this suit has been brought.

The second outstanding feature of the deed is that Bapuji, though acting as *karta* of the family and though settling a maintenance allowance which under the Hindu Law would normally vary according to the fortunes of the family, has nevertheless contracted on behalf of his sons as well as himself, that the plaintiff will be paid Rs. 250 a year for the period of her life.

The defendants contend that this contract must be construed in the light of the surrounding circumstances and that there must be read into it an implied clause which makes the undertaking to pay Rs. 250 a year subject to variation in the family fortunes.

They also urge that Bapuji had no power to bind them contractually except to the extent that the manager of a joint Hindu family can bind the other members: that an undertaking of this sort (if there is no implied term as above), which takes no account of possible fluctuations in the family fortunes, is on the face of it imprudent, and therefore the family is not bound

to honour it when its fortunes decline, as they have at the present juncture.

The third feature is that the agreement settles not only the amounts payable in the future but also all claims in respect of arrears. The plaintiff's contention is that she gave up her right to a lump sum in respect of arrears, which she says were then due, on condition that she would be paid a steady and unvarying allowance of Rs. 250 a year irrespective of fluctuations in the family fortunes. The argument against this is that the clause dealing with arrears has nothing to do with the rest of the agreement. It merely states that the parties have come to a mutual understanding about the matter and agree that nothing is now due. This forms no part of the consideration for the remainder of the agreement and merely recites a settled fact.

The defendants admit that the agreement was executed by their father, and admit the plaintiff's right to maintenance, but they contend that since that agreement was executed, there has been a sharp decline in the family income and that therefore the amount fixed in the agreement must now be reduced. The plaintiff replies that there can be no reduction and relies on the terms of her bond.

The first Court upheld the plaintiff's contention and decreed her claim, though on agreement (which also gave the defendants liberty to appeal) instalments were allowed. The lower Appellate Court agreed with the defendants. In second appeal the learned Judge, from whose decision the appeal has been filed, agreed with the first Court and so allowed the appeal and restored the original decree. The defendants appeal again.

Two things are, we think, beyond doubt. First, that under the Hindu Law the widow's right to maintenance is dependent upon the family fortunes and so is liable to fluctuation both up and down in sympathy with them; and second, that the parties concerned can contract themselves out of this and undertake to pay and receive a fixed and unvariable sum irrespective of the state of the family's finance at any given time; that is to say, as Pollock, J. has put it, they can contract themselves out of the realm of status and enter the domain of contract and can agree to regulate their relations henceforth according to the terms of an agreement. The first thing, therefore, to look to is the deed and that is

what the learned Judge whose decision we are now considering has done.

According to him, the deed is plain. It says that the plaintiff is to be paid Rs. 250 for her life and is to be paid not only by the father Bapuji but also by his sons after his death. It does not make this payment subject to fluctuations and does not say that the figure is liable to variation on the happening of a given event. Therefore, the learned Judge holds, full effect must be given to these terms.

There can be no doubt that that is what the deed actually says and had there been no complications, we would have had no hesitation in agreeing with that view. But we feel that the matter is not as simple as that. The deed must be construed in the light of the surrounding circumstances and with reference to the practice and usage in these matters: to do otherwise would result in an unjust conclusion.

The right, and in fact the duty to do so, is conferred by the fifth proviso to s. 92 of the Evi. Act. The reason for allowing an exception of this kind is given by Lord Campbell in *Humfrey v. Dale* (1). His remarks with the necessary modification are apposite here. He says:—

"Merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they will continue to do so; and in a vast majority of cases, of which Courts of law hear nothing, they do so without loss or inconvenience; and, upon the whole, they find this mode of dealing advantageous even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present case, that in fact this contract was made with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract, and must lead to an unjust decision."

If we might paraphrase that we would say that in spite of the lamentations of Judges, Hindu widows and members of joint Hindu families dealing with widows and other maintenance holders will not employ skilled draftsmen for the drawing up of their deeds, and will persist, much to the embarrassment of Courts and Judges, in resorting to crude instruments fashioned by crude craftsmen.

It is possible that in a poor country like

India where skilled legal advice is not easily available and indeed is a luxury resorted to only as a last resort, this occasions no great ill in a large class of cases which never reach the Courts, but unless this is borne in mind when a case does find its way into the Courts, injustice is likely to result.

People who enter into these agreements may not be learned in the law but they are usually steeped in an atmosphere of Hindu tradition and know well enough Hindu ideas and usage about these matters. They know that the amount claimable by a Hindu widow for her maintenance fluctuates with the family fortunes, and consequently when agreeing to any particular rate all that they mean is that that is the fair rate when the family fortunes are at a certain ebb. Therefore their undertaking is to pay at that rate so long as the family income and expenditure remains where it is at the date of the agreement. All concerned understand that if the income increases and there is no corresponding increase in the expenditure, as for example having more mouths to feed, then so also will the amount claimable by the widow; on the other hand, if it decreases, then so also will the sum agreed upon.

The agreement in such cases is not so much about the right, nor yet the circumstances in which it is claimable, for about that ordinarily there neither is nor can be room for controversy, but about the rate which is reasonable in a given set of circumstances, and that is all that they usually apply their minds to.

There is thus force in the appellants' contention that an implied term should be read into the contract, and we think this follows from the observations of their Lordships of the Privy Council in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (2) at p. 550:

"The Hindu Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the Testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be

(1) (1857) 110 R.R. 587 at p. 593; 7 El. & Bl. 266; 26 L.J. Q. B. 137; 3 Jur. (N.S.) 213.

(2) 6 M. I. A. 526 at p. 550; 4 W.R. 114; 1 Suther. 291; 1 Ind. Jur. (N.S.) 37; 1 Sar. 583 (P.O.).

carried out. If that law has attached to particular words a particular meaning, or to a particular disposition, a particular effect, it must be assumed that the Testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

The right to maintenance is, in the absence of a contract to the contrary, governed by the Hindu Law, and is, as Pollock, J. has put it, matter of status. The incidents attaching to it are well known and the term itself has acquired a particular meaning when used in relation to a given set of facts like the ones we have present here, and although it is true that such persons may contract themselves out of this status we hardly think that they intend to do so altogether unless they say so in express terms. When they agree to a certain rate, and say nothing more, they are, we think, merely reaching agreement on one question, namely the fair rate applicable to a given set of circumstances. We do not think that they usually mean to abrogate the rest of the law which states that that rate shall be liable to variation if and when circumstances alter, and indeed, to cease altogether under certain conditions.

The force of this is seen when we turn to another class of cases. It is a rule of Hindu Law that a widow loses her right to maintenance (except at a starving rate) if she becomes unchaste, also that while unchaste she is not entitled to any maintenance at all. So also it is well-settled that the right ceases upon re-marriage. It has never been doubted that these rules obtain in full force, unless expressly abrogated, even when there has been a decree or an agreement of the kind now under contemplation. See *Vishnu Shambhog v. Manjamma* (3), *Daulta Kuari v. Meghu Tewari* (4), *Nagamma v. Virabhadra* (5), Mayne's Hindu Law, 10th Edn. 831. The true principle then is, we think, that when one contracts oneself out of status one must include in the agreement expressly or by necessary implication every point on which the laws appertaining to that status are intended to be set aside; either that or agree wholly to leave the realm of status and expressly agree from thenceforth to be governed, solely by the laws of contract in all matters touching the subject-matter of the agreement. Unless that is done, the ordinary law will continue to apply in all other respects. An

implied term has to be read into the contract that the agreement is subject to the usual incidents of Hindu Law and is to be read along with it and interpreted in that light.

This, as we understand it, is the principle upon which decrees, including compromise decrees, and also agreements, have so repeatedly been held to be subject to variation in the absence of an express direction to the contrary, when on the face of it they do not appear to be so. In any event it is the only legal foundation we are able to find for the long line of rulings which deal with this matter. But however that may be, and whether these were the reasons which prompted the learned Judges who so interpreted the law or not, the fact remains that maintenance decrees and agreements have so repeatedly been treated as subject to variation in the absence of an express direction to the contrary that that has now become the settled practice, and to hold otherwise at this stage would seriously disturb existing rights and might ruin families which have placed their hands to documents on the assumption that that was the law. It is, in our opinion, a class of case to which the rule of *stare decisis* should apply.

Turning now to the rulings on this point, they can be summarised thus. The Calcutta High Court enunciated the rule as far back as 1868 in *Sreeram Bhattacharjee v. Puddomokhee Debia* (6), and applied it to a compromise decree in the year 1879 in *Rajendernath Roy v. Ranee Putto Soondery Dassee* (7). The Bombay High Court made similar observations in connection with decrees in a Full Bench case decided in the year 1878. It is reported in *Sidlingappa v. Sidava* (8). The Allahabad High Court followed suit in a case decided in the same year in which an earlier decree had directed payment of a particular sum "so long as the firm of Gulab Rai Ohura Mal (the family firm) should exist," a provision not unlike the one found here. That decision is reported in *Ruka Bai v. Ganda Bai* (9). Madras comes next with three decisions, one in 1884, one in 1888 and the other in 1899. The first two, though *obiter*, uphold this principle, and the third is directly in point. These decisions are *Vijaya v. Sripathi* (10), *Venkanna v. Ait-*

(6) 9 W R 152.

(7) 5 O L R 18.

(8) 2 B 624 at p 630.

(9) 1 A 594.

(10) 8 M 94 at p. 96.

(2) 9 B 108 at p. 110.

(4) 15 A 389; A W N 1893, 149.

(5) 17 M 392.

amma (11) and *Bangaru Ammal v. Vijaya-machi Reddiar* (12). Then comes a decision from this Province decided in 1900: *Narayan Rao v. Janki Bai* (13). It was also a case of a decree. There is also another Bombay case to the same effect in that year; *Gopika Bai v. Dattatraya* (14). These decisions have been followed since and the rule has been reproduced in the latest text books. See Mayne's Hindu Law 10th Edition, p. 835 and Mulla's Hindu Law, 8th Edition, p. 596, para. 56. The same rule was applied to agreements as distinct from decrees in *Thakur Sheo Mangal Singh v. Bodhi Kuar* (15), and in *Subramanian Patter v. Vembammal* (16). We have not been shown any case to the contrary. There are therefore strong reasons for applying the principle of *stare decisis*. A decision the other way round is *Mohieswara Rao v. Durgamba* (17). There the agreement provided.....expressly that the sum fixed was not to be varied. That illustrates the rule we have been expounding. When the contract or decree, either expressly, or by necessary implication, provides that there shall be no variation, then the Hindu Law rule of variation is excluded. To the same effect is *Purshottamdas v. Rukmini* (18).

We may observe in passing that it would save trouble, and in many cases unnecessary litigation, if agreements, and certainly decrees, were to be more specific and were to include clauses allowing variation instead of leaving them to be inferred. So far as decrees are concerned, it is the more logical, and certainly the more convenient course, and in England there would always have to be "liberty to apply" clause. Without it variation would not be permissible. Of course the rules of Hindu Law do not obtain there and that makes a difference, but the rules for construing decrees ought to be the same in both countries; and in any case a clause of that kind would avoid the necessity for bringing a fresh suit to have the decree varied. This was pointed out

(11) 12 M 183 at p 185.

(12) 22 M 175 at p. 177.

(13) 13 O P L R 158.

(14) 24 B 386; 2 Bom. L R 191.

(15) 11 Luck. 807; 159 Ind. Cas. 356; A I R 1936 Oudh 60; (1935) O W N 1249; 1935 O L R 670; 8 R O 180.

(16) 14 M L J 339.

(17) 47 M 308; 78 Ind. Cas. 831; A I R 1924 Mad. 687; 46 M L J 189; 19 L W 165; (1924) M W N 260.

(18) A I R 1937 Bom. 358; 170 Ind. Cas. 897; I L R (1938) Bom. 1; 39 Bom. L R 458; 10 R B 148.

by Parsons, J. in *Gopikabai v. Dattatraya* (14) and we reproduce his observations for the future guidance of Courts in this Province.

"We think that, in decrees where maintenance is awarded, Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved."

We turn now to a more difficult question. Granting that an agreement of the kind we are considering can be varied, the question arises as to how it can be done and from what date the variation is to take effect.

It was argued that the only logical rule is that so long as the contract subsists, it must be enforced as it stands and if variation is desired, then the contract itself must be varied in one of the ways known to law before variation can be permitted, and then the variation will, in the absence of an express agreement to the contrary, take effect from that date and will affect only the future and not the past.

We agree that this is so but what is the contract? If what we have said is correct, then there is an implied condition in it incorporating the usual incidents of Hindu Law relating to this matter. It must be remembered that there is no case here either for rescission or for rectification of an instrument. The only circumstances in which rectification is possible are enumerated in s. 31 of the Specific Relief Act, namely when through

"fraud or mutual mistake of the parties the instrument does not truly express their intention."

There is no case of fraud here nor yet of mutual, or to use a more correct expression, common mistake, nor does the instrument fail to express the intention of the parties. If the principles which we have been analysing are correct, then both sides understood quite clearly what was meant and expressed their intention adequately enough for all legal purposes. There is therefore no room for rectification; nor are there grounds for rescission. That is dealt with in s. 35 and the only ground relevant here is the one given in cl. (a):

"where the contract is voidable or terminable by the plaintiff."

As we read the law, the right to alter or rescind does not rest in the hands of either one side or the other but depends upon external circumstances which apply equally to both.

The issue before the Court in such cases is therefore a simple one. Have the

circumstances changed to the necessary extent? If they have, then variation is permissible; if not, then it is not. If that is so, then it does not matter when the question is raised; that is to say, whether by a suit in which the family sue for a declaration (not for rescission or rectification) be it observed, for on these assumptions there is nothing to rectify or rescind), or by way of defence when the maintenance-holder sues. The issue in either case will be the same: have the circumstances altered to such an extent as to justify a variation of the figure agreed upon, and did they alter before the cause of action for the maintenance accrued? This, we think, follows from a decision of their Lordships of the Privy Council.

It was doubted for a time whether a widow could sue in respect of arrears, and some Courts held that this was a matter within the discretion of the Courts and that the Court could, for sufficient reason, refuse to award any arrears, or that it could award arrears at a lower rate than that fixed for her future maintenance. But their Lordships of the Privy Council overruled this in *Ekradeshwari Bahausin v. Homeshwar Singh* (19) and held that

"such arrears if they truly exist, fall within the range of the widow's right to maintenance."

Therefore, as we see it, all that the Courts are required to determine is whether the right to the figure claimed existed when the cause of action accrued. If it did, the widow is entitled to it whatever the date of suit (questions of limitation aside); if not, then the figure must be fixed in accordance with the state of the family fortunes at the date when the right accrued. Whether the issue is raised by way of attack or in defence is immaterial. The point for determination is the same in either event.

We observe in passing that it is not any and every alteration in circumstances which will justify variation. The alteration in fortune must be substantial and of a kind which will justify an inference that the parties could not possibly have intended the old rate to continue in the altered circumstances. It is also to be observed that the alteration must have occurred before the cause of action to the maintenance holder accrued.

(19) 8 Pat. 840 at p. 847; 116 Ind. Cas. 409; A I R 1929 P. O 128; 56 I A 182; 33 O W N 637; 10 P L T 345; 49 O L J 579; 31 Bcm. L R 816; 6 O W N 526; (1929) A L J 695; 30 L W 1; 57 M L J 50; (1929) M W N 468; Ind. Rul. (1929) P O 193 (P O).

It is only when both elements are present that a departure from the figure agreed upon can be justified.

The decisions deal mainly with decrees and would appear to indicate a different rule, namely that unless a decree provides on the face of it machinery for its own alteration, variation can only be obtained by a separate suit properly framed for the purpose. But a decree, we think, stands on a different footing. There is not there, or at any rate ought not to be, room for implied clauses and unexpressed understandings. If a decree directs the doing of a certain thing, then that thing must be done unless and until the decree is altered or provides on the face of it for the limits of its own existence. It is not like a contract which can be varied by common consent and in which the law, recognising the unwillingness of the average person to put into writing clauses which are too obvious to his mind to require mention, takes into consideration the surrounding circumstances. No such laxness can ordinarily be imputed to Judges. Their decrees can only be varied or altered by the Court itself and only in a particular way.

It is true that owing to the unfortunate practice which has grown up in the matter of drawing up maintenance decrees, they now have to be construed, for reasons *stare decisis*, as liable to alteration even though they do not say so. But though we would not feel justified in making a greater departure than is necessary from normal rules of construction in the case of decrees, we do not think that the same considerations apply to contracts which have not merged in a decree.

The rulings are as follows. In the following cases a decree had fixed the rate and it was allowed to be varied as regards the future, or so we gather, though it is not expressly so stated in some of the judgments. *Ruka Bai v. Ganda Bai* (9), *Bangaru Ammal v. Vijayamachi Reddiar* (12), *Gopikabai v. Dattatraya* (14). To the same effect is *Subramanian Patter v. Vembammal* (16), the only difference being that the rate there was fixed by a document and not in a decree. These rulings are not of much assistance because they do not determine whether a separate suit is necessary. That question can naturally only arise in a suit for arrears.

It did arise, however, in the following cases. In *Maharana Shri Ranmalsangji v. Bai Shri Kundan Kuwar* (20) modification (20) 26 B 707; 4 Bom. L R 531.

of the rate fixed *de futuro* was sought in execution of the decree fixing it. It was held that the decree could not be altered in execution and that the proper remedy was a separate suit. This, we think, lays down the right rule as regards decrees in spite of a sentence in the judgment of Westropp, C. J. in *Sidlingappa v. Sidava* (8) which indicates other possibilities :

"unless either party, by suit or otherwise brought to the notice of the Court that circumstances rendered it equitable that the rate should be enhanced or reduced."

But, as we have said, we do not think this rule applies to agreements for, as we have explained, an agreement can only be varied or rescinded (apart from common consent) when the conditions specified in s. 31 or 35 of the Specific Relief Act are present. Therefore unless the agreement provides on the face of it for variation, or that is the necessary implication, it cannot, in the absence of a subsequent agreement modifying it, be varied either by suit or otherwise so long as it subsists. Consequently the only method of obtaining relief would be by showing that the agreement has ceased to subsist, or that the circumstances which according to its implied meaning will justify a variation, have now come into play.

The decision in *Sidlingappa v. Sidava* (8) does not assist us because there the claim was made for the first time in the suit itself. The rate had not been fixed previously either by agreement or in a decree.

In *Thakur Sheo Mangal Singh v. Bodhi Kuar* (15) the rate had been fixed in an agreement. The suit was by the maintenance holder for arrears, claiming at the agreed rate. The defendant was allowed to set up a plea of altered circumstances by way of defence and to obtain relief accordingly. Similar prayers were allowed in *Rajendra Nath Roy v. Ranee Putto Soondery Dassee* (7) and in *Narayan Rao v. Janki Bai* (13): in both these cases the rate had been fixed by a decree, a compromise decree in the first case and an ordinary decree after contest in the other. There can, therefore, be no doubt that the plea can be set up either by way of attack or by way of defence and that it can relate to arrears of maintenance. But none of these cases decide when the altered circumstances must come into existence so as to affect the claim, nor is it possible to deduce any rule in respect of this from the facts given. This therefore

is a matter which is of first impression. In our opinion the only possible rule is the one we have given.

As we have said the Judicial Committee has decided that if the widow's right to arrears truly exists, then she is entitled to recover them. The extent of this right can only be determined with reference to the circumstances as they exist on the date when the right accrues. Therefore any alteration in circumstances after the right has matured cannot avail either side. They can only affect a right which accrues after they themselves have come into existence.

Turning back now to the deed sued on and reading it in the light of these observations we do not think that the parties contracted themselves wholly out of the realm of status. All they did was to settle the rate of maintenance applicable to the circumstances of the family at the date of the agreement. We hold, therefore, that it is subject to variation both up and down if the circumstances of the family can be shown to have altered, and the basis for this decision is that that was the implied understanding between the parties and the sense in which the words found in the document were used.

We do not think that the words making the sum settled payable for life make any difference, for that would be the case under the Hindu Law as well. The right enures through life, but the amount payable is subject to variation, and if the true principle be that the amount was settled with reference to the circumstances of the family as they existed at the date of the agreement, then the true construction of the document, read in the light of the circumstances in which it was executed, is that maintenance is to be paid for life, and that the rate fixed is to enure for life also, unless the fortunes of the family change either for better or for worse. In that event the rate will be liable to alteration either up or down provided of course the circumstances altered before the sum became due.

The defendants raised this plea in this case. Therefore, the burden will be on them to show that the agreement to which their father set his hand has ceased to subsist. That is to say, they will have to prove that the family circumstances altered for the worse before April 1, 1933, when the Rs. 250 due for 1933-34 became due; and as regards the sum 2-8-0 due on account of the previous year that they had altered on April 1, 1932, as well.

There is also an item of Rs. 60 in the

claim. The plaintiff says that she had to borrow money because the maintenance due to her was not paid in advance and that this represents the interest on that loan. If she succeeds in proving this, then she will, in our opinion, be entitled to it provided she borrowed at a reasonable rate, reasonable that is to say, in the circumstances in which she was placed. The test will be whether she could have obtained money at a lower rate if she had made reasonable efforts to do so. The state of the family circumstances is a matter peculiarly within the knowledge of the other side, and so unless they either pay the widow her money when it is due, or make her a reasonable offer, telling her the reason for the reduction, on or before the date on which the sum is due, she is entitled to assume that there has been no alteration in circumstances. If that has not caused her to act to her detriment, then of course no complication arises, for no damage or loss can be said to have resulted to her. But if she has been caused thereby to act to her detriment (and that is a matter which she must allege and prove), then an estoppel arises and she will be treated exactly as if the circumstances had not altered. If they had not altered, she would have been entitled to her money on the dates due, and if she was not paid promptly, she would be entitled to borrow on such reasonable terms as she was in a position to obtain. The defendants would then be liable to make good that loss to her.

Two more points remain but they need not detain us long. The defendants contended that they were not liable for an agreement made by their father. We are of opinion, that they are. The agreement was made as manager, and the manager of a joint Hindu family has the right to settle maintenance claims. When he does so, he acts on behalf of the family as a whole; so it is bound by his action. On the interpretation which we have placed upon the agreement, the father acted within his powers, and there is no suggestion that the sum fixed was so unreasonable as to place the matter beyond the manager's implied authority.

The other point is that the rate was fixed at Rs. 250 on consideration that the plaintiff gave up her right to arrears. We are unable to read the document in that way. It does not state that this formed any part of the consideration for the payment of the Rs. 250 a year. We are of opinion, that that clause is an independent

one reciting a settled fact. Ordinarily the two questions would be separate and independent and so in the absence of an express statement to the contrary, we must assume that they were treated separately there.

The result is that the appeal succeeds. The decree of this Court is reversed and the order of the lower Appellate Court remanding the case for a determination of the remaining issues is upheld.

As regards costs it was the duty of the defendants either to pay the sum promised or to tender a lesser amount, giving their reason. Since they have done neither, they will pay the entire costs of this litigation from the beginning whatever the result.

D.

Appeal allowed.

CALCUTTA HIGH COURT

Civil Rule No. 555 of 1939

August 4, 1939

NASIM ALI AND NARSINGH RAO, JJ.

PRAFULLA KUMAR MAITY AND OTHERS—
PETITIONERS*versus*UDAY CHANDRA PRADHAN AND OTHERS
—OPPOSITE PARTY*Bengal Tenancy Act (VIII of 1885), s. 28-G—
Whether affects law of estoppel contained in Evidence Act (I of 1873)—Estoppel.*

The Evi. Act is an existing Indian Statute falling in the Concurrent List in Sch. VII to the Govt. of India Act. The Amending Act which introduced s. 28-G was passed by the Provincial Legislature of Bengal and it did not receive the assent of the Governor-General-in-Council. Consequently, the Provincial Legislature never intended to affect the law of estoppel as contained in the Evi. Act. There is a presumption that a Legislature acts *intra vires*.

Where therefore relying on the representation of the petitioners that they were *mokarari mourasi raiyats*, the opposite party advances money to them on the mortgage of the tenancy, the petitioners are precluded thereafter from showing that they were occupancy tenants.

Mr. Sarat Chandra Jana, for the Petitioners.

Messrs. Amarendra Nath Bose and Soroj Kumar Maity, for the Opposite Party.

Nasim Ali, J.—The only point for determination in this Rule is, whether the petitioners are precluded from showing that they are occupancy *raiayats*. The learned Subordinate Judge has found that the petitioners represented to the opposite party that they were *mokarari mourasi raiyats* and relying on that representation the

opposite party advanced Rs. 5,000 to the petitioners on the mortgage of the tenancy. This finding is based on the evidence of opposite party No. 1. It is consequently a finding of fact and cannot be interfered with in revision. The contention of Mr. Jana on behalf of the petitioners, however, is that the law of estoppel cannot be invoked in a proceeding under s. 26 G, Ben. Ten. Act, as that section clearly states that the mortgagor would get back his property notwithstanding anything contained in any contract or in any other law for the time being in force. His argument is that the Evi. Act which contains the law of estoppel is included within the words "any other law for the time being in force." I am unable to accept this contention. The section really proceeds on the footing that the mortgagor is an occupancy *raiyat* and the Legislature was evidently thinking of the rights in the property, as for example, the law of mortgage. The Evi. Act is an existing Indian Statute falling in the Concurrent List in Sch. VII, to the Govt. of India Act. The Amending Act which introduced s. 26-G was passed by the Provincial Legislature of Bengal and it did not receive the assent of the Governor-General-in-Council. Consequently, the Provincial Legislature never intended to affect the law of estoppel as contained in the Evi. Act. There is a presumption that a Legislature acts *intra vires*. Consequently, opposite party No. 1 is entitled to invoke the principle of estoppel in order to defeat the petitioners' claim for re-transfer of the mortgage property. The Rule is accordingly discharged with costs, the hearing-fee being assessed at one gold *mohur*.

Narsingh Rau, J.—I agree.

D. Rule discharged.

LAHORE HIGH COURT

Criminal Revision No 1045 of 1938

December 7, 1938

BHIDE, J.

BEHARI LAL SUD—ACCUSED—PETITIONER
versus

EMPEROR—RESPONDENT

Penal Code (Act XLV of 1860), s. 193—Statements forming subject-matter of charge under s. 193 need not be material for decision of suit—Question arises only for purpose of sentence—Criminal Procedure Code (Act V of 1898), s. 439—Prosecution under s. 193—Lower Courts concurring—Order, if can be revised—Civil Procedure Code (Act V of 1908), O. VI, r. 5—Rejected replication though cannot be treated as pleading, can be placed on record

and used to contradict statements by petitioner under s. 145, Evidence Act (I of 1872).

It is not necessary that the statements which form the subject-matter of a charge under s. 193, I. P. C. should be material for the decision of the suit and the question can only be considered for the purpose of the sentence in the event of a conviction. *Jugal Chandra Dalal v. Emperor* (1) and *Emperor v. Babu Ram* (2), referred to.

Revision can only be granted, if there is some error of law, some irregularity, or some abuse of or failure to exercise jurisdiction. It is inadvisable for the High Court to interfere in revision when two Courts have concurred in holding that a prosecution is in the interests of public policy. In case of a prosecution under s. 193, I. P. C., such a course is not even in the interests of the accused person as it deprives him of the only means of clearing his character, which would otherwise remain affected by the fact of the complaint having been made and endorsed by the Court of appeal; *Ganda Singh v. Bisakhi* (3) and 95 Ind. Cas. 312 (5), relied on.

Though the replication which is rejected cannot be treated as a pleading, the Court can place the replication on the record with its order thereon. The replication can be used as a previous statement to contradict the statements made by the petitioner in Court under s. 145, Evi. Act.

Cr. R. from the order of the District Judge, Ambala, dated July 4, 1938.

Messrs. B. R. Puri and Jindralal, for the Petitioner.

Messrs. Nand Lal Salooja and Feroze-ud-Din Ahmad, for the Advocate-General, for the Crown.

Order.—The petitioner in this case was ordered to be prosecuted under s. 193, I. P. C., in respect of certain statements made by him as a witness in the course of a suit for recovery of Rs. 1,000 instituted by him. The statements were in conflict with those in a replication which was sought to be put in by him under O. VI, r. 5, Civil P. C., but which was rejected by the Court. The replication was, however, placed on the record and was used to contradict the statements made by the plaintiff in the course of his evidence. The plaintiff's suit was dismissed and thereafter on an application made by the defendant the trial Court sanctioned the plaintiff's prosecution under ss. 193, 199 and 209, I. P. C. On appeal the learned Sessions Judge held that prosecution under ss. 199 and 209, I. P. C. was not sustainable. He therefore ordered that the prosecution should be under s. 193, I. P. C. only. A petition for revision of this order has now been presented to this Court. The conflicting statements made by the plaintiff in the course of his evidence and in the replication which are to support the charge under s. 193, I. P. C., have been given in the order of

the learned Subordinate Judge who sanctioned the prosecution as well as in the complaint filed in pursuance of that order. The fact that the statements in question were made by the plaintiff is not disputed and there can be no doubt that the statements are in conflict and cannot *prima facie* be reconciled. The learned Counsel for the petitioner raised only two points before me:

(1) That the replication having been rejected by the trial Court should not have been placed on the record and could not legally be made use of for the purposes of prosecution under s. 193, I. P. O., and (2) that the statements in respect of which the prosecution has been ordered were not material for the purposes of the suit.

As regards the first point, it is true that the replication having been rejected could not be treated as a pleading but the Court was right in placing the replication on the record with its order thereon, as the order was liable to be challenged in appeal and was indeed so challenged. The replication could be used as a previous statement to contradict the statements made by the petitioner in Court under s. 145, Evi. Act and was so used. When the petitioner was confronted with para. 2 of the replication, he gave at first an evasive answer that the para. may or may not be true but later on admitted that it was true. Paragraph 2 of the replication has thus become a part of the petitioner's statement in Court. No attempt was, however, made by him to reconcile his statements in Court with those in the replication. The petitioner's statements in Court are contradicted by the replication and in some respects even by the evidence of his own witnesses.

As regards the second point, the learned Counsel for the Crown pointed out that it is not necessary that the statements which form the subject-matter of a charge under s. 193, I. P. O., should be material for the decision of the suit and the question can only be considered for the purpose of the sentence, in the event of a conviction. In support of this contention, reference was made to the language of s. 193, I. P. O. and also to *Jugal Chandra Dalal v. Emperor* (1), which follows *Emperor v. Babu Ram* (2), and certain other rulings. The correctness of this contention of the learned Counsel for the Crown was eventually conceded by the learned Counsel for the petitioner also. Moreover, some of the

statements, which form the subject-matter of the complaint were material to the suit. For instance, the petitioner's statement that the money was paid by L. Durga Das in his presence, a statement which appears to be contradicted by his own witnesses, was material to the suit. So also the statement that the petitioner did not know whether the sum of Rs. 1,000 was to be contributed solely by the petitioner or by other persons was also material to the question, whether this sum, even if it was paid could have been paid by the petitioner alone. It may be pointed out in this connection that it was stated in the replication that money was to be contributed equally by the plaintiff and other persons. The learned Counsel for the Crown has drawn my attention to certain other conflicting statements of the petitioner on the question whether the sum of Rs. 1,000 was advanced as a loan and has urged that these should also be made the subject-matter of the charge. But I do not think it necessary or proper that this matter should now be taken up in revision.

The scope of revision in cases of this description is limited. It was held in *Ganda Singh v. Bisaki* (3), following the decision in *In the matter of Alanda Hussain* (4), that revision can only be granted, if there is some error of law, some irregularity, or some abuse of or failure to exercise jurisdiction. A similar view has been expressed in *Behram v. Emperor* (5), where it was held that it is inadvisable for this Court to interfere in revision when two Courts have concurred in holding that a prosecution is in the interests of public policy. It was further remarked that such a course is not even in the interests of the accused person as it deprives him of the only means of clearing his character which would otherwise remain affected by the fact of the complaint having been made and endorsed by the Court of appeal. I express no opinion whatever on the merits of the case; but as matters stand at present, it cannot be said that there was no *prima facie* case against the petitioner. It seems unfortunate that a person in the position of the petitioner should have made conflicting statements of the kind that are to be found in his evidence and that no attempt should have been made to remove or reconcile them. In the circumstances the petitioner

(1) 42 C W N 31.

(2) 26 A 509; A W N 1904, 115; 1 A L J 236; 1 Cr. L J 434.

(3) 18 P R 1902 Cr.; 73 P L R 1902.

(4) 23 A 249; A W N 1901, 59.

(5) 7 L L 108; 95 Ind. Cas. 312; A I R 1926 Lah. 305; 27 P L R 314; 27 Cr. L J 776.

must be left to clear his position in the course of the trial. The petition is accordingly dismissed.

D.

Petition dismissed.

PRIVY COUNCIL

Appeal from the Lahore High Court
November 7, 1939

LORD THANKERTON, LORD ROMER AND
SIR GEORGE RANKIN.

Lala RAM SARUP—APPELLANT

versus

THE COURT OF WARDS, THROUGH THE
DEPUTY COMMISSIONER, DELHI,

AND OTHERS—RESPONDENTS

Contract—Champertous transaction—Agreement to finance suit in consideration of having share in property, if recovered—When opposed to public policy—Points to be considered—Agreement held valid.

Champertous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. In applying the principle that "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy", it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money, he may well be allowed some chance of exceptional advantage. *Ram Oomarr Oondoo v. Chunder Canto Mookerjee* (1), referred to.

Held, that the agreement was valid and binding.

Messrs. J. P. Eddy, K. C. and A. P. Pennell, for the Appellant.

Mr. W. Wallach, for the Respondents.

Sir George Rankin.—The appellant Lala Ram Sarup and respondent No. 4, Lala Alopri Parshad (herein called the plaintiffs), brought the suit out of which this appeal arises in the Court of the District Judge at Delhi on October 16, 1928. The suit was brought upon an agreement of a champertous nature dated October 2, 1920, and made between the plaintiffs and one Saleem Mahomed Shah. Saleem had since January 26, 1920, been suing in the Court of the District Judge at Delhi to establish

his legitimacy as son to Shahzada Mirza Souriya Jah of the Moghul dynasty, who had died in 1913 possessed of considerable property. Besides Saleem, Souriya had left him surviving two widows and two daughters. The Court of Wards had in 1913 taken over his whole estate as belonging to these female heirs, giving a compassionate allowance to Saleem as a temporary measure. It had been decided by the Chief Commissioner that the Court of Wards should not, upon its own responsibility, recognise Saleem as entitled to succeed to any portion of the estate, but that he should be invited to obtain the decision of a Civil Court, and informed that the Court of Wards would give all possible aid to the Civil Courts in order to arrive at an early decision with the least possible cost to the litigants. His application for a loan was not unnaturally refused by the Court of Wards; who gave him instead some inexperienced advice about bringing a friendly suit for a mere declaratory decree on a court-fee of ten rupees and about suing *in forma pauperis*. By June, 1919, he had approached a Muslim lawyer of Delhi by name Abdur Rahman. This gentleman was a *Khan Bahadur* and has since become a Knight and a Judge of the High Court of Madras. Having made an arrangement with Saleem to take a fee payable by monthly instalments of Rs. 100, he undertook the case and acted for Saleem throughout. On January 26, 1920, Saleem attempted to proceed *in forma pauperis* by filing an application under O. XXXIII, Civil P. C. containing the same particulars as a plaint. He impleaded the Court of Wards, his father's junior widow and daughter and the husband of a deceased daughter. The senior widow had died in 1919. Two Schs. (P-1 and P-2) were annexed to the application being lists of the movable and immovable property left by Souriya according to such information as Saleem had been able to obtain. P-2 comprised a considerable number of immovable properties, some of which had been held by Souriya as *jagirs* and were not heritable. The claim was for possession or administration of the whole movable and immovable property left by Souriya on the footing that by a family custom overriding the Muhammadan Law, Saleem as the only son was the sole heir. He asked for mesne profits, accounts and enquiries and other relief and valued his suit at ten lacs of rupees. The Court of Wards did not, however, fulfil the expectations which

it had held out as regards facilitating an early decision in a friendly and inexpensive suit. Mr. Modad Ali, its manager, opposed the grant of leave to sue *in forma pauperis* on a number of grounds, with the result that the Subordinate Judge on April 7, 1920, framed four issues and adjourned the case till August 3, 1920, for evidence and arguments on the question whether leave should be given. When August came, Saleem, despairing of progress along these lines, had got into touch with respondent No. 4, Alopi Parshad, who at that time (and until 1923) carried on business with the appellant, Ram Sarup, as money-lenders and bankers. Saleem succeeded in arranging that they should find the money to pay the court-fee (Rs. 3,000) so that his suit should proceed in the ordinary way and not *in forma pauperis*, and also that they should meet all the expenses of the litigation. Mr. Abdur Rahman on August 27, 1920, applied to the Court and obtained leave to put in the court-fee by October 4. The money was paid into the Treasury on October 2, and on October 8, the Court made an order treating the application made under O. XXXIII, as a plaint.

The agreement for finance (which is now sued upon) is a registered instrument dated October 2. It recites that Saleem had only an allowance of Rs 100 per month, that he had filed a case *in forma pauperis*, and that it could not be quickly or satisfactorily conducted in that way. A long list of immovable properties is attached to the agreement: it is said to be in the same terms as the list attached to the application under O. XXXIII. The agreement provides that the financiers, the present plaintiffs, should bear all the expenses of the case, and in return therefor, should get a three annas share of the immovable property recovered, provided that this should be increased to four annas should the case be taken on appeal to the Privy Council. It was to be in Saleem's option either (a) to have the property partitioned and give the plaintiffs their share, or (b) to have the property valued and pay the plaintiffs in cash.

It is not disputed that the plaintiffs carried out their part of the agreement, providing whatever money was required of them; such monies as had previously been raised by Saleem and paid to Mr. Abdur Rahman being refunded out of the sums provided by the plaintiffs.

The suit was decided by the Subordinate Judge on May 10, 1925. By his judgment

of that date he disposed of a large number of issues which had apparently been argued before him for sixteen days. He found that Saleem was the legitimate son of Souriya; that a document put forward as Souriya's will was not proved and was otherwise invalid; that the alleged family custom of succession excluding females was not proved; and that the succession to the property of Souriya was governed by the rules of Muhammadan Law, so that Saleem was entitled to a 14-32nds share and no more. As regards the immovable property of Souriya, he found that there was hardly any dispute, the Court of Wards having filed two lists at Saleem's instance; but the record before their Lordships in the present appeal does not enable them to say what properties were held to have descended to the heirs of Souriya. He found that the claim in respect of movables was barred by limitation except as regards any movables which came to the hands of the Court of Wards. He thought it unnecessary to direct accounts or administration as the property was under management by the Court of Wards, and he confined his decree to a direction in Saleem's favour "for possession of 14-32nds share of the estate of his late father." From this decree neither side, upon consideration, thought fit to bring an appeal.

In consequence of the decision, the Court of Wards on July 16, 1925, was placed in charge of Saleem's share with retrospective effect on the ground that he was a co-sharer with female wards. Soon afterwards, on September 17, 1925, Saleem died leaving a widow and a daughter (defendants Nos. 2 and 3 in the present suit). As neither these ladies nor the Court of Wards were willing to recognise the plaintiffs' claim under the agreement of October 2, 1920, the present suit was brought against them on October 16, 1928, asking for a decree for possession of 21-256ths share in the immovable properties belonging to Souriya's estate, and for partition thereof, as well as for mesne profits since May 10, 1925. The plaintiffs, Ram Sarup and Alopi Parshad, gave evidence and called on their behalf Mr. Abdur Rahman. For the defendants, Mr. Modad Ali, manager of the Court of Wards, Saleem's widow and a collateral relation of his called Nazir-ud-din were the main witnesses. The learned Subordinate Judge (October 30, 1935), held that the plaintiffs' claim being a claim for specific performance of an agreement was by virtue of Art. 113 of the Schedule to the Lim. Act of 1908

barred as having been brought in October, 1928, more than three years from the date of the decree of May 10, 1925. But he found in the plaintiffs' favour that Saleem was not of weak intellect, that the agreement of October, 1920, was executed by him of his own free will, and that the agreement was not unlawful nor opposed to public policy. The High Court on appeal (June 10, 1937,) reversed the trial Court's decision as to limitation, holding that time did not begin to run against the plaintiffs on the date of the decree of May 10, 1925, but only when the plaintiffs had notice that performance was refused. But the learned Judges having referred to the evidence as to Saleem's being given to drink and being of weak intellect held that it was "highly probable that Saleem Mohammad Shah was induced to enter into an unfair bargain whereby he agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees." They held that the agreement of October 2, 1920, was highly detrimental to his interest and was inequitable and unenforceable. They assessed the reasonable expenses of Saleem's suit at Rs. 8,440 and gave the plaintiffs a decree for that sum, refusing them any costs on the ground that the Court of Wards had offered Rs. 8,500 before the suit was filed.

Upon the question of limitation their Lordships agree with the High Court that Saleem's obligation under the agreement sued upon was not that on the same day as that on which the trial Court should give judgment he should get the property partitioned or valued and should transfer the plaintiffs' share of the lands or pay the plaintiffs the value thereof in cash. The May 10, 1925, cannot be regarded as the date fixed for the performance of the agreement of October 2, 1920.

On the merits, however, their Lordships consider that the High Court have taken an unduly unfavourable view of the agreement, which was neither extortionate nor inequitable. There is some dispute as to the amount of money found by the plaintiffs for the purposes of Saleem's suit. The plaintiffs produce four cheques amounting to Rs. 19,000 which were paid by them to Mr. Abdur Rahman and are dated August 23, 1920, (Rs. 5,000), January 13, 1921, (Rs. 500), February 21, 1921 (Rs. 10,000), and June 6, 1921, (Rs. 3,500). Both they and Mr. Abdur Rahman deposed that these cheques were all given for the expenses of the suit. The latter says that by January, 1920, he had

agreed with Saleem for an inclusive fee of Rs. 10,000 to be paid in monthly instalments of Rs. 100. The widow and Nazir-ud-Jin say that the fee agreed on was Rs. 2,000, but the trial Judge thought that there was "no reason to disbelieve the statement of Sir Abdur Rahman that his fee was Rs. 10,000." The learned Judges of the High Court do not say that they disbelieve the statement but express the opinion that a fee of Rs. 10,000 was highly excessive. The plaintiffs cannot be held responsible for fixing the fee, which had been settled before they were approached, and their Lordships think it sufficiently proved that the fee was paid by the plaintiffs. The learned Subordinate Judge was satisfied that "about Rs. 10,000 in all must have been spent on carrying on the litigation by the plaintiffs," but as there was a junior Counsel and some expense upon commissions to examine witnesses, it seems reasonably clear that the expenditure exceeded that figure by several thousands of rupees. According to Sir Abdur Rahman he got the money from the plaintiff's cheques and used it all for the suit; giving money to Saleem, who kept an account of his expenditure which he showed to Sir Abdur's clerk and himself when asking for more money. It seems quite probable therefore that the whole Rs. 19,000 was expended in this manner, and had the case gone on appeal to the High Court further moneys to a considerable amount might have become necessary. What then in the events that have happened has been the plaintiffs' reward? It is now admitted that, as the Court of Wards accounts show, the total value of Saleem's share of his father's estate is Rs. 88,753 of which three-sixteenths is Rs. 16,641. So that the plaintiffs have got a poor return for their venture if indeed they have not actually lost money by it. The trial Judge on a review of these matters held that the agreement sued on was neither unlawful nor opposed to public policy and their Lordships agree. The learned Judges of the High Court based a contrary opinion mainly upon the statement of Alop Parshad that he had seen the properties in Delhi which were mentioned in the agreement, and could approximately assess the value of those outside the city; and that he estimated the value of them all, including the *jagirs*, at about eight lacs of rupees. Mr. Modad Ali, the Court of Wards' manager, deposed: "The value of the property was fixed by the plaintiff (i. e. Saleem) as ten lacs in which he

claimed his own share, but the value of the whole property in fact was about three lacs." The learned Judges of the High Court taking three sixteenths of eight lacs as Rs. 1,50,000 say that by the agreement in suit Saleem "agreed to give up property worth a lac and fifty thousand rupees for a sum of ten or twelve thousand rupees." This, their Lordships think, is to mistake the business meaning of the transaction. Though the Court of Wards was not minded to accept Saleem as Souriya's legitimate son, he had, and was thought by his lawyer and by the plaintiffs to have, a good chance of establishing his legitimacy. Even so, he had certain difficulties to overcome, *e. g.*, as regards the alleged will of Souriya. But beyond that lay a great difficulty—that of proving a custom, in derogation of the rules of Muhammadan succession, whereby he could succeed to the whole estate. On this point he would indeed appear to have had little chance of success. To speak of the plaintiffs as though they were having three-sixteenths of eight lacs handed to them for ten or twelve thousand rupees is therefore a serious mistake. But in truth the figure of eight lacs refers in part to property which was not heritable at all, and takes no account of any mortgages or charges, still less of any question as to debts left by Souriya. The shrinkage in the value of Saleem's inheritance to the figure of Rs. 88,753 may be due in part to a fall in values not expected in October, 1920; but even that is not a contingency too remote to be taken into account by business men striking a bargain for the finance of a suit to recover immovable property. The High Court's conclusion appears to have been influenced by the evidence that Saleem was given to drink and of weak intellect. This they regard as rendering it "probable that he was induced to enter into an unfair bargain." But there is no evidence that the agreement sued upon was entered into by him while under the influence of drink and much to show that he took a long time to consider it, consulted with his wife and his lawyer and fully understood it. The evidence that he was of weak intellect is very thin indeed, and Sir Abdur Rahman denied this though he admitted that Saleem was occasionally intoxicated. The trial Judge had very correctly dealt with the evidence upon this aspect of the case and had found against the contentions of the defendants, which the High Court appear to have accepted on the ground that they were "highly prob-

able." The fairness of the agreement of October 2, 1920, must be considered independently of unproved suggestions that it may have been improperly obtained.

Champeritous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. Saleem was a poor man with a reasonable, and as it turned out, a just claim. He was put by the Court of Wards in the position of having to undertake expensive litigation. He was well justified in his own interest in resorting for finance to persons willing to take a risk; and the plaintiffs *prima facie* justified in helping him to his rights upon terms that they would share in his good fortune if he succeeded and lose their money if he failed. Not only is there no proof to support the suggestion that the agreement of October 2, 1920, was obtained by unfair means or was not fully considered by Saleem and freely accepted by him, but in the events which have happened it appears that, after taking all risks of the suit being unsuccessful, the plaintiffs notwithstanding that it succeeded are likely—to put it no higher—to gain little or nothing by the transaction. Had the suit succeeded in all respects, the plaintiffs' reward would doubtless have been high but Saleem would have become a rich man retaining thirteen annas in the rupee. In applying the principle that "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy." *Ram Coomarr Coondoo v. Chunder Canto Mookerjee* (1)], it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of

(1) 4 I A 23 at p. 47; 2 O 233; 3 Sar. 654 (P O),

litigation are proverbial; and if the financier must needs risk losing his money, he may well be allowed some chance of exceptional advantage. Their Lordships agree with the trial Judge in thinking that the agreement of October 2, 1920, is valid and binding.

The order to be made on this appeal should, in their Lordships' opinion, direct that the appeal be allowed, and the decree of the High Court dated March 18, 1937, set aside; declare that the agreement dated October 2, 1920, should be specifically performed; that the defendants should be permitted to elect whether to have a valuation of such of the properties mentioned in the said agreement as were recovered by Saleem Mahomed Shah in Suit No. 235/127 of 1920-22 in the Court of the Senior Subordinate Judge at Delhi and to pay three-sixteenths of such value to the plaintiffs, or to have a partition thereof; that the present suit should be remanded to the trial Court for further consideration in accordance with these directions and such other directions in that behalf as the High Court may think fit to give, having regard to the fact that some of the said properties are under management by the Court of Wards. Their Lordships will humbly advise His Majesty accordingly. The defendants must pay the plaintiffs' costs in the trial Court and in the High Court as also the appellant's costs of this appeal.

s.

Appeal allowed.

Solicitors for the Appellant:—Messrs. Lambert & White.

Solicitors for the Respondents:—*The Solicitors, India Office.*

PATNA HIGH COURT

Criminal Revision Petition No. 48
of 1939

February 13, 1939

AGARWALA, J.

NARSINGH SINGH AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Criminal trial—Evidence—Riot—Riot as result of party faction in village—Cause of trouble should be ascertained—Riot alleged as result of threats by accused to prevent complainant's servant from working for him—Threats, proof of—Hearsay evidence of complainant as to what his servant told him regarding threats—Admissibility of—Story of unjustified attack not supported by unambiguous and unimpeachable evidence—Value of.

In a case of riot which is the result of a party faction in a village where the evidence on either side is liable to be prejudiced, it is necessarily of

importance to ascertain the cause of the trouble [p. 595, col. 1.]

Where the prosecution allege that the riot was the result of the threats and attempts of the accused to prevent the servant of a complainant from working for his employer, the only way the prosecution can prove these threats is by the evidence of some one who heard them uttered. The hearsay evidence of the complainant with regard to what the servant told him that the accused persons had said, is inadmissible unless, possibly, it is impossible to secure the attendance of the servant. [p. 595, cols. 1 & 2.]

It is possible to believe a story of an apparently unjustified attack when it is supported by unambiguous and unimpeachable evidence. But when the evidence tendered is not of that description, it is unsafe to accept it unless it is supported by circumstances indicating its truth. Evidence of previous threat is evidence of such a nature. [p. 596, col. 2.]

Cr. R. P. against the order of the Sessions Judge, Bhagalpur, dated December 22, 1938.

Messrs. N. N. Sinha and S. S. Bose, for the Petitioners.

The Govt. Pleader, for the Opposite Party.

Order.—The petitioners have been convicted of rioting and assaults committed in prosecution of the common object of the rioters and sentenced to various terms of imprisonment. Their appeal against their convictions and sentences to the learned Sessions Judge was dismissed.

The case for the prosecution was that in village Bishunpur the Rajput inhabitants are divided into two hostile parties, one of them headed by the petitioner Dharam Narain Singh. The complainant Mahabir Singh formerly belonged to this party but has now gone over to the other side. According to the evidence of the complainant, the result of this was that attempts were made by the petitioners to prevent Babulal (his ploughman) from working for him and that the attempt to deter Babulal from doing so ultimately resulted in the riot which is the subject-matter of this prosecution. The story told by the complainant was that when he went to call his ploughman, Babulal, on the Sri Panchmi day, the latter refused to work alleging that the petitioners Dharam Narain Singh and Narsingh Singh had told him not to do so. He was ultimately persuaded to work on that day, however, but on the next day he again failed to turn up and when the complainant went to fetch him, Babulal is alleged to have said that he had been threatened by Dharam Narain Singh and Narsingh Singh if he worked for the complainant. Babulal is again said to have been persuaded by the com-

plainant to resume work but on the way they were met by the petitioners and an altercation ensued during which Babulal was abused and the petitioners stated that they would not allow him to go with the complainant. The complainant took hold of Babulal's hand and insisted upon taking him when the petitioner, Jagat Narain Singh, gave an order in consequence of which the other petitioners assaulted Mahabir Singh and two other persons on the prosecution side. Babulal was not examined at the trial although his name appeared in the list of prosecution witnesses to be examined and summons was actually served on him. But for the trial Court believing that Babulal was to be examined, it is difficult to understand how the complainant was allowed to make statements as to what Babulal was alleged to have told him about the threats which had been made by Dharam Narain Singh and Narsingh Singh if he continued his work for the complainant. When it was found that the prosecution were not producing Babulal as a witness, the defence moved the Court to examine him as a Court witness. It appears from a note on the petition that was filed for that purpose that the prosecution objected on the ground that he had been won over by the defence. The Court nevertheless directed Babulal to be summoned as a Court witness, but the summons was not served. The report of the process-server was that he had gone to the house of Babulal and not finding him there had affixed the summons to the house. No further attempt was made to secure the attendance of Babulal. The Courts below have justified the conviction on the ground that apart from the evidence of Babulal there was sufficient evidence to sustain the conviction in spite of the fact that the trial Court found it necessary to reject the greater part of the evidence adduced by the prosecution on the ground that it was partisan evidence.

In a case of this description which is the result of a party faction in a village where the evidence on either side is liable to be prejudiced, it is necessarily of importance to ascertain the cause of the trouble. Now, the prosecution alleged that the cause of the riot under investigation was that in spite of the threats and attempts of the petitioners to prevent Babulal from working for his employer, the latter was actually about to do so when he was obstructed by the petitioners and

Mahabir Singh and his companions were assaulted. The genesis of the riot therefore was the threat by the petitioners to Babulal and the success of the latter's employer in persuading him to ignore the threats. The only way the prosecution could prove these threats was by the evidence of some one who heard them uttered and there is no indication that anybody heard these threats except Babulal himself. He therefore was the only person competent to prove them. The hearsay evidence of the complainant with regard to what Babulal told him that the accused persons had said was inadmissible unless, possibly, it was impossible to secure the attendance of Babulal. The process-server's report does not indicate that it was impossible to secure Babulal's attendance. The mere fact that the latter was not at his home when the process-server visited, it is insufficient material from which to draw an inference that Babulal had permanently disappeared or that he was avoiding the service of summons. In my view, therefore, the complainant's evidence with regard to the threats said to have been held out by the petitioners prior to the occurrence was inadmissible.

The learned Govt. Pleader, however, referred to the evidence of the complainant with regard to what took place at the time of the occurrence. After stating what Babulal was alleged to have said to him with regard to the threats he (the complainant) went on to say that he persuaded Babulal to accompany him and they stated:

"When we had gone to the south of Laldhari's house, the accused surrounded me, Narsingh Singh and Dharam Narain Singh abused Babulal, I protested. There was altercation between us as they said that they would not allow Babulal to go and I insisted on taking him with me. I caught hold of Babulal and wanted to take him away forcibly. Jagat Singh ordered and Narsingh hurled his *pharsa* at me."

In this passage we have direct evidence that Narsingh and Dharam objected to Babulal going to the complainant on the day of the occurrence. But this evidence does not indicate whether Babulal was willing to go with the complainant or whether it was his desire to refrain from doing so. The fact that the complainant caught hold of Babulal to take him away forcibly, as he says, may indicate that Babulal was undecided what to do or it may, on the other hand, indicate that the complainant caught hold of him merely to prevent his being detained by the accused. In any case, the best evidence on that point would have

been the evidence of Babulal himself and in a case like this where the evidence was mainly of a partisan nature, it is regrettable that a more serious attempt was not made to procure that evidence. Section 540, Criminal P. C., provides :

"Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case."

It is manifestly therefore the duty of the Court to summon and examine any person whose evidence the Court considers essential to the just decision of the case. It cannot be denied that in the present proceedings the evidence of Babulal was essential and the Court itself recognized that by directing summons to be issued to him, the Court should have been vigilant to satisfy itself that a real attempt was made to serve the summons on Babulal or to take further steps to secure his attendance. Its omission to do so has resulted in the admission of inadmissible evidence and the absence from the record of the best possible evidence of Babulal's attitude when the petitioners endeavoured to detain him from accompanying his employer. The explanation which the Magistrate has given to this Court is extremely unsatisfactory. It is as follows:

"On March 23, 1935, the accused filed a petition that Babulal should be examined as a Court witness which was allowed and summonses were issued against him but he could not be found. Thereafter the defence did not apply for enforcing his attendance."

It was not on March 23, but on May 23, that the accused filed a petition for the examination of Babulal. There is no order in the order-sheet either on March 23, or on May 23, or on any other date to indicate that this petition was filed or what the Court's order was with regard to it or why the Court did not take further steps to secure his attendance. All that can be found in the record is the order on the petition itself that Babulal should be summoned as a Court witness and the process-server's report on the back of the summons which I have already referred to above. That report so far from showing that Babulal could not be found merely showed that no attempt was made to find him. The Magistrate's remark that the defence did not apply for enforcing his attendance is entirely beside the point. It was the duty of the Court to secure the attendance of

this important witness. The Magistrate goes on to say that

"Babulal's evidence could at best have been partisan evidence. Reliance has been placed for proof of the common object on very much superior evidence."

What is meant by this ambiguous statement I am unable to understand. If the Magistrate meant that Babulal would have deposed for the prosecution regardless of the true facts that idea is negated by the prosecution's attitude towards him. As I have already stated, when the accused applied for Babulal to be examined the prosecution stated that he had been gained over by the defence. If, however, the Magistrate meant that Babulal would have deposed in favour of the defence regardless of the truth, it seems difficult to believe that the petitioners had behaved towards Babulal in the manner alleged by the prosecution, namely that they at first threatened him if he continued working for his employer and then forcibly attempted to prevent him from doing so. In the circumstances I am far from satisfied with the manner in which the trial was conducted and in the absence of the evidence of Babulal do not feel justified in accepting the view taken by the Courts below that there is sufficient reliable evidence to sustain the convictions. Without evidence as to the preceding threat, the bald prosecution case is that for no apparent reason the petitioners suddenly appeared and forcibly attempted to prevent Babulal from accompanying his employer. It is possible to believe a story of an apparently unjustified attack when it is supported by unambiguous and unimpeachable evidence. But when the evidence tendered is not of that description, it is unsafe to accept it unless it is supported by circumstances indicating its truth. Evidence of previous threat is evidence of such a nature. It is missing in the present case. The result is that the Rule is made absolute and the petitioners are acquitted and their conviction and sentences are set aside.

S.

Rule made absolute.

ALLAHABAD HIGH COURT

Execution Second Appeal No. 488 of 1937

July 25, 1939

BENNET AND VERMA, JJ.

RAI INDRA NARAIN—OBJECTOR—

APPELLANT

versus

MOHAMMAD ISMAIL—OPPOSITE PARTY

AND OTHERS—OBJECTORS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 100 (as amended by s. 50 of Act XX of 1929), ss. 5, 2 (d)—S. 50 of Amending Act is retrospective—"Transfer" in s. 100, if includes auction sale or auction-purchasers.

The amendment of s. 100, T. P. Act in s. 50 of Act X of 1929 is in a section which is not mentioned by s. 63 of that Act as not retrospective and therefore s. 50 of the Amending Act which amended s. 100, T. P. Act is retrospective.

The word "transfer" in s. 100 as amended must be read as defined in s. 5. This definition cannot include an auction-purchaser as he is not a person to whom the judgment-debtor has conveyed his property. Section 100, as amended, does not therefore refer to auction sales or auction-purchasers. Therefore an auction-purchaser is not protected by s. 100.

Ex. S. A. from the decision of the District Judge, Aligarh, dated December 10, 1936.

Mr. B. Malik, for the Appellant.

Bennet, J.—This is an execution second appeal brought by R. B. Rai Indra Narain who objected to the execution of a decree by the decree-holder Mohammad Ismail and the objection was dismissed by the execution Court and that order was confirmed by the lower Appellate Court. The facts are that on June 12, 1913, there was a compromise decree granted to the respondent Mohammad Ismail by which he was to get Rs. 10 per mensem from his relatives and this sum was to be a charge on the property. Mohammad Ismail several times put his decree in execution and recovered his maintenance allowance. On May 20, 1933, the appellant Indra Narain purchased this property at an auction sale on a decree against the owners Irshad Ali and Masum Ali who were apparently the persons liable under the decree of Mohammad Ismail or their descendants. The objection is that the auction-purchaser had no knowledge of the charge and that he was a *bona fide* purchaser for value. Learned Counsel for the auction-purchaser-appellant claims that his client is protected by the amendment of the T. P. Act, s. 100, which was made by s. 50 of the Amending Act (Act XX of 1929). This section deals with charges and the amendment provides:

"save as otherwise expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to

whom such property has been transferred for consideration and without notice of the charge."

The execution Court wrongly held that this amendment did not have retrospective effect but the amendment in s. 50 of Act XX of 1929 is in a section which is not mentioned by s. 63 of that Act as not retrospective and therefore s. 50 is retrospective.

The lower Appellate Court pointed out that the execution Court was wrong in this respect but the lower Appellate Court considered that the rule of *lis pendens* laid down in s. 52, T. P. Act, would apply against the appellant. It is difficult to see exactly what the lower Appellate Court meant as the decree on which Mohammad Ismail relies was of June 12, 1913, and the matter has now arisen long subsequent to that decree, so there is no question of a transfer while litigation was pending. We cannot therefore justify the order of the lower Court on the ground set forth by that Court. But it seems to us that the appellant is incorrect in relying on s. 100 as amended. The appellant is an auction-purchaser and the amendment is in regard to "any property in the hands of a person to whom such property has been transferred for consideration." Now it appears to us that the word "transfer" must be read as defined in s. 5. Section 5 states: "In the following sections 'Transfer of Property' means an Act by which a living person conveys property....." This definition cannot include an auction-purchaser as he is not a person to whom the judgment-debtor has conveyed his property. An auction-purchaser is a person who has acquired the right, title and interests of the judgment-debtor by the order of the Court. In s. 2, sub-s. (d), it is stated:

"But nothing herein contained shall be deemed to affect (d) save as provided by s. 57 and Chap. IV of this Act any transfer by operation of law or by or in execution of a decree or order of a Court of competent jurisdiction."

When we turn to s. 57, we find that there is a definite mention of property sold in execution of a decree and the word "transfer" is not used. In Chap. IV no doubt s. 100 is one of the sections but it does not refer to auction sales. There were certain sections, Nos. 85 to 90, in the original Chap. IV which contained provisions for auction sale. Doubtless the reference in s. 2 (d), T. P. Act, to Chap. IV is to these particular provisions in s. 85 to s. 90. As s. 2 (d) clearly provides that nothing in the Act shall apply to any transfer in execution of a decree other than so provided in

Chap. IV it is clear that s. 100 as amended does not refer to auction sales or auction-purchasers. No ruling has been produced by learned Counsel for the appellant to support his claim that his client was protected by s. 100 as amended. The rulings cited are all previous to the amendment of s. 100 and it is not necessary to consider them. For these reasons, we dismiss this second appeal. No costs are granted as no one appears for the other side in this appeal.

s.

*Appeal dismissed.***PATNA HIGH COURT**

Criminal Revision No. 544 of 1939

November 27, 1939

DHAVLE, J.

RAM BILAS SHARMA AND OTHERS—
PETITIONERS

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 499, 514, 537, 439—Bail—Surety—Conditions on which accused was released not forming part of bail bond—Surety, however, signing order-sheet containing terms—Whether form part of bond—Procedure under s. 514 not followed—Facts not showing failure of justice—Interference in revision.

Where although the conditions imposed on the accused before releasing him on bail do not form part of the bail bond executed by the surety, yet if the surety has signed the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds, the order-sheet with the surety's signatures itself becomes a part of the contract between the parties.

Where the Magistrate has failed to follow the procedure under s. 514, Criminal P. O., in holding the surety to his bond without calling upon him to show cause why the penalty should not be paid, although such an omission is not justifiable, yet if the facts show that such an omission has not occasioned any failure of justice it is sufficient to prevent interference in revision.

Cr. R. against an order of the Sub-Divisional Magistrate of Monghyr, dated July 19, 1939.

Mr. G. P. Shahi, for the Petitioners.

The Assistant Govt. Advocate, for the Crown.

Judgment.—The petitioners stood bail for certain persons accused of offences under ss. 143 and 447 of the I. P. O. Before accepting the bail bonds into which they entered, the learned Magistrate who took the bonds made it clear that the release of the accused persons was to be conditional. The Court Sub-Inspector had prayed that the bailors' fitness might

be enquired into, and the Magistrate did not consider this necessary, especially when the bailors were substantial people. As regards the conditional release of the accused persons he added.

"The bailors undertake before me orally that they would keep the accused in Monghyr so that they may neither re-join the Satyagraha at Lagar nor do they instigate others to join or carry on the movement there. I accept their undertaking on the distinct understanding that if any report is received showing contravention of this undertaking, I will at once cancel the bail and forfeit the bail amount. On this condition I accept the bail bond and order the release of the three accused on bail at once."

This was a part of the order passed by the Magistrate on July 7, 1939, and was signed in the margin by the bailors, the petitioners before me. On the 19th of the same month the Magistrate appears to have received a report from the Police saying that two of the accused persons had been to Gogri and had made arrangements for volunteers to be sent in batches to Lagar to offer Satyagraha.

He thus found that the undertaking given by the bailors had been violated "as the accused themselves say that they had gone to Gogri", and he cancelled the bail bonds of those two accused persons and also forfeited the bail amount of Rs. 200 of the bailors. He further directed the issue of distress warrants at once for realization of the amounts.

On July 24, the petitioners applied to the Magistrate and prayed for being exempted "from the liability of paying penalty". The application was apparently rested on the ground that the petitioners "executed the bail bond in which there was nothing regarding the accused persons not going anywhere, that is, in ordinary course of business the bail bond had been executed", though in the next paragraph of the applicant it was said "of course in the order-sheet mention of the fact was made that the accused persons should 'not go to Lagar and take any part, etc.'" In the next paragraph it was stated that it appeared that Suresh Chandra Misra (one of the accused persons) went to Bihpur and thence to Gogri and met the Inspector of Police who asked him to go back to Monghyr and he at once came to Monghyr and surrendered before the Court and admitted his mistakes in leaving Monghyr on some economical grounds. The learned Magistrate refused the application of the petitioners and noted that "the conditions were explained to the bailors in

Court and the latter put in their signatures in the order-sheet."

Against the dismissal of the petitioners' application of July 24, to the Sub-Divisional Magistrate, an appeal was preferred to the District Magistrate. The argument in the appeal appears to have been that the bail bonds did not contain the conditions imposed by the Sub-Divisional Magistrate, and that, therefore, the bail could not be forfeited for breach of those conditions. The learned District Magistrate dismissed this as a "merely technical argument to wriggle out of the situation". He dismissed the appeal.

It has been contended by Mr. Shahi, who appears for the petitioners, that the procedure followed by the Sub-Divisional Magistrate, in holding the petitioners to their bond was wrong and that the petitioners should have been heard before the order of forfeiture was passed. This contention must clearly be accepted.

The learned Advocate has further contended that the conditions which I have quoted from the order-sheet of the Magistrate form no part of the contract of bail and that the liability of the petitioners must be determined on the terms of the bail bonds themselves. But if it be a fact that the petitioners signed the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds, the 'order-sheet with the petitioners' signatures itself becomes a part of the contract between the parties. If a contract is required to be in writing, it is not the law that it must be contained in one piece of writing alone and the full terms of contracts in writing have often to be gathered from a series of letters passing between the parties put together. I am, therefore, unable to accept the petitioner's contention that their liability is confined to the bail bonds alone, and I hold that bail was accepted, as the Magistrate put it in his order of July 7, "on the distinct understanding that if any report is received showing contravention of this undertaking I will at once cancel the bail and forfeit the bail amount."

This is a case where the Magistrate concerned undoubtedly failed to follow the appropriate procedure under s. 514 in that he held the petitioners to their bonds without calling upon them to show cause why the penalty should not be paid. But it is also a case where there is no real dispute about the facts. In fact, the only

point mooted below was that the "distinct understanding" was no part of the contract of bail, and this, as I have already held, is quite untenable. It was suggested by Mr Shahi that there is no proof that the signatures against the Magistrate's order of July 7, which purport to be the signatures of the petitioners were in fact made by them. But the answer to this is furnished by what the Magistrate has said in his order of July 31, on the petitioners' application of the 24th of that month and by the failure of the petitioners to challenge it in appeal. There is also no question that the Magistrate did receive a report on July 19, regarding the doings of at least one of the accused persons for whom the petitioners had stood bail, nor indeed about the doings of that accused contrary to the conditions imposed by the Magistrate before agreeing to accept bail.

Section 537 of the Criminal P. O. provides (to quote those portions which are now material) that

"no order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any error, omission or irregularity in any enquiry or other proceedings under this Code unless such error, omission, irregularity has occasioned a failure of justice."

It seems to me quite clear that this is sufficient in the circumstances of this case to prevent interference in revision, though it must not be understood that this is in any sense an approval of the carelessness shown by the Magistrate in his proceeding under s. 514.

The application is dismissed.

s. *Application dismissed.*

LAHORE HIGH COURT

Second Appeal No. 394 of 1938

May 5, 1939

MONROE, J.

KANSHI RAM—DEFENDANT—APPELLANT
versus

MRS. OWEN ROBERTS—PLAINTIFF—
RESPONDENT

Tort—Negligence—What is—Ordinary, prudent and reasonable man is not required to drive on assumption that he shall meet obstruction on highway—Issue whether driver's negligence was cause of accident, is one of fact.

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. The ordinary, "prudent and reasonable man is not required to drive on the assumption that he will

meet with improper obstructions on the highway. Merely because the ordinary man knows that at times others unlawfully place obstacles on the highway, drive at a furious pace, turn across the road without giving the recognized sign, he is not to be penalized, when he is behaving as a reasonable and prudent man would [p. 602, col. 1.]

The question of contributory negligence is one of fact.

The issue whether the driver's negligence was the cause of the accident can be treated as a question of fact. *Tart v. G. W. Chitty & Co.* (1), and *Baker v. R. Longhurst & Sons Ltd.* (2), not followed. *Tidy v. Battman* (4), and *Griffiths v. East & West India Dock Co.* (5), relied on.

S. A. from the decree of the Additional District Judge, Lahore, dated March 31, 1938.

Mr. J. G. Sethi and Diwan Mehr Chand, for the Appellant.

Mr. Ishwar Das Khanna, for the Respondent.

Judgment.— This is a second appeal from the judgment of the Additional District Judge, Lahore, upholding the judgment of the trial Judge in favour of the plaintiff except on the amount of damages. The plaintiff sued the defendant for damages for the defendant's negligence in leaving a steam-roller on the Mall, Lahore, unlighted, with which the plaintiff's car collided. The defendant pleaded that the driver of the car was exclusively to blame for the accident by reason of his rash and negligent driving, that there was no obstruction caused by the steam-roller, that the steam-roller was lighted and that a *chaukidar* was present: admitting the presence of the steam-roller on the left-hand side of the roadway, the defendant pleaded further, that he did all in his power to warn approaching traffic. Amongst the issues framed were the following:

(1) Whether there was no *chaukidar* and proper lights on the steam-roller on the highway and this led to the collision.

(2) Whether the collision was due to the negligence and rash driving of the person driving the car.

The learned trial Judge found on the first of these issues that the steam-roller was on the left side of the road midway between two lamp posts, where the light was dim, and under a *pipal* tree. He refused to accept the evidence for the defendant that after a break-down the steam-roller had been moved to the extreme left of the roadway. He found also that there was no *chaukidar*, and no light on the steam-roller. He found also that the impact took place on account of the negligence of the defendant and his servant. He did not discuss the second of the issues set out above

separately; he referred to his discussion on Issue No. 1. There was no issue on the question of contributory negligence as such: such an issue did not arise on the pleadings: the defendant's case throughout both in his pleadings and evidence was that on his part there had been no negligence. The notice of appeal to the District Judge re-asserts the same position which is summed up in para. 5:

"It is sufficiently proved that there was a *chaukidar* and a proper light on the spot and that the alleged impact was due to the gross negligence and carelessness and rash driving on the part of the driver of the car."

The two questions argued before the learned District Judge were whether the damage to the plaintiff's car was the result of the negligence of the defendant's servant and what damage had been suffered. The learned District Judge accepted Mr. Wilson's evidence. Mr. Wilson who was driving a car in the opposite direction saw the accident. Earlier he had driven in the other direction and himself narrowly escaped driving into the steam-roller. His evidence shows that the steam-roller in such a position was in the nature of a trap. There is no evidence to show that the speed of the car was excessive. The main ground of appeal to this Court is stated thus:

"When the learned District Judge held that it may be that the sidelights of Mr. Wilson's car were contributing to prevent the driver from seeing the steam-roller, he ought not to have held that the damage to the plaintiff's car was due to the negligence of the servant of the defendant."

It is clear that such a finding would not relieve the defendant of liability for his negligence, if his negligence caused the accident and there was no contributory negligence on the part of the driver. In the arguments before me, the learned Counsel for the defendant introduced a new line of argument altogether. He was confined to questions of law, and with a finding of fact against him on the question of negligence and no finding of contributory negligence in his favour, he was compelled to argue that on the plaintiff's case, it was not open to the Judge to find for the plaintiff, i. e., that if the case had been tried by a jury, the question of contributory negligence would not have been left to the jury. The argument was based on two English cases, *Tart v. G. W. Chitty & Co.* (1) and *Baker v. R. Longhurst & Sons, Ltd.* (2) In both these cases the negligence of the defendants consisted in having vehicles on the road

(1) (1933) 2 K B 453; 102 L J K B 568; 149 L T 261.

(2) (1933) K B 461; 102 L J K B 573; 149 L T 264.

without rear lights; in the former case the vehicle was a steam-lorry and in the latter a horse and cart; in both cases the plaintiffs riding motor-bicycles, rode into the unlighted vehicle from behind. The Appellate Courts held in both cases that the trial Courts were bound to find the plaintiffs guilty of contributory negligence. In the second case *Scrutton, L. J.* said:

"Either he (the plaintiff) was going at a pace at which he could not stop within the limits of his vision, or, if he could stop within the limits of his vision, he was not looking out. In either event he was guilty of negligence."

In *Tart v. G. W. Chitty & Co. (1)*, Swift, J. said:

"Here, to my mind, it is perfectly clear, however wrongly and improperly the defendants acted in putting their steam lorry in the place where it was, the plaintiff might by the exercise of ordinary care have avoided the collision, and he must therefore have failed to exercise ordinary care, and, as a matter of law, was guilty of negligence and such negligence should have been found as a matter of law on those facts by the County Court Judge."

Now it has never, so far as I am aware, been suggested that the issue of negligence is a question of law: but the cases cited above make it possible, if the facts are disclosed in the plaintiff's case, to treat the question of contributory negligence as one of law. The most obvious criticism of this view is that at the same time the defendant might be relying on the same facts as evidence of negligence on the part of the plaintiff, in England in a counter-claim, in the Punjab in a suit consolidated with the original suit and the issue whether the plaintiff was guilty of negligence would have to be treated as a question of fact. The leading authority on the question of contributory negligence is *Dublin, Wicklow and Wexford Railway Co. v. Slattery (3)*. Four of the majority of five Lords of appeal expressed themselves clearly on this point: Lord O'Hagan said:

"The questions raised at the trial were questions of fact only. first whether the defendants had been guilty of negligence and secondly, whether contributory negligence could be ascribed properly to the unfortunate person, who lost his life."

Lord Hatherley was the member of the Court on whose judgment, it may be said the proposition that the issue of contributory negligence might, in certain circumstances, be treated as a question of law, is based. His view is put shortly in the following passage:

"If such contributory negligence be admitted by the plaintiff or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact."

Lord Hatherley's dictum has been discussed and applied in several later cases, but until the decisions of 1933 were pronounced, it had not been applied in any case in which "the relation of cause and effect between the plaintiff's negligence and the injuries complained of was not clear." In the most recent decision of the Court of Appeal in England, *Tidy v. Battman (4)*, the principle enunciated in *Baker v. E. Longhurst & Sons, Ltd. (2)* and *Tart v. G. W. Chitty & Co. (1)*, was not accepted by the Court, which consisted of Lord Hewart, Lord Wright and Lord Justice Slesser. In very short judgments the three learned Judges, dealing with facts stronger in the defendant's favour, if anything, than those in *Baker v. E. Longhurst & Sons, Ltd. (2)*, laid down very emphatically that the issue of contributory negligence was a question of fact. It may be that, notwithstanding the general rule, there are cases where the relation of cause and effect is so clear that the Court might hold on the plaintiff's evidence that there was no question for the jury: as Lord Esher said in *Griffiths v. East and West India Dock Co. (5)*:

"The question of contributory negligence ought never to be withdrawn from the consideration of a jury except in a very extreme case but, when the evidence was so strong that it would be wholly unreasonable for the jury to find otherwise than that the plaintiff had been guilty of contributory negligence, then it was the duty of the Court to stop the case."

In ascertaining whether in a particular case "it is wholly unreasonable to find otherwise," it is essential to remember what is the test of negligence and, so far as I can see, it is because *Scrutton, L. J.*'s dictum which seems so simple and logical, ignores the test, that it fails to be useful. In the first place, whether an act is negligent or not depends on all the surrounding circumstances the dictum seems to me to ignore the surrounding circumstances in *Evans v. Downer & Co., Ltd.*, which is summarized in a note to the report in *Baker v. E. Longhurst & Sons, Ltd. (2)*, it was said: "In the peculiar circumstances of this case, there was just enough evidence to support the jury's verdict;" curiously enough the peculiar circumstances in that case were not unlike the circumstances of the present case—the vision of the driver was impeded by the approaching lights of a third vehicle. The chief objection to the dictum is that it sets up perfection on the part of the driver as the standard: the law does not require so high a standard

(3) (1878) 3 A C 1155; 39 L T 365; 27 WR 191.

(4) (1934) 1 KB 319; 103 L J KB 158; 150 L T 90.
(5) (1889) 5 T L R 371.

of conduct. "Negligence," said Baron Alderson in *Blyth v. Birmingham Water Works Co.* (6).

"is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing sometimes which a prudent and reasonable man would not do"

The ordinary prudent and reasonable man is not required to drive on the assumption that he will meet with improper obstructions on the highway: because the ordinary man knows that at times others unlawfully place obstacles on the highway, drive at a furious pace, turn across the road without giving the recognised sign, is he to be penalized, though he is behaving as a reasonable and prudent man would? An affirmative answer would encourage the real law-breaker.

I may conclude this discussion by a brief reference to an American case. In some of the American Courts [e.g., see *Stone v. Muller* (7).] the doctrine of *Scrutton, L. J.* is applied; the Rule is there called the "drive within radius of your lights rule." Other Courts in America hold that the question to be determined in such cases as the present is whether the driver should have seen the obstruction. In the judgment in *Morehouse v. City of Everett* (8), the following passage occurs:

"The rule contended for is, in our opinion, entirely too broad, and if put in effect, would have very serious and unjust results. It loses sight of the fact that one driving at night has at least some right to assume that the road ahead of him is safe for travel, unless dangers therein are indicated by the presence of red lights; it does not take into consideration that visibility is different in different atmospheres;"

and though in that case the driver had driven his car into a very large obstruction, a wooden dwelling-house which occupied practically the whole breadth of the roadway, the Court held that the driver was not guilty of contributory negligence as a matter of law and that the question had been properly left to the jury. I have no doubt that, in the case now before me, the issue whether the driver's negligence was the cause of the accident was properly treated as a question of fact. There was, in my opinion, ample evidence to support the finding that the driver was not guilty of contributory negligence, and, indeed if the question were open to me for decision, I should so find. No attempt was made to show that the speed of the car was excessive and owing to the position on the road in which the steam-

roller was left, it created a trap for the driver. I find no reason for interfering with the amount of damages awarded. Again, I have the power to interfere only, if a question of law is involved. The evidence of the amount of damage is sufficient to support the findings. I dismiss the appeal with costs.

D.

Appeal dismissed.

PATNA HIGH COURT

Letters Patent Appeal No. 11 of 1938

April 27, 1939

HARRIES, C. J. AND WOERT, J.

HARIHAR DORA AND OTHERS

—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

UPENDRA PATI—PLAINTIFF AND ANOTHER—

DEFENDANT NO. 4—RESPONDENTS

O. P. Land Revenue Act (XVIII of 1881), ss. 33, 152—Jurisdiction of Civil Court—Lambardar co-sharer paying land revenue on behalf of co-sharers as zabti bhogra—Suit to recover such amount from co-sharers—Civil Court, if can entertain—Land tenure—Zabti bhogra—Assessment of—If can be challenged in civil suit.

For a case to come under cl. (10) of s. 152, O. P. Land Revenue Act, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of arrears of revenue. [p 604, col 1.]

Where a *lambardar* co-sharer pays the whole of the revenue and brings a suit against other co-sharers to recover the amount paid by him on their behalf as *zabti bhogra*, the cause of action does not arise out of the collection or anything connected with the collection but rather from a payment made to the defendants' use and in view of s. 33 which presupposes that the Civil Courts have jurisdiction to hear suits by *lambardars* for arrears of revenue payable through them by the proprietors whom they represent, such a suit does not fall within s. 152 (b) (10). Such a claim is one under s. 69, Contract Act, and the Civil Court has jurisdiction to entertain it.

Once the assessment is made and left unchallenged, it becomes binding upon the co-sharers' *gaontias*. When no steps are taken to contest the assessment made at the time of the settlement, it cannot be challenged in a civil suit and a partition among the co-sharer *gaontias* does not put an end to the liability for *zabti bhogra*. [p 603, col 2.]

L. P. A. from decision of Mohammad Noor, J., dated May 4, 1938.

Mr. P. Misra, for the Appellant.

Messrs. S. C. Mazumdar and G. C. Das, for the Respondents.

Harries, C. J.—This is a Letters Patent Appeal from a decision of Mohammad Noor, J. in second appeal. The plaintiff brought the suit out of which this appeal arises against his co-sharer *gaontias* for a sum said to be due as arrears of *zabti bhogra*. The plaintiff was a co-sharer *gaontia* and *lambardar*

(6) (1856) 11 Ex 781; 25 L J Ex. 212; 2 Jur (N S) 333; 4 W R 294.

(7) 257 Massachusetts 344.

(8) 141 Washington 399.

of village Kharmunda, whereas the defendants were his co-sharer *gaontias*. In Govt. *khalsa* villages in the Sambalpur District, there are *gaontias* who are village managers having proprietary rights in their homefarm lands. These lands are called the *gaontia's bhogra* or *sir* lands. The co-sharer *gaontias* are allowed 25 per cent. of the collections of the village as payment for their duties as managers of the village, and they are bound to make over the balance of the collections through the *lambardar* to the Govt. The *bhogra* lands of each *gaontia* are assessed to revenue, and if the revenue payable on a particular *gaontia's bhogra* lands is equal to that particular *gaontia's* share in the 25 per cent. of the total village collections, then the *gaontia* has to pay over the whole of the collections made to the *lambardar*. If the assessment on the *bhogra* lands is more than that particular *gaontia's* share in the 25 per cent. of the collections, the *gaontia* has to pay the *lambardar* not only the whole of the collections made but the difference between the amount assessed on his *bhogra* lands and his share of the 25 per cent. of the total village collections. On the other hand, if the assessment on the *bhogra* lands is less than his share of the 25 per cent. of the village collections, the *gaontia* is entitled to deduct from the collections made the difference between his share of the 25 per cent. of the village collections and the assessment on his *bhogra* lands. He, of course, has to pay the balance over to the *lambardar*. In cases where the assessment on the *bhogra* lands is greater than the *gaontia's* share of the 25 per cent. of the total collections, the difference is known as *zabti bhogra*. Where the *gaontia* is entitled to keep back money out of his collections to make up the difference between his share in 25 per cent. of the collections and the assessment on his *bhogra* lands, the amount which he is entitled to keep back is known as *purskar*.

In the present case the defendant's share in the village was five annas four pies, and in lieu of this share, they were admittedly holding a hamlet of the village Kharmunda known as Darangapali. *Zabti bhogra* payable by the defendants was assessed at Rs. 52 per annum. According to the plaintiff's case, he as *lambardar* had paid the whole of the revenue due from the *gaontias* to the Govt. and, according to him, the defendants had refused to pay the amount claimed in this suit as *zabti bhogra*. The learned Munsif who heard the

case at first instance, dismissed the plaintiff's claim for *zabti bhogra* but on appeal this decree was reserved, and the plaintiff's claim decreed. In second appeal Mohammad Noor, J. affirmed the decree of the lower Apoellate Court and dismissed the appeal. It has been argued before us that the amount of *zabti bhogra* alleged to be payable by the defendants was not satisfactorily proved in this case. The lower Courts relied upon a document (Ex. 1) which is a table showing the *zabti* and *puraskar* lands of village Kharmunda. It is said that this document is not part of the Record of Rights, and accordingly it does not prove the amount payable by the defendants as *zabti bhogra*. This point does not appear to have been made in any previous hearing, and from a perusal of the judgment of the learned Munsif and of the learned Subordinate Judge, it is clear that the defendants never challenged the fact that *zabti bhogra* at the rate of Rs. 52 per annum was assessed on the defendants' lands. The defendants contended that they had never paid this sum and that the assessment was excessive, but that those contentions are very different from the contention now put forward, namely that the amount assessed on these lands was never proved. It is clear that in the Courts below it was admitted that the assessment amounted to Rs. 52 per annum, and that what was challenged was the legality of the assessment.

In my judgment, it is not open to the defendants to challenge the validity of the assessment of *zabti bhogra* in the Civil Court. Such was assessed at the time of settlement and steps should then have been taken to contest the assessment. Once the assessment was made and left unchallenged, it became binding upon the defendants, and they cannot in a suit, such as the present one, challenge the validity of that assessment. The defendants also alleged that this village had been partitioned in the year 1885 and that this partition put an end to any liability which may have existed for the payment of *zabti bhogra*. I entirely fail to appreciate how a partition could put an end to such a liability; in any event the *zabti bhogra* of Rs. 52 per annum was assessed on the defendants' *bhogra* lands as late as the year 1927, that is 42 years after the partition. In those circumstances, it cannot possibly be said that the partition has in any way affected the defendants' liability to pay *zabti bhogra*. It was contended before Mohammad Noor, J., and has

again been contended before us that the Civil Courts had no jurisdiction to entertain this suit. Reliance is placed on s. 152 (b) (10), C. P. Land Revenue Act, (Act XVIII of 1881). The relevant portion of that section is in these terms :

"Except as otherwise hereinbefore provided, (a) no Civil Court shall entertain any suit instituted, or application made, to obtain a decision or order on any matter which the Governor-General in Council the Chief Commissioner or a Revenue or a Settlement Officer is, by this Act, empowered to determine or dispose of; and in particular (b) no Civil Court shall exercise jurisdiction over any of the following matter:—

(10) claims connected with, or arising out of the collection of revenue, or any process enforced on account of an arrear of revenue, or on account of any sum which is under this or any other Act realizable as revenue."

According to the appellants, this is a claim connected with or arising out of the collection of revenue and hence no Civil Court has jurisdiction to decide it. The claim, it is said, is a claim for *zabti bhogra*, that is a claim for a form of revenue. It must be remembered that in this case the plaintiff-respondent as *lambardar* had paid the whole of the revenue due, and this claim was for the amount which the defendants should have paid the plaintiff as *zabti bhogra*. The plaintiff had in fact paid this sum to the Govt. on the defendants' behalf, and in this suit he was claiming from the defendants money which he had paid to their use. The defendant-appellants have to concede that this claim is not a claim to recover an amount due as revenue, but they urge it is a claim connected with or arising out of the collection of revenue. Claims connected with or arising out of the collection of revenue must be claims which have arisen through actual collection. It is to be observed that cl. (10), deals not only with claims connected with or arising out of the collection of revenue but also with claims connected with or arising out of any process enforced on account of arrear of revenue, or on account of any sum which is under this or any other Act realizable as revenue. It appears to me that this clause deals with claims arising from actual collections or from the processes to enforce the realization of arrears of revenue or arrears of sums realizable as revenue. To come within this clause, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of arrears of revenue. The cause of action must be intimately connected with the col-

lection or with the process for the recovery of revenue. In the present case this *zabti bhogra* was not collected by the *lambardar* from the defendants. The amount was actually paid by the *lambardar* to the Govt. though he had never received it from the defendants. The present suit is a suit to recover a sum which the plaintiff has paid on behalf of the defendants, and in my view the present claim is not a claim connected with or arising out of actual collection. In fact, it was the failure to collect the revenue before actual payment by the *lambardar* which gives rise to this suit. The cause of action does not arise out of the collection or anything connected with the collection but rather from a payment made to the defendants' use. It appears to me that s. 33, C. P. Land Revenue Act, makes it clear that a suit such as the one now before the Court does not fall within s. 152 (b) (10) of that Act. Section 33 provides that

"when any local area is under settlement, the Chief Commissioner may invest any Subordinate Settlement Officer with the powers of any of (the last five classes) of Courts described in s. 4 of (the Central Provinces Civil Courts Act, 1885), and the Chief Settlement Officer with the powers of a Court of a Deputy Commissioner described in the same Act, (s. 7), for the trial, in the first instance, of any of the following classes of suits instituted within such area:

(b) suits by *lambardars* for arrears of revenue payable through them by the proprietors whom they represent;"

This section gives Revenue Officers during a settlement powers to hear certain suits, which clearly would otherwise be heard by the Civil Courts. The section presupposes that the Civil Courts have jurisdiction to hear suits by *lambardars* for arrears of revenue payable through them by the proprietors whom they represent. It is to be observed that by reason of s. 4 (a) "proprietor" includes a *gaontia* of a Govt. village in the Sambalpur District. The defendants, who are *gaontias* in a Govt. village are, therefore, within the purview of s. 33, C. P. Land Revenue Act. After the settlement is completed, the powers given to the Settlement Officer to hear these claims is terminated; and s. 39 of the Act provides:

"When the settlement of any local area has been notified as completed, all the powers exercised by the Settlement Officers in such area shall cease, and all suits and applications pending before such officer shall be transferred to such of the Courts ordinarily having jurisdiction in such cases as the Commissioner of the Division directs, or, if there

are no such Courts, shall be disposed of in such manner as the Chief Commissioner directs."

These sections clearly show that during the pendency of settlement operations claims otherwise cognizable by the Civil Courts may be dealt with by Settlement Officers but when the settlement has been completed, the powers of the Settlement Officers are terminated and all pending suits are transferred back to appropriate Civil Courts. Unless claims by a *lambardar* against co-sharers for arrears of revenue paid on their behalf are cognizable by the Civil Courts, then s. 33 and the following sections of the C. P. Land Revenue Act, are unintelligible. In my view the present claim is a claim under s. 69, Contract Act, and is not a claim connected with or arising out of the collection of revenue, and the Civil Courts had jurisdiction to entertain the claim. In my view the decision of Mohammad Noor, J. is right and should be affirmed. I would, therefore, dismiss this appeal with costs.

Wort, J.—I agree.

S.

Appeal dismissed.

RANGOON HIGH COURT

Second Appeal No. 305 of 1938

May 25, 1939

MOSELY, J.

TAN SIT SHAN—DEFENDANT—APPELLANT

versus

U PO NYUN AND ANOTHER—PLAINTIFFS
—RESPONDENTS

Easements Act (V of 1882), ss. 1, 4—Applicability to Burma—Limitation Act (IX of 1908), s. 26—Tenant of one land, if can acquire for himself or on behalf of landlord right of way, as of right upon another land of his own—Easement—Rights of way—Ownership of two estates not co-extensive and equal in validity—Easement, if extinguished by unity of possession of dominant and servient tenements.

Although the Easements Act does not apply to Burma, the Court must have regard to that Act in considering the question relating to an easement. 160 Ind. Cas. 786 (1), relied on.

No doubt the possession of the tenant is the possession of the landlord, but a tenant of one land cannot acquire, either for himself or on behalf of his landlord, a right of way as of right upon another land of his own; that is a principle of the English Law repeated in s. 4, Easements Act. *Moahosoodun Dey v. Bissonauth Dey* (3), 96 Ind. Cas. 968 (4), relied on.

The acquisition of a right of way is not extinguished, but only suspended, by unity of possession of the dominant and servient tenements where the ownership of the two estates is not co-extensive and equal in validity, the dominant tenement being held for a term of years only and the servient tenement in full right of ownership. 10 Ind. Cas. 663 (5), relied on.

S. A. against the decree of the District Court, Mergui, in C. A. No. 9 of 1938.

Dr. Ba Han, for the Appellant.

Mr. Maung Aung Gyaw, for the Respondents.

Judgment.—The plaintiff-respondents, U Po Nyun and his wife, sued the defendant-appellant, Tan Sit Shan, for a declaration of a right of way and an injunction to restrain the defendant from obstructing it. They obtained a decree in the trial Court, which was upheld on appeal to the District Court. The facts of the case are that U Po Nyun and his father before him have owned the mill-site shown as B in the plan Ex. A for 60 or 70 years. This land was leased to one U Chein for 15 years. U Chein first erected a boat-building shed on it and 12 years later a mill, without obtaining a fresh lease. That mill was sold to Ba Swee Seng (Ban Shwe Sin) company, of which plaintiff No. 1 was one of the partners. That company was in possession of the mill for 26 or 27 years up to 1932, so the sale to them was in 1905 or 1906. U Chein came on the land 26 years before then, that is, in 1879 or 1880, and built the mill in 1891 or 1892, and he and then after his death his wife Daw Lu Ngon owned the mill for 14 years before she sold it to Ban Swee Seng Company in 1905 or 1906. The company went into liquidation in 1932, and another party in 1934 bought the mill buildings and they were dismantled and taken away. The defendant bought from Ban Swee Seng Company at the same auction in 1934 the land shown in the plan as A, over which the road in question, marked O D runs. Ban Swee Seng Company had bought this land from the original owners some three years after they had bought the mill buildings from Maung Chein, i. e. in 1908 or 1909. The defendant has built a substantial granary at the place marked by me as X in Ex. A, where the road O D debouches on the municipal road EF. Exhibit B, plan of 1901-2, shows that the road existed in its present width and state in that year. The evidence showed that U Chein was exercising a right of way over this road since he built the mill in 1891 or 1892 for some 14 years up to 1905 or 1906, and that Ban Swee Seng Company exercised a right of way over it after that, from 1905 or 1906 until it bought the land on which the road stood in 1908 or 1909, after which it continued to use the same road over its own land. In all 17 years

user or at the most 18 years user as of right over another's land was proved.

Before U Chein's time there was admittedly a footpath of unknown width on the same site as this road. The plaintiffs claim a right of way over the whole length of the road for width of 18 feet. A right of way is not denied, but it is denied in this appeal that a right of way for carts over a width of 18 feet was acquired. The evidence, that of the plaintiff and his witness Za To (P. W. No. 2), goes to show that the road which led from the mill buildings to the municipal road was only used *qua* cart road after the mill was built. Both the plaintiff and U Za To say that the road was only made into a cart road and a bridge built over the creek when the mill was built. When there was a boatshed on the land, there was a footpath on the same alignment, but Za To makes it clear that it was then only a footpath, and it would seem that carts could not have used it before there was a bridge. A right of way is acquired under s. 26, Lim. Act, by enjoyment by any person claiming title thereto as an easement and as of right without interruption and for 20 years. Although the Easements Act does not apply to Burma, no doubt the Court must have regard to that Act in considering the question now under consideration: *Daw Gyan v. U Maung Maung* (1) at p. 752.

It is the law that the possession of the tenant is the possession of the landlord *Gaford v. Moffat* (2), but a tenant of one land cannot acquire, either for himself or on behalf of his landlord, a right of way as of right upon another land of his own; that is a principle of the English Law repeated in s. 4, Easements Act, which defines "easement" as a right which the owner or occupier of certain land possesses in respect of certain other land not his own; see *Modhoosoodun Dey v. Bissonauth Dey* (3) at pp. 365, 366 and *Subba Rao v. Lakshmana Rao* (4). No doubt the acquisition of a right of way was not extinguished but only suspended, by unity of possession of the dominant and servient tenements, for the ownership of the two estates was not co extensive and equal in validity, the dominant tenement being held for a term of years only, the servient tenement in full right of ownership, *Tinkowri Pathak*

(1) 13 R 748 at p. 752; 160 Ind. Cas. 296; A I R 1936 Rang 58; 8 R Rang 431.

(2) (1868) 4 Ch A 133.

(3) 15 Beng L R 361 at pp. 365, 366.

(4) 49 M 820; 96 Ind. Cas. 968; A I R 1926 Mad 726; 23 L W 609; (1926) M W N 923 (F B.)

v. Ram Gopal Pathak (5). But there is no evidence of user after the mill went into liquidation.

The learned District Judge said that although plaintiff No. 1 was a partner of the company he was always the owner of the land Ex. B, and used the road as such quite apart from the user of it by his tenant, the mill company; but it is clear from the evidence that the use of the road as a cart road was by the tenant mill company and its customers only. For these reasons it appears to me that 20 years uninterrupted user of the right of way claimed, i. e. of an 18 feet cart road, was not proved on behalf of the plaintiffs, but only 17 or at the most 18 years user was proved. This appeal must be successful and the plaintiff's suit dismissed with costs in this Court, Advocate's fee four gold *mohurs*. As, however, the defendant adduced what was undoubtedly shown to be false evidence on a point never taken in the written statement, that the company paid rent to the previous owner of the land Ex A before the company bought that land, the parties will pay their own costs in the two lower Courts.

D.

Appeal allowed.

(5) 50 C 356; 70 Ind. Cas. 663; A I R 1923 Cal 8, 36 CL J 161.

PATNA HIGH COURT

Appeal from Appellate Order No. 215 of 1939

November 29, 1939

HARRIS, O. J. AND DHAYLE, J.
BUXAR CENTRAL CO-OPERATIVE
BANK, LTD.—APPELLANT

versus

AKHOURI BINDHYACHAL
PARSAD SINGH—RESPONDENT.

Execution—Bar to—Decree obtained by depositor against Co-operative Bank for return of deposit—During pendency of suit, compromise sanctioned by Registrar, Co-operative Societies under s. 24-A, Bihar and Orissa Co-operative Societies Act (VI. of 1935)—Decree-holder no party to it—Whether bar to execution of decree.

Where during the pendency of a suit by a depositor against a Co-operative Bank to recover the amount of the deposit, a scheme of compromise under s. 24-A of the Bihar and Orissa Co-operative Societies Act is sanctioned by the Registrar of Co-operative Societies, the compromise is binding on the plaintiff depositor under s. 24-A (2) of that Act although he is not party to the compromise and a decree passed in the suit is only a security for the debt that is owing to the decree-holder and has the effect of establishing that debt as against the Bank and though the compromise is no bar to the passing of a decree, it is a clear bar to execu-

tion of the decree. The compromise bars execution, not by reason of any express provision in the Bihar and Orissa Co-operative Societies Act, but under the general law.

A. from an order of the Subordinate Judge, Arrab, dated May 25, 1939.

Messrs. Mahabir Prasad and Brahmadeva Narain, for the Appellant.

Messrs. S. M. Mullick and Harnarayan Prasad, for the Respondent.

Dhavlé, J.—This is an appeal from a decision disallowing objection of the appellant, the Buxar Central Co-operative Bank, Ltd., that execution of a decree obtained against it by the respondent is barred by a scheme of compromise under s. 24-A of the Bihar and Orissa Co-operative Societies Act (VI of 1935) which was sanctioned by the Registrar of Co-operative Societies on October 15, 1936. In 1927, the respondent deposited Rs. 13,000 with the appellant. In 1935 correspondence began between the parties regarding the re-payment of this sum, and failing to get satisfaction, respondent filed a suit on February 3, 1936, for the recovery of his deposit. During the pendency of the suit the scheme of compromise under s. 24-A of the Act was agreed to by the required majority of creditors and sanctioned by the Registrar under sub-s. (2) of s. 24-A of the Act. The respondent's suit was decreed on December 18, 1936. An appeal was preferred by the appellant against this decree and dismissed by Wort, J. (Chatterji, J. concurring), who found that there was nothing either in the alleged arrangement (that is to say, the "scheme of compromise", the factum of which is not disputed before us) or in the Act itself which would bar plaintiff's claim or bar his action for the money or balance of the money deposited by him. The learned Judge went on to add

"I propose to say no more for fear of dealing with matters which are not strictly before us in this appeal, the substance of the decision of this Court being that the plea taken up by the defendant society was not a bar to the plaintiff's suit."

When the respondent put the decree into execution, the appellant again pleaded the scheme of compromise by way of a bar. The lower Court found no provision in the Bihar and Orissa Co-operative Societies Act (Act VI of 1935)

"ousting the jurisdiction of the Civil Court, either to entertain a suit for money deposited with the Central Co-operative Bank or for execution of a decree for such money obtained in a Civil Court", and arrived at the conclusion that the provision in s. 24-A that the order of the

Registrar shall be final "would not bar a proceeding in the Civil Court instituted before such scheme was contemplated or sanctioned."

The objection of the judgment-debtor-appellant was accordingly dismissed.

It is not very clear from the order of the lower Court how far the contention advanced on behalf of the decree holder that as a depositor he was not a creditor of the judgment-debtor within the meaning of s. 24-A was accepted by the lower Court; but Mr. Sushil Madhab Mullick, who appears for the decree-holder-respondent, does not dispute the position that as a depositor the respondent was a creditor of the appellant. Sub-s. (2) of s. 24-A of the Act makes the compromise agreed to by the specified majority, if sanctioned by an order of the Registrar, "binding on all the creditors, or the class of creditors, as the case may be, and also on the Society". It was suggested on behalf of the respondent that he was not a party to the compromise; but sub-s. (2) makes his individual participation absolutely immaterial. It has not been suggested on behalf of the respondent that the compromise, which was published in the *Gazette* with the order of the Registrar sanctioning it as required by sub-s. (4) of s. 24-A, was in any respect informal. The learned Subordinate Judge fell into an error in thinking that in this execution proceeding he was asked to hold that the finality of the order of the Registrar barred "a proceeding in the Civil Court instituted before such scheme was contemplated or sanctioned". It was the suit of the respondent that had been instituted before the order of the Registrar sanctioning the compromise; but the execution proceeding itself came years after that order. It is true that the scheme was pleaded as a bar to the suit itself, but in overruling the plea Wort, J. was careful enough "to say no more for fear of dealing with matters which are not strictly before us in this appeal". The learned Subordinate Judge has missed the point of this reservation. The compromise with the sanction of the Registrar bars execution, not by reason of any express provision in the Bihar and Orissa Co-operative Societies Act, but under the general law. A judgment-debtor is always entitled to resist execution on the basis of a compromise if the compromise is binding on the decree-holder and has the effect of barring execution. It has been contended on behalf of the respondent that the compromise in the present case contains nothing to bar execution of the decree

obtained by him. Now, it is true that the compromise says nothing expressly about any decrees obtained or to be obtained by any creditor of the Buxar Central Co-operative Bank. Indeed, it does not purport to impose any obligations on any of the creditors of the Bank. What it does do is to make such provisions as that in the first place at least 75 per cent. of the Bank's recoveries on account of principal shall be distributed strictly *pro rata* among the creditors, towards the principal, and that all recoveries on account of interest shall, after meeting certain indispensable and also unforeseen expenditure, be similarly paid towards interest at certain flat rates. There are other restrictions imposed on the Bank as regards the manner in which it is to conduct its business. It is also provided that the lands purchased by the Bank may be sold to any creditor in set-off of his deposit, provided he is the highest bidder, and that the scheme is to be in operation for five years, unless it is revised earlier with the approval of the Registrar, if the financial position of the Bank should require it. This was the "scheme of compromise" which the Registrar sanctioned as in the best interests of all the parties concerned. It is plain that it would be no compromise at all if its effect was to impose no obligations on the creditors. It may, indeed, be doubted whether it would be binding as a compromise upon the Bank in the absence of any consideration moving from the creditors for the restrictions to which the Bank is subjected under the scheme. When pressed with this aspect of the matter, Mr. Mullick argued that what the respondent may be taken to have given up was his right to attach all the income of the Bank. But it is plain that at the time the scheme of compromise was arrived at, neither the respondent nor any other creditor of the Bank had any such right; the respondent still had to obtain his decree. It seems to me impossible to read the sanctioned scheme of compromise in any other light than as an arrangement under which creditors were to refrain from levying execution in return for the restrictions imposed upon the Bank as regards the disposal of its income and property. Mr. Mullick has contended that in this view the decree obtained by the respondent would become a nullity. But there is no substance in the contention. The decree is only a security for the debt that is owing to the respondent, and has the effect of establishing that debt as against the appellant;

and though the compromise was no bar to the passing of a decree establishing the respondent's debt, it is, in my opinion, a clear bar to execution.

I would accordingly allow this appeal with costs.

Harries, C. J.—I agree.

s.

Appeal allowed.

BOMBAY HIGH COURT

Second Appeal No. 545 of 1937

June 28, 1939

LOKBER, J.

NARHAR SONAJEE JAHAGIRDAR—

PLAINTIFF—APPELLANT

versus

TRIMBAK SHRIDHAR JAHAGIRDAR—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—Decree in suit to recover sums payable by khatedar to inamdar as superior holder—Second appeal, if lies—Bombay Land Revenue Code (Act V of 1899), ss. 86, 87—Co-sharer not registered as managing inamdar, whether can bring suit directly against khatedar—His remedy.

Sums payable by a *khatedar* to an *inamdar* as superior holder are "dues", and a suit to recover such dues is not cognizable by a Court of Small Causes, and a decree passed in such suit is subject to a second appeal. 27 Ind. Cas. 350 (1), relied on.

The object of the entry of the names of co-sharers in the village *khatavani* is to enable the village officers to distribute the land revenue among them; it is only the registered managing *inamdar* who has the sole right to manage the village, i. e., to recover revenue, etc. If any of the village *khatedars* fail to pay the land revenue into the hands of the village officers, then it is for the managing *inamdars* to seek assistance from the *mamlatdars* under ss. 86 and 87, Bom. Land Revenue Code, or to file a suit against them in a Civil Court. But other co-sharers who are not recognized as managing *inamdars* cannot file a suit or seek assistance against the *khatedars* directly. Their remedy is to sue the managing *inamdars* for an account and to recover their share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing *inamdars*.

S. A. from the decision of the District Judge, East Khandesh at Jalgaon, in Appeal No. 239 of 1936.

Mr. G. M. Joshi, for the Appellant.

Mr. Y. D. Dikshit, for the Respondent.

Judgment.—The appellant is one of the co-sharers of the *inam* village of Shindi Digar, his share being annas 3 and 9 3/7 pies. The respondent and one Gopal Shankar are the managing *inamdars* of the village. The *inamdars* of the village are said to be alienees of land revenue. The plaintiff is said to be a co-sharer who is recognized in the *khatavani* as holding a share of 3 annas

and 9 3/7 pies. The village land revenue is recovered by the village officers and then distributed among the different sharers according to the shares as entered in the village *khatavani*. The respondent holds certain lands for which he has to pay Rs. 16-13-3 as land revenue every year. He did not pay the assessment for the year 1928-29, and the plaintiff filed this suit to recover his share in that amount together with interest thereon by way of damages. Both the lower Courts upheld the respondent's contention that the plaintiff was not entitled to file a suit directly against a *khatedar* tenant to recover his share in the land revenue, and he has presented this second appeal. A preliminary objection is raised that as the claim is such as can be taken cognizance of by a Small Cause Court and is less than five hundred rupees, no second appeal is maintainable under s. 102, Civil P. O. But it was held in *Madhavrao Moreswar v. Rama Kalu* (1) that sums payable by a *khatedar* to an *inamdar* as superior holder are "dues," and a suit to recover such dues is not cognizable by a Court of Small Causes, and a decree passed in such suit is subject to a second appeal. I therefore hold that this second appeal lies; but on merits, the appeal must fail.

Admittedly, the appellant's name is not registered as a sharer in Village Form No. 3. It is true that the appellant's name is entered in the *khatavani* as a sharer. But as stated in s. 176 of Joglekar's Alienation Manual (p. 144), the object of the entry of the names of co-sharers in the village *khatavani* is to enable the village officers to distribute the land revenue among them. Section 171 of that Manual (p. 112) shows that it is only the registered managing *inamdar* who "has the sole right to manage the village, i. e., to recover revenue, etc." Were it not so, every co-sharer, who is not registered in the Village Form No. 3 as such, might file a suit to recover his own share individually from the different *khatedars* in the village. It is to avoid a confusion which necessarily would arise from this that managing *inamdars* are appointed, and village officers recover the land revenue from the *khatedars* on behalf of all the *inamdars*. It is for them to distribute the land revenue thus recovered among the recognized co-sharers. If any of the village *khatedars* fail to pay the land revenue into the hands of the village officers, then it is for the managing *inamdars* to seek assistance

from the *mamlatdars* under ss. 86 and 87, Bom. Land Revenue Code, 1879, or to file a suit against them in a Civil Court. But other co-sharers who are not recognized as managing *inamdars* cannot file a suit or seek assistance against the *khatedars* directly. Their remedy is to sue the managing *inamdars* for an account and to recover their share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing *inamdars*.

It is urged in this case that the *khatedar* being himself a managing *inamdar*, he cannot file a suit against himself. But there is another managing *inamdar* in this case who could have filed a suit against the respondent. But, even if there be only one managing *inamdar*, he is liable to account to his co-sharers not only for the land revenue recovered by him through the village officers, but also by way of damages for whatever he has failed to recover owing to negligence or laches or through his own default. The present suit is filed against the respondent in his capacity as a *khatedar* and not as a managing *inamdar*. Such a suit is rightly held to be not maintainable. I therefore dismiss the appeal with costs.

s.

Appeal dismissed.

LAHORE HIGH COURT

Execution Second Appeal No. 284
of 1939

May 26, 1939

DALIP SINGH, J.

BALDEV SINGH—DEBTEE—HOLDER—

APPELLANT

versus

SHER SINGH AND ANOTHER—JUDGMENT—

DEBTORS—RESPONDENTS

Res judicata—Execution proceedings—Decision held not *res judicata* in subsequent execution proceedings—Civil Procedure Code (Act V of 1908), s. 60—Question whether judgment-debtor is agriculturist has to be decided with reference to date of attachment—Second appeal—Point of law patent on record can be raised for first time in second appeal.

Res judicata in execution proceedings is not governed by the specific terms of s. 11, Civil P. O. which applies only to suits. It is only the general principles of *res judicata* that apply in execution proceedings. Where the subject-matter of the previous execution proceedings is not the same as in the subsequent execution proceedings, the decision about the judgment-debtor not being proved to be an agriculturist in the previous execution application is not *res judicata* in the subsequent execution application.

The question whether the judgment-debtor is an agriculturist has to be decided with reference to

(1) 39 B 131; 27 Ind. Cas. 350; A I R 1914 Bom. 238; 16 Bom. L R 746.

the date of the attachment and whether the property is attachable or not has to be decided with reference to the situation on that date. A man might cease to be an agriculturist within the meaning of s. 60, Civil P. O. Surely it cannot be argued if a man had so ceased to be an agriculturist that his property could not be attached because at the time of the decree he might have fallen within the definition of agriculturist. Similarly, a man might become an agriculturist and his property might not be liable to attachment at the time when it is attached and it cannot be argued that because at the date of the decree he was not an agriculturist therefore the property was liable to attachment. Where therefore the property is attached when in the possession of and owned by legal representative who is a non-agriculturist, the property therefore is liable to attachment and sale on that date. It is beside the question to discover whether the original debtor was or was not an agriculturist within the meaning of s. 60. 167 Ind. Cas 457 (1), distinguished, 177 Ind. Cas. 235 (2), explained.

A point of law patent on the record can be raised for the first time in second appeal.

Mr. Qabul Chand, for the Appellant.

Mr. F. C. Mittal, for the Respondents.

Judgment.—In this case the decree was obtained by the decree-holder against Sher Singh personally and Bhola Singh as legal representative of one Mithe to the extent of the property of Mithe in the hands of Bhola Singh. An execution application was filed against certain property on August 7, 1936, and in the course of that certain property was attached. Bhola Singh filed objections under s. 60, Civil P. O., alleging that the house attached belonged exclusively to him and that he, Bhola Singh, was an agriculturist and the previous owner Mithe was also an agriculturist and hence the house was not liable to attachment. These objections were rejected on August 5, 1937, the Appellate Court holding that Mithe was not proved to be an agriculturist and that it was the status of Mithe which determined whether the property was or was not liable to attachment under s. 60. The Court followed *Hirda Ram v. Mohammad Din* (1) a Single Bench ruling of this Court. On April 2, 1938, a second execution was taken out against Bhola Singh and his half share in a different house was attached. Objections under s. 60 were again put in on May 18, 1938. The Appellate Court decided on the authority of *Hirda Ram v. Mohammad Din* (1) and *Firm Gurparshad Dewat Ram v. Kishen Chand* (2) a Division Bench ruling of this Court, that Mithe was an agriculturist and his status determined whether the

property was attachable or not and therefore Bhola Singh being a non-agriculturist did not affect the question. The decree-holder has come in second appeal from this decision.

It is contended by him firstly that it is *res judicata* that Mithe was not an agriculturist. The learned Counsel for the respondents contends that this plea was not raised in the Courts below and should not be allowed to be raised now. The reply is that this is a point of law patent on the record. The question resolves itself into a decision whether the whole of execution record is one, though there may have been separate execution applications, or whether each execution application is a separate record. If the latter is the correct view, then no doubt this plea could not be patent on the present record. On the whole, however, I am inclined to think that the whole execution record is part of one record and therefore the point is one that can be raised. I do not, however, agree that the finding is *res judicata* in the case. *Res judicata* in execution proceedings is not governed by the specific terms of s. 11, Civil P. O., which applies only to suits. It is only the general principles of *res judicata* that apply in execution proceedings and to my mind as the subject-matter of the previous execution proceedings was not the same as in the present execution proceedings, the two houses being different, the decision about Mithe, not being proved to be an agriculturist in the other execution application is not *res judicata* in the present execution application. To take a simple illustration, if on a certain mortgage a person contended that he was a member of an agricultural tribe and the mortgage was not binding on him *qua* the property mortgaged, and it was held that he was not proved to belong to that agricultural tribe, would it be *res judicata* in the case of certain other property that the mortgagor did not belong to an agricultural tribe as between the same parties? I should doubt this very much. The title litigated is not really the same. Following this principle I would hold therefore that the matter is not *res judicata* except of course *qua* the property which was then attached where the matter would be in my opinion *res judicata*.

The next point is whether *Hirda Ram v. Mohammad Din* (1) and *Firm Gurparshad Dewat Ram v. Kishen Chand* (2) govern the case. The facts are not entirely the same. In *Hirda Ram v. Mohammad Din* (1),

(1) A I R 1936 Lah. 895; 167 Ind. Cas. 457; 9 R. L. 493.

(2) A I R 1938 Lah. 608; 177 Ind. Cas. 835; 40 P. L. R. 409; 11 R. L. 369.

the decree was obtained against the original judgment-debtor and the property was attached during his lifetime. The question therefore in that case might well have been decided on the status of the man to whom the property belonged at the time when it was attached. *Firm Gurparshad Dewat Ram v. Kishen Chand* (2) is a Division Bench ruling, but it appears to me that the decision in that case is *obiter dicta* because that ruling itself states that the points which it decides do not arise as in that case both the original judgment-debtors and his legal representatives were agriculturists within the meaning of s. 60. The matter therefore is, I think, free for decision. To my mind the question has to be decided with reference to the date of the attachment and whether the property is attachable or not has to be decided with reference to the situation on that date. It seems perfectly clear to me that a man might cease to be an agriculturist within the meaning of s. 60. Surely it could not be argued if a man had so ceased to be an agriculturist that his property could not be attached because at the time of the decree he might have fallen within the definition of agriculturist. Similarly, a man might become an agriculturist and his property might not be liable to attachment at the time when it is attached and it could not be argued that because at the date of the decree he was not an agriculturist therefore the property was liable to attachment. Once this fundamental principle is clearly grasped, it becomes clear that in this case the property was attached when in the possession of and owned by Bhola Singh who has been held to be a non-agriculturist. The property therefore was liable to attachment and sale on that date. It is beside the question to discover whether the original debtor was or was not an agriculturist within the meaning of s. 60. The very words of s. 60 make this clear, for, it speaks of property belonging to an agriculturist, not property that once belonged to an agriculturist. A dead man cannot own any property, and the property at the date of the attachment in this case belonged to Bhola Singh who is held not to be an agriculturist. I would therefore accept this appeal and dismiss the objection petitions with costs throughout. As the point of *res judicata* and the second point decided are both arguable, I would allow a Letters Patent Appeal, if applied for.

D,

Appeal allowed.

ALLAHABAD HIGH COURT Special Bench

Miscellaneous Case No. 167 of 1939

September 22, 1939.

IQBAL AHMAD, RAOHYPAL SINGH AND
HUNTER, JJ.In the matter of BHAIRO DUTT
BHANDARI, AN ADVOCATE, RANIKHET*Legal practitioner—Professional misconduct—Investments of his savings by Advocate, when constitute engagement in money-lending business—Findings on questions of fact recorded by Bar Tribunal—When accepted by High Court.*

What does or does not constitute money-lending business must depend on the facts and circumstances of each case and is not capable of an exact definition. The question is a mixed question of fact and law and the answer to the question must depend on the facts found in each particular case. An element of continuity and habit is essential to constitute the exercise of a profession or business. [p. 613, col. 1.]

Investments of his savings by an Advocate do not necessarily amount to engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless, if investments by way of loan are made as a matter of regular business and for gain, there can be no escape from the conclusion that such investments constitute engagement in money-lending business. [p. 613, col. 2.]

[English and Indian Case-law relied on.]

The question whether a particular Advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently the High Court ordinarily accepts findings on questions of fact recorded by the Bar Tribunal provided the findings are not perverse. [p. 613, col. 2.]

Mr. N. P. Asthana, for the Crown.

Sir Tej Bahadur Sapru and Mr. A. P. Pandey, for the Opposite Party.

Iqbal Ahmad, J.—On the receipt of a complaint of one Prem Singh, dated December 23, 1937, about the alleged professional misconduct of Mr. Bhairo Dutt Bhandari, an Advocate on the rolls of this Court and practising in the Courts at Ranikhet, this Court referred the case for inquiry to the Bar Council and the case was in due course enquired into by a tribunal of the council appointed by the Hon'ble the Chief Justice. The charge framed by the Tribunal against the Advocate was as follows:

"That you, Mr. Bhairo Dutt Bhandari, an Advocate on the rolls of the High Court of Judicature at Allahabad while practising in the Courts of the Kumaun Division, subordinate to the said High Court, have been for a considerable time past carrying on money-lending business which is against the rules governing professional etiquette and have thereby been guilty of professional misconduct."

The Advocate concerned filed a written statement in the course of which he admitted that during a period of ten years, viz., from 1926 to 1936, he advanced loans

on promissory notes and mortgages on no less than 12 occasions. Out of these 12 transactions of loan, three advances were on the security of immovable properties and the rest of the advances were made on the basis of promissory notes. All the three mortgages were in favour of the minor sons of the Advocate and so were some of the promissory notes and the rest of the promissory notes were in favour of the Advocate himself. Out of the 12 transactions, three took place in 1930 and the remaining nine advances were made in the course of nine years one in each year. It was alleged in the written statement that the Advocate had from time to time set aside certain sums of money for the use and benefit of his minor children and had invested the amounts from time to time solely with the intention to benefit his sons. It was also mentioned in the written statement that the loans referred to above were made either to the relatives or to the friends of the Advocate or his family. The Advocate also submitted that interest was charged on most of these loans only because the borrower expressed a preference to having the transactions placed on that basis. His motive, in most cases, according to the Advocate, was not gain but the obliging of friends.

Prem Singh, the complainant, did not appear to substantiate the complaint before the Tribunal, but as the fact of loans being advanced by the Advocate was admitted by him in his written statement, the Tribunal proceeded with the enquiry in the course of which it recorded the evidence of the Advocate and of two witnesses produced by him and then, on consideration of the materials before it, came to the conclusion that the charge referred to above was not established against the Advocate and forwarded its finding to this Court. The learned Advocate-General filed objections to the finding maintaining that the finding was contrary to the weight of evidence in the case and was erroneous in law. After hearing the learned Advocate-General and considering the findings on questions of fact recorded by the Tribunal, we have decided, though not without some hesitation, to accept the findings of the Tribunal. The charge framed against the Advocate is with respect to the breach of the following rule framed under s. 15, Bar Councils Act (XXXVIII of 1926):

"No Advocate while practising shall engage in trade or business or accept an appointment carry-

ing a salary without previously obtaining the permission of the Bar Council and the High Court."

The question that arises for consideration is whether the advances of loan admitted by the Advocate do or do not amount to engagement in money-lending business by the Advocate and the answer to the question is beset with considerable difficulty. Investments of his savings by an Advocate do not necessarily amount to engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless, if investments by way of loan are made as a matter of regular business and for gain, there can be no escape from the conclusion that such investments constitute engagement in money-lending business. What does or does not constitute money-lending business must depend on the facts and circumstances of each case and is not capable of an exact definition. The question is a mixed question of fact and law and the answer to the question must depend on the facts found in each particular case. The view that we take finds support from the decision in *Edgell v. MacElwee* (1). In the course of his judgment in that case McCardie, J. made the following observations:

"A man does not become a money-lender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindness are not the bases of usury. Nor does a man become a money-lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money lending, and the word "business" imports the notion of system, repetition, and continuity. . . . The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree."

In *Litchfield v. Dreyfus* (2) it was observed that:

"speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible."

To the same effect are the observations contained in *Granger and Sons v. Gough* (3) at p. 343. Lord Morris is reported to have observed as follows:

"There can be no definition of the words "exercising a trade." It is only another mode of expressing "carrying on business"; but it certainly carried with it the meaning that the business or (1) (1918) 1 K B 205; 87 L J K B 738; 118 L T 177.

(2) (1908) 1 K B 584; 75 L J K B 447; 22 T L R 385.

(3) (1896) A C 325 at p. 343; 65 L J Q B 410; 74 L T 435; 44 W R 561; 60 J P 692.

trade must be habitually or systematically exercised and that it cannot apply to isolated transactions. There is no special legal meaning to the words "exercising a trade," and it must be considered with regard to what would be its ordinary or popular meaning, and that must in each case depend on the facts of that particular case; and we are not to canvass what might be a logical outcome from any decision when it is the fact of a particular case that are solely decided on. I have heard no suggestion of any plainer or more intelligible meaning for the words "exercise his trade" than the words themselves convey."

The question under consideration formed the subject of decision by a Full Bench of this Court in *Ram Sarup v. Tika Ram* (4) and the view taken by that Bench was that an element of continuity and habit is essential to constitute the exercise of a profession or business. That this is so is apparent from the following observations made in the course of the judgment:

"The Vakil has admitted that from time to time he entered into transactions for the sale of grain, salt, cotton seeds, etc., by way of speculation, but he has not done so habitually. He has mentioned eight instances, seven of which were instances of business carried on in the years 1915, 1916 and 1917. It does not appear that he has habitually or systematically exercised the profession of a trader in addition to his work as a Vakil. We do not think, therefore, that he can be held to have violated the provisions of the rule to which we have referred."

On the other hand if it is found that money-lending transactions by an Advocate are numerous, continuous and systematic, the Advocate must be held to have entered into money-lending business and to this effect is the decision of a Full Bench of the Madras High Court in *Chinnappa v. Timma Reddi* 8 Ind. Cas. 617 (5). The Pleader concerned in that case had nearly a hundred money-lending transactions in his own name and in that of his minor son and it was found that the transactions in the son's name were only a shield or screen and that they really were transactions by himself and it was held that the Pleader had engaged in money-lending business. The cases noticed above illustrate in a remarkable degree the difficulty, rather the impossibility, of fixing a line of demarcation and in formulating a hard and fast rule as to what does and what does not constitute money-lending business and it is this state of uncertainty that has to a great extent turned the scale in the present case in favour of the Advocate and has induced us not to interfere with the finding of the Tribunal.

(4) 17 A L J 1147; 52 Ind. Cas. 638; AIR 1919 All. 13; 42 A 125; 1 U P L R (H O) 139 (F B).

(5) 8 Ind. Cas. 677; 9 M L T 55; (1911) 1 M W N 111; 21 M L J 559; 11 Cr. L J 697 (F B).

The question whether a particular Advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently this Court ordinarily accepts findings on questions of fact recorded by the Bar Tribunal provided the findings are not perverse. In the present case the Tribunal accepted the evidence of the Advocate and of his witnesses and held that the advances of loan which he made were made to close acquaintances, relations and friends. The Tribunal further held that the loans advanced by the Advocate were occasional and disconnected and did not amount to engagement in money-lending business. While we consider that the case is one on the border line and that the Advocate by making 12 advances in the course of ten years dangerously sailed near the wind, we are not prepared to hold that the conclusion arrived at by the Bar Tribunal is erroneous and we must therefore accept the finding that the charge was not brought home to the Advocate. Before parting with the case we must, however, observe that it is in the interest of the Advocates themselves that before they make advances by way of loan, they should obtain the previous sanction of the Bar Council and of this Court. It may be that in a particular case half a dozen advances made during a particular period may not be held to amount to engagement in money-lending business, but seven advances by way of loan made during the same period may be held to amount to engagement in money-lending business. It is this state of uncertainty that Counsels caution on the part of the Advocates in their own interest and we hope and trust that the requisite caution will be exhibited by members of the profession in future. In the circumstances of the present case, we make no order as to costs.

S.

Order accordingly.

LAHORE HIGH COURT

Civil Revision Petition No. 138 of 1939

May 12, 1939

DALIP SINGH, J.

SHIB LAL—PLAINTIFF—

PETITIONER

versus

Musammat GOBINDI—DEFENDANT—

RESPONDENT

Punjab Debtors' Protection Act (II of 1936), s. 3
6)—Sum advanced without interest, for purchase,

whether loan—Registration Act (XVI of 1908), s. 17 (1) (c)—Entry of such advance, if receipt—Civil Procedure Code (Act V of 1908), s. 115 (c)—Mistake as to onus—Revision lies.

A sum given without interest as a payment in advance for a property which is to be sold, cannot be called a loan within the meaning of the Punjab Debtors' Protection Act.

The entry, that is no more than a memo of a sum advanced for a purchase of a property is not a receipt of money received for a sale of an immovable property and therefore does not need registration.

The mistake as to onus gives rise to a revision petition.

O. R. P. from a decree of the Senior Sub-Judge, Rohtak, dated November 10, 1938.

Mr. F. C. Mittal, for the Petitioner.

Mr. Qabul Chand, for the Respondent.

Order.—In this case the question is whether the sum claimed by the plaintiff was or was not paid. Both Courts below have held that the plaintiff has failed to prove that any consideration passed as alleged by him on the date in question. The learned Counsel for the petitioner, however, contends that once execution was proved of the entry, which appears to have been accepted by the learned Senior Subordinate Judge, the onus shifted on to the respondent to prove that the entry was made without consideration. Ordinarily speaking, this would no doubt be so. The learned Counsel for the respondent contends that the mistake as to onus does not give rise to a revision-petition, but there are rulings of this Court to the contrary and I hold that the question of onus may give rise to a revision petition. The second point is that the matter being a loan under the Debtors' Protection Act and the plaintiff being a money-lender, it was for him to prove consideration. I do not think the sum given in this case can be called a loan; there was no interest, nor was it in substance a loan. It could only be looked upon as a payment in advance for a shop which was to be sold. The learned Counsel for the respondent next contends that the entry needs registration. I am of opinion, after considering this objection and the entry, that the entry is no more than a memo of a sum advanced and though it is stated that the object is finally to have a sale, I do not consider that this is a receipt of money received for a sale of an immovable property and, therefore, does not need registration.

Lastly, it is contended that even if the onus shifts, the circumstances of the long delay by the petitioner in bringing this suit shift the onus back on to him to prove

consideration. The learned Counsel for the petitioner contends that the reason for the delay was that the plaintiff did not want his money back but wanted the property agreed to be sold, but as the property agreed to be sold could not be specified because it was not mentioned clearly in the agreement, the petitioner delayed as long as possible hoping that Hira Lal would accede to his request to have the property sold and, therefore, he did not immediately bring a suit. But the petitioner himself admits that Hira Lal had refused to carry out the bargain, his witnesses say within a month of the contract; he himself says within a year. Hira Lal appears to have lived for a year and a half and yet the petitioner did not bring a suit. This seems to me abnormal and on the whole, therefore, I do not consider that I should upset the decision of the Courts below and I, therefore, dismiss the petition but make no order as to costs of this petition. I point out to the learned Senior Subordinate Judge that the trial Court had held that Hira Lal was not proved to have thumb-marked the registered sale deed; it was little use, therefore, finding that the thumb-marks on the entry and the registered sale-deed are the same without a finding that Hira Lal had signed the registered sale deed. I have gone into the matter and consider that Hira Lal may be held to have thumb-marked the registered sale-deed and therefore the execution of the entry is proved.

D.

Petition dismissed.

RANGOON HIGH COURT

Criminal Revision No. 158-B of 1939

June 19, 1939

MOSELY, J.

KUMARAPAN AND ANOTHER—APPLICANT
versus

THE KING—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 514, 106—Bond for appearance of accused—Forfeiture—Recording of evidence—Burden to give explanation why accused was unable to attend Court—Bond under s. 106—Evidence to prove fresh breach of peace and forfeiture of bond—Opportunity of cross-examining witness—Witness on whose evidence forfeiture is established examined in absence of accused—Whether should again be examined in presence of accused—Forfeiture should not be ordered without giving accused or surety chance to prove their allegation.

In cases where a bond has been executed for appearance merely, it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed

to appear in his Court. The burden of proving the negative, that is to say that the accused absented themselves without reasonable cause for their non-appearance, is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court.

Obiter.—In case of bond under s. 106, Criminal P. O., it is necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of s. 514, be taken in the presence of the respondent, but when the respondent appears and shows cause, he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. The section does not require that before a final order is made the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence. *Queen-Empress v. Har Chandra Chowdhury* (3), dissented from. *The Empress v. Nobin Chunder Dutt* (1), relied on. *In re Mohesh Chundra Roy* (2), explained.

Where the Magistrate directs forfeiture of bond executed for the appearance of accused and directs the surety to pay penalty without giving the accused and the surety an opportunity of showing cause by adducing evidence, as to why the accused failed to appear, the order is bad must be set aside.

Order.—The applicants in revision went bail to the amount of Rs. 100 each for certain persons accused of trespass, an offence under s. 447, I. P. O. On a date at a later stage of the case to which the case was adjourned only two out of the six accused were present. The Advocate for the remaining accused filed a petition stating that they had started by boat from their village, and that they had probably been detained by a storm. The Magistrate recorded his grounds for belief that this was not so, and called upon the sureties under s. 514, Criminal P. O., to show cause why their bonds should not be forfeited to the amount of Rs. 100 each. The sureties showed cause in writing to the same effect as that mentioned. The Magistrate did not believe this explanation as he said that two of the accused had been able to come, and, in any event, the other accused should have appeared as soon as possible after the date fixed, and should have explained their non-appearance. It was ordered that the sureties pay a penalty of Rs. 100 each. In appeal the penalties were reduced to Rs. 50 each on each surety. It is now contended in revision that the Magistrate's order was bad because it had not been proved to the satisfaction of the Court that the bond had been forfeited, that a formal inquiry should have been held by the Magistrate, and that in any case it should have been found that there was sufficient reason for the non-appearance of the absent accused on

the date fixed: *The Empress v. Nobin Chunder Dutt* (1), is cited as authority in this connection. Section 514, Criminal P. O., of 1898, which is substantially the same as the Code, current in 1879, says

"Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid."

The only authority that I can find on the subject is the above cited case and two other cases, also from the Calcutta High Court in *In re Mohesh Chundra Roy* (2), and *Queen-Empress v. Har Chandra Chowdhury* (3). These are all cases of breach of a bond executed either by the surety or by the accused under s. 106, Criminal P. O., and not bonds for the appearance of accused persons. In two of these cases there was no relevant evidence against the accused on record and the Magistrate had wrongly relied on evidence implicating him in cases against other persons without recording further evidence himself. In the third case, which was against the surety, the Magistrate had relied on the case in which the accused was convicted, and that evidence was not relevant against the surety: *vide* s. 43, Evi. Act (but see now sub-s. (7) of s. 514).

In such cases it is obviously necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of s. 514, be taken in the presence of the respondent, but clearly, as was said in *The Empress v. Nobin Chunder Dutt* (1), when the respondent appears and shows cause, he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate had directed him to show cause why the bond should not be forfeited. I do not agree with what was said in *Queen-Empress v. Har Chandra Chowdhury* (3), that the section requires that before a final order is made, the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence. *In re Mohesh Chundra Roy* (2), is cited as authority for that proposition, but it is clearly no authority, for all that is said there is that evidence should be re-

(1) 4 C 865; 4 O L R 243 (F B).

(2) 10 O L R 571.

(3) 25 O 440.

recorded by the Magistrate before calling upon the person bound by the bond to pay the penalty thereof. Where a bond has been executed for appearance merely, I am of the opinion that it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say, that the accused absented themselves without reasonable cause for their non-appearance, is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court.

In the present case, however, in view of the petition put in and as two accused persons did appear, it was clearly the duty of the Magistrate to examine them as to the reason put forward for the non-appearance of the other accused. One of the two accused who did appear came from the same village as the four defaulters and the other accused from evidently a neighbouring village, who presumably would come by the same route. It does not necessarily follow, of course, that either of the two accused who did appear came from their villages on the day in question, they might have come from elsewhere. The other reason given by the Magistrate, I think, is no reason if the accused persons were really unable to appear because of the storm. They were not bound to come all the way to Court to explain how they had been detained. In my opinion, however the Magistrate's proceedings were bad for another reason—the simple reason that the accused persons should have been given an opportunity of proving their allegation, if they so desired, by adducing evidence. It is quite possible that the storm was so bad that they really were detained by it, and so were unable to attend Court.

There is another matter which should be remarked on in the present case. This prosecution for trespass was apparently a petty case. It started on June 30, 1938. All the accused were present on August 5, the date fixed for the case, when it appears that the Magistrate himself was absent. On September 5, four out of the six accused were present and two were sick. On September 30, the same thing happened. On October 20, all six accused were present and some only of the prosecution witnesses were examined. On October 31, all six accused were present, but nothing was done on the excuse that a cross case had not been finished. The next hearing (the sixth hear-

ing) was on November 11, the date in question, when four accused were absent. There were no less than six subsequent adjournments before orders were passed on February 21, when the accused, were fined Rs. 10 each. It is no wonder, in view of the lamentable delay in trying this trivial case, if some of the accused made only a half-hearted attempt to appear on the sixth occasion. As the Magistrate did not give the respondents a proper opportunity of showing cause, the order directing the forfeiture of the bonds will be set aside and the amounts paid refunded to the applicants.

D.

Order set aside.

PRIVY COUNCIL

Appeal from the Calcutta High Court
November 3, 1939

LORD MACMILLAN, SIR GEORGE RANKIN
AND MR. M. R. JAYAKAR.

SATISH CHANDRA GIRI—APPELLANT

versus

DHARANIDHAR SINGHA ROY AND

OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), ss. 9, 92—Religious endowment—Mahant having two capacities, secular and religious—Both offices interdependent and inseparably blended—Suit relating to religious office, whether falls under explanation to s. 9—Jurisdiction of Civil Court to remove such mahant from both offices—True test to be applied in considering such removal—S. 92, scope of—Temple a trust within purview of s. 92—Entire office of mahant is indivisible and falls under s. 92—Suit for only religious part of mahant's duties is maintainable.

Where the secular and the religious duties of the mahant in the temple are interdependent and inseparably blended, efficient discharge of the one depends on the control of the other. In other words, in all such religious endowments, where tradition and custom play a vital part in intermingling the two functions, their division is unthinkable. Where such an office is connected with an endowment which has valuable properties and is associated with the control of extensive funds, even if the two capacities of the office can be separated, and the mahantship on its spiritual side regarded as purely an office or dignity, the office is of such a nature that a suit relating to it must fall within the purview of the explanation to s. 9 of the Civil P. O., as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of such office are associated with religious rites or ceremonies. 33 Ind. Cas. 583 (1), referred to. [p 622, col. 1.]

The matter relating to the removal of the mahant of such an institution from both the capacities, secular as well as religious, is one for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. But the jurisdiction of the Civil Courts to decide such questions can no longer be doubted. The true rule in such matters can be stated to be that if it be found by the Court that

the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices. Observations of *Mohammad Noor, J.*, in 138 Ind. Cas. 417 (3), approved. [p. 622, col. 2.]

Where the *mahant* of a temple which is a trust for public purposes of a charitable or religious nature within the purview of s. 92 of the Civil P. O., has two capacities secular as well as religious, the entire office of *mahant* held by the same individual is indivisible and falls within the operation of s. 92. No words are to be found either in s. 92 or elsewhere excluding the religious part of the *mahant's* duties from the operation of that section. The only limit to the Court's jurisdiction to entertain suits under that section is to be found in the provisions of s. 9 of the Civil P. O., but, the spiritual portion of the office being intimately connected with the exercise of rights to property, a suit relating to it cannot be said to be outside the purview of s. 9. [*ibid*]

Messrs. C. S. Rewcastle, K. C., J. M. Parikh, S. C. Chaudhuri, for the Appellant.

Messrs. A. M. Dunne, K. C. and H. R. Abdul Majid, for the Respondents.

Mr. M. R. Jayakar.—These two appeals are against a decree dated July 6 and August 24, 1934, of the High Court of Judicature at Calcutta, modifying a preliminary decree, dated November 6, 1929, of the Court of the District Judge of Hoogly. The suit in which the decrees were passed was instituted under s. 92 of the Civil P. O., 1908, by certain persons claiming to be interested in the administration of the shrine of Sri Taraknath near Calcutta, against one Satish Chandra Giri, the appellant in the main appeal (No. 29 of 1934) (hereinafter called the appellant), who was described as the *shebait* or *mahant* of the said shrine.

The shrine of Taraknath, though sometimes referred to in the present proceedings as a *math*, is in reality a temple containing an idol called Sri Taraknathji. Its origin is lost in antiquity. The High Court of Calcutta has in its judgment traced its history back to 1747 A. D., and there is no doubt that it is a very ancient public, religious and charitable endowment, of which the appellant had been for many years the *mahant*. It is unnecessary for the purposes of this appeal to enter into the details of its antiquity. It is sufficient to say that the succession to the *mahantship* descended from one Mohan Giri, the *mahant* in 1769, who acquired properties while he held that office. These properties along with the *mahantship* came to be

vested, through successive holders, in one Madhab Giri in or about the year 1864. On November 17, 1873, he executed a document in favour of his senior *chela* Shamchand Giri. By that document, Madhab Giri, who was at that time about to face a trial for sexual misbehaviour, appointed Shamchand Giri to manage, in the event of his incarceration, the properties of the temple during his absence. The properties were stated to be of twofold character: *debottar* (properties belonging to the temple) and *nij* (private properties of the *mahant*), of which a list was appended to the document. The document also provided that, on the return of Madhab Giri, Shamchand Giri was to hand over to him possession of both classes of property and render an account in respect of each, but if Madhab Giri died before his return, Shamchand Giri was to succeed him.

Madhab Giri was convicted and sentenced on November 25, 1873. After his release in December 1876, he obtained possession of all the properties from Shamchand Giri, but the latter instituted a summary suit for possession against Madhab Giri and obtained a decree on August 28, 1877.

On December 29, 1877, Madhab Giri instituted a suit against Shamchand Giri, on the strength of the document mentioned above, for the recovery of the properties in Shamchand Giri's possession. There were *inter alia* two schedules annexed to the plaint: schedule Ka, which was a list of *debottar* properties and schedule Kha, a list of the properties claimed as *nij*. Madhab Giri prayed, amongst other things, that, according to the document of November 17, 1873, Shamchand Giri was bound to deliver possession and was not entitled to deny Madhab Giri's title or set up an adverse one and that it might be declared that the properties mentioned in schedule Kha were Madhab Giri's personal or private properties. Shamchand Giri contested the suit, mainly on the ground that he had no knowledge of the said document, that Madhab Giri had forfeited his title to the office of *mahant* by reason of his sexual misbehaviour and that Shamchand Giri had been duly appointed *mahant* in his place.

On December 5, 1878, the District Judge delivered judgment, holding that Shamchand Giri was not a duly appointed *mahant*, that Madhab Giri had not forfeited the *mahantship* on account of his misbehaviour, that the document of November 17, 1873, was genuine and Madhab Giri

was entitled to keep possession of the properties therein mentioned. The District Judge further held that the properties in schedule Kba were not the *nij* properties of the *mahant*. In the result, he held that Madhab Giri was entitled to recover possession of the office of *mahant*, with the properties in both the schedules Ka and Kha, which belonged to the endowment of the idol. Madhab Giri's claim to the properties in schedule Kha as his private properties was dismissed. A decree dated November 5, 1878, giving effect to the judgment, was drawn up. There was an appeal by Shamchand Giri and cross objections by Madhab Giri. It is to be noted that in his cross-objections Madhab Giri raised no objection to the decision of the District Judge that the properties in schedule Kha were not the private properties of the *mahant*. Madhab Giri thereafter applied for possession in accordance with the decree, making no distinction between the two kinds of properties and eventually he recovered possession of both. These facts may not operate as an estoppel against the appellant, but their evidentiary value cannot be denied in connection with the appellant's contention in the present suit that the said properties and their accretions are his private properties.

Madhab Giri died on March 11, 1893. He left a will dated March 5, 1893, whereby he appointed the appellant his successor as *mahant* and also executor of the will. He devised the *nij* properties to the appellant absolutely. The appellant accordingly ascended the *gadi* and applied for probate of the will, which was granted by the High Court of Calcutta on July 1, 1895.

In September 1922, four persons, who are now respondents Nos. 1—4 in the first appeal and appellants Nos. 1—4 in the second appeal here, and three others, who have since died, instituted the present Suit (No. 28 of 1922) in the Court of the District Judge of Hoogly, against the appellant. During the pendency of the suit, three other persons were added as plaintiffs and they are parties to these appeals. All these persons are hereinafter referred to as plaintiffs.

The suit was instituted under s. 92 of the Civil P. C. There were 13 prayers, out of which the following are material at the stage of this appeal:—

"1. For a declaration that certain properties specified in the schedules annexed to the plaint were not the *nij* properties of the appellant, but belonged to the deity.

2. For a declaration that the appellant was not a

fit and proper person to continue as *mahant* or trustee of the said trust estate and that he might be removed from such office by the order of the Court.

3. That in his place a fit and proper person be appointed as *mahant* and trustee of the temple and of its properties.

4. That all the properties adjudged to be trust properties be vested in the new *mahant* and that the appellant be directed to make over their possession to him.

5. For an account.

6. For the settlement of a scheme for the proper management and control of the trust properties."

The appellant contested the suit and denied the material allegations contained in the plaint. He filed a lengthy written statement. Shortly stated, his defence was that the temple was not a public, religious or charitable endowment within the meaning of s. 92; that the *mahant* managed the *debottar* properties as *malik* owner, that he took his predecessor's *nij* properties under an absolute bequest contained in his will, that he could and did acquire new properties, which were his *nij* properties, that he was not of immoral character, as alleged in the plaint, nor was he guilty of a breach of trust, nor of mismanagement or misappropriation of any part of the trust properties, that he was a fit and proper person to act as *mahant*, having acted as such for over 30 years and that he was not liable to render an account of the trust properties.

On these pleadings, the District Judge framed appropriate issues and delivered judgment on November 6, 1929. He found all the issues in favour of the plaintiffs and also that the charges of immorality and misappropriation made against the appellant were proved. A decree was passed, of which the following are the material terms:

"1. The Tarkeshwar endowment was a public, charitable and religious trust.

2. The properties mentioned in certain schedules to the plaint were *debottar* properties of the temple.

3. The appellant was not entitled to have any *nij* property of his own and the properties claimed by him as *nij*, whether acquired in his own name or in the names of other persons, belonged to the temple.

4. The appellant was not a fit person to continue as *mahant*, that he was removed from that office and was to forthwith make over possession of all properties to the temple, to be vested in the Receiver, pending further orders.

5. The appellant was to render accounts of both sets of properties, from the day he ascended the *gadi* to the present time.

6. A scheme for the proper administration and control of the trust estate was to be framed."

Against the said judgment and decree, the appellant filed an appeal (No. 1 of 1930). Plaintiffs also filed a cross-objection on the ground that, upon the findings arrived at, the Court below ought to have directed

accounts to be taken from the appellant on the footing of wilful default. The appeal and cross objection were eventually heard by a Bench of the High Court of Calcutta (Manmatha Nath Mukerji and Sarat Kumar Ghose, JJ.) who affirmed the findings of the District Judge and his decree, with the following variations:—

"1. The order for accounts against the appellant was set aside

"2. Certain properties claimed in the plaint and held by the District Judge to be *debottar* properties were excluded from the decree."

The appellant's appeal and the plaintiffs' cross-objection were dismissed.

On the question of misappropriation and breach of trust by the appellant, the learned Judges held that the appellant had diverted trust funds for the purpose of self-aggrandisement and for the benefit of others who were not entitled thereto and that gross breaches of trust on a most gigantic scale had been proved against the appellant. On the issue relating to the appellant's moral character and habits of life, the High Court went into the details of the charges made against him and held them substantially proved. About the appellant's fitness to continue as *mahant* and his liability to be removed from his office, the learned Judges observed that by reason of the continuous course of the misappropriation of trust properties in which the appellant had indulged on a most extensive scale, the breaches of trust which he had systematically committed in respect of such properties, the unfounded claim thereto which he had persistently put forward and in pursuance of which he had treated such properties as his own properties, and the life he had led which was repugnant to the intention of the trust, the appellant had rendered himself unfit to continue in such office. They further observed that infinitely more than what would justify the removal of a trustee of a public, religious and charitable endowment had been established, that, on the most charitable view of the appellant's conduct and his dealings with the endowment, it was impossible to resist the conclusion that the interest of the endowment peremptorily demanded the removal of the appellant from his office as *mahant*. In setting aside the District Judge's order for accounts against the appellant and in dismissing the plaintiffs' cross-objection on the same question, the learned Judges left it open to the deity or anybody, who would represent him in future, to recover such other properties as there might be

belonging to the endowment and to sue the appellant for accounts.

The question of framing a suitable scheme was considered by the District Judge after the other issues had been decided. He delivered a separate judgment framing a scheme for the administration of the endowment. It was the subject of a separate appeal to the High Court and was disposed of by a separate judgment.

The appellant applied to the High Court for a certificate of fitness. It was granted to him in the main appeal (No. 29 of 1934) and refused in the appeal (No. 30 of 1935) relating to the framing of the scheme. A certificate (appeal No. 2 of 1935) was likewise granted to the plaintiffs respondents in respect of the liability of the appellant to account on the basis of wilful default.

Since the leave to appeal to His Majesty in Council was granted, the scheme has been given effect to and a new *mahant* and a committee of management have been appointed. They have taken over charge of the property from the Receiver. It is to be noted that the new *mahant* is not a party to the appeals before the Board and there is no question now before their Lordships relating to the scheme.

From the foregoing history of the proceedings it is clear that many of the questions arising in the appeal are concluded by concurrent findings of fact and there is strong reason in the present case why their Lordships should be slow to depart from the rule of practice, which, though not a rule of law nor a rigid rule, plays an important part in the exercise of the prerogative—that concurrent findings of facts will not be disturbed.

The question about the *nij* properties, which had been decided against the appellant, falls under this category. These properties are admittedly accretions to the original nucleus of five *putni taluks*, having been acquired out of their income.

In the light of past events, their Lordships find no difficulty in understanding the contention of the appellant and his predecessors as regards the *nij* properties. They were throughout claimed as the private and absolute properties of the *mahant*. Before the Board, however, the appellant's Counsel sought to make a distinction and endeavoured to place them in an intermediate category of properties which, though personal and private, the *mahant* could not dispose of, as he was

under an obligation to use their income, in case of deficiency, for the purposes of the temple, but as regards the surplus, he could dispose of it in any way he liked and was not liable to render an account thereof. Their Lordships find in the facts of this case no justification for such distinction, which may in certain cases be justified as the creature of the immemorial customs of the institution. In his defence, the appellant claimed the *nij* properties as absolutely belonging to him under the provisions of his predecessor's will, and the question must be decided on that footing, and cannot admit of the refinements urged by his Counsel. Their Lordships see no reason to differ from the concurrent findings of the lower Courts on this question.

With reference to this question, there are undoubtedly a few subsidiary points on which the High Court disagreed with the District Judge, but, in their Lordships' opinion, this difference of view in no way weakens the main finding of the High Court, which is clear. The learned Judges held that upon the views, circumstances and probabilities they had dealt with, they had come to the conclusion, about the correctness of which they entertained no doubt whatever, that the claim to the *nij* properties which the appellant had asserted was entirely unfounded. They added that the material documents properly read were unequivocal in their terms and left no vestige of doubt that Mohun Giri (the original acquirer) never treated the *putni taluks* as his personal property, nor intended that Raghuchandra Giri (his successor) should ever regard them as such. The learned Judges went on to observe that, in arriving at this conclusion, they were not unmindful of the fact that they had not been able to ascertain the exact sources from which Mohun Giri had acquired the five parent *taluks*; but notwithstanding it, they were firm in their conclusion that there was no foundation for the supposition that he acquired or left any properties as his personal properties, as distinguished from the properties of the deity.

It was argued that in arriving at this conclusion, the learned Judges contradicted their view, expressed in an earlier part of the judgment, that the onus was on the plaintiffs to prove that the said properties belonged to the temple. Their Lordships, however, on a proper appreciation of the High Court's judgment, can detect

no such contradiction. The entire evidence was before the learned Judges, which they considered with great care and scrutiny and their Lordships cannot allow the question to be re-opened.

Likewise, on the question of the appellant's moral character and his consequent unfitness to occupy the office of *mahant*, there is a concurrent finding of fact which cannot be disturbed. It was argued that the appellant's moral character could not be considered in any suit under s. 92 of the Civil P. C. Their Lordships are unable to agree with this contention. The question of his character was not considered *in vacuo*, but as directly relevant to some of the issues which arose under s. 92, *e. g.* his fitness to remain in office and his liability to be removed therefrom.

It may be noted that the decree of the lower Courts directing the appellant's removal from office was not based entirely on his immorality, but partially upon the finding of a continuous course of misappropriation of trust properties on a most extensive scale, the breaches or trust which he had systematically committed in respect of such properties, the unfounded claim thereto which he persistently put forward and in pursuance of which he treated such properties as his personal properties.

The main point argued before their Lordships is the following:—

The *mahant*, it is said, acts in two distinct capacities: he is the spiritual head of the endowment, the *shebait* of the deity. He is also the trustee and manager of the properties and temporal affairs of the temple and the deity. It is, therefore, contended that a Civil Court has jurisdiction under s. 92 of the Civil P. C. over his latter capacity only; it has no power to pass any orders affecting his spiritual position or his control over the spiritual affairs of the deity or endowment, and that, under that section, the Court can deprive him only of the trusteeship and management of the temporal affairs of the endowment, but it cannot remove him from his spiritual duties. A contrary view, it is contended, will enable a Civil Court to assume ecclesiastical jurisdiction over the religious affairs of the endowment.

Before their Lordships examine the soundness of this contention, it is material to note that during the long and protracted hearing of this case in the lower Courts, no distinction was made between the two sets of duties, and the question now urged before the Board was not raised in the

appellant's written statement, is not dealt with in the exhaustive judgments of the Courts below, nor mentioned in the elaborate grounds of appeal to His Majesty in Council.

On the question whether the two capacities are distinct as alleged by the appellant or interrelated, it is useful to turn to the pleadings to ascertain what the common view of the parties was.

Paragraph 4 of the plaint is as follows:—

"The management of that *sheba* (worship) and *sadabrata* at the said *math* or shrine, and also of the *debottar* properties thereto appertaining and belonging to the said Thakur (deity), was and has always been, according to the ancient customs and usage of the *math*, entrusted to a *mahant*, who, as the trustee thereof, discharges all the duties of a *shebait* in connection therewith. Save as aforesaid, as such *shebait* and trustee, the *mahant* of Tarakeswar has no personal or any other right to the said *math* and the properties thereto appertaining and belonging to the said Thakur (deity)."

This allegation was met by para. 20 of the appellant's written statement, which is as follows:—

"According to the long established custom and usage of the *math*, the *mahant* for the time being makes all arrangements for the *sheba* (worship of the said Thakur, etc., and manages the *debottar* properties as *math* *shebait* of the said Thakur and that whoever becomes the *mahant* of the *math* possesses the right to perform those acts by virtue of his office."

It is clear, therefore, that in the opinion of both the parties, the secular and the religious duties of the *mahant*, in the temple in question, are interdependent and inseparably blended; and such must be the case in any well-organised institution, if the obligations of the *mahantship* have to be effectively discharged.

The interconnection of the two aspects of the office was explained by Lord Shaw, who in delivering the judgment of the Board in *Ram Parkash Das v. Anand Das* (1) observed:—

"The *mahant* is the head of the institution. He sits upon the *gadi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. ...the succession to him in such property follows with the succession to the office."

The two capacities are thus closely intermingled and a proper and efficient discharge of the one depends on the control of the other. The *mahant* must have authority over the funds and income of

the institution to be able to discharge his religious duties efficiently, in conformity with the customary and traditional obligations of the office and to the satisfaction of those who claim the benefit of the worship. He necessarily enjoys large patronage in the discharge of his religious functions. He cannot, in consequence, depend, for the due performance of such duties, on the mercy or caprice of another functionary, with separate or co-ordinate authority over the funds of the institution. Any division of the two capacities would lower his prestige, as also impair the efficiency of his religious functions. On the other hand, the funds of the institution have to be administered with a proper regard to the religious traditions of the institution and the sentiments of its worshippers, of which the *mahant*, for the time being, is the custodian and interpreter. He furnishes a salutary check upon the tendency, which experience proves is not at all infrequent to administer the funds of the endowment with sole regard to secular and utilitarian considerations. In other words, in all such religious endowments, where tradition and custom play a vital part in intermingling the two functions, their division is unthinkable.

As pointed out in the case of *Striman Sadagopa v. Krishna* (2), such offices may have, in reality, a secular character, although religious duties are attached to them, because the occupants are called upon to exercise business functions, either as trustees or managers of the properties and funds of the temple, or as overseers in the regulations of its affairs generally and have necessarily civil rights and consequent liabilities, which may properly be made the subject of civil litigation.

There may, however, be cases where the duties of an office are purely spiritual and moral, entirely unconnected with any particular temple or place. The office may be such that no pecuniary benefit is attached to it or its emoluments are purely voluntary contributions, or the duties attendant to it are the exercise of spiritual and moral supervision over the voluntary actions of the worshippers. In such cases, it may be futile for a Civil Court to interfere with the exercise of the duties of the office. No rights of property are connected with it and there is no machinery by which the Court can control the voluntary action of the worshipper or the *mahant*.

(2) 1 M H O R 301 at p. 308.

(1) 43 I A 73 at p. 76; 33 Ind. Cas. 583; 20 O W N 802; 14 A L J 621; (1916) 1 M W N 406; 31 M L J 1; 18 Bom. L R 490; 3 L W 576; 24 O L J 116; 20 M L T 267; A I R 1916 P O 256; 43 O 707 (P O).

The office in the case is, however, of a different character. It is connected with an endowment which has valuable properties and is associated with the control of extensive funds. Even if the two capacities of the office can be separated, and the *mahantship* on its spiritual side regarded as purely an office or dignity, there is no doubt that the office is of such a nature that a suit relating to it must fall within the purview of the explanation to s. 9 of the Civil P. O., as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of such office are associated with religious rites or ceremonies.

There are to be found in the reported rulings, both of this Board and of the Indian High Courts, numerous cases where *shebaitis*, *mahants*, and in Muslim endowments, *mutuwallis* and *sajjadanashins* have been removed by Civil Courts from the performance of their temporal as well as religious duties, where the Courts have come to the conclusion, from the evidence adduced that such removal was necessary in order to safeguard a faithful discharge of the obligations of the office. One such instance of removal is to be found in *Syed Shah Muhammad Kazim v. Syed Ali Saghir* (3), see also *Sarabjit Bharti v. Gourinath Kakaji* (4). Their Lordships agree with the observations of Khwaja Mohammad Noor, J. that :—

"Cases may be conceived in which a *sajjadanashin* or a spiritual head of a Hindu institution, say for instance, a *mahant* of a *sangat*, may so behave himself that his very connection with the institution may be repulsive to the general public and may amount to desecration of the sacred places; I see no reason why the Courts cannot interfere in such cases *Syed Shah Muhammad Kazim v. Syed Ali Saghir* (3)."

Their Lordships are aware that no general rule can be laid down befitting the different kinds of religious heads of varying sanctity and eminence. It must depend upon the facts of each case. It may be that mere mismanagement or incapacity is, in the case of certain high dignitaries, not ordinarily sufficient for their removal from the performance of their religious duties, as distinct from their duties as managers of the properties of the institution. It may also be that a Court, in certain cases, exercises a wise discretion in not directing their total exclusion from their religious office, where, e. g., the lapses are due to causes

like a misconception of their position or obligations. The Court may sometimes not order their total removal, but may associate with them a committee of management. But these are all matters for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. But the jurisdiction of the Civil Courts to decide such questions can no longer be doubted.

The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices.

Their Lordships' attention was invited to certain rulings both of this Board and the High Courts in India, which enumerate and distinguish between the two sets of functions—secular and religious—performed by such religious heads. These rulings, in their Lordships' opinion, merely enumerate and classify such functions. None of them has proceeded so far as to lay down that in cases like the one before their Lordships, where both the functions are intermingled and interdependent and have always been held and performed throughout the long history of the endowment by the same individual, the Court in a fit case will not have the power to remove the individual from the performance of both the functions.

The appellant's Counsel conceded, at an early stage of his argument, that the temple in this suit was a trust for public purposes of a charitable or religious nature within the purview of s. 92 of the Civil P. O. If so, it cannot be doubted that the entire office of *mahant*, which according to the admission of the parties and the evidence in the case is and has always been indivisible and held by the same individual, falls within the operation of this section. No words are to be found either in s. 92 or elsewhere excluding the religious part of the *mahant's* duties from the operation of that section. The only limit to the Court's jurisdiction to entertain suits under that section is to be found in the provisions of s. 9 of the Civil P. O. but, for reasons already explained, the spiritual portion of the office in this case—assuming that it could be separated from the secular—is so intimately

(3) 11 Pat. 288; 136 Ind. Cas. 417; 12 P L T 817; A I R 1932 Pat. 33; Ind. Rul. (1932) Pat. 81.

(4) 27 O O 149; 80 Ind. Cas. 674; 10 O & A L R 1; 10 O L J 619; A I R 1924 Oudh 261.

connected with the exercise of rights to property that a suit relating to it cannot be said to be outside the purview of s. 9.

Perhaps the most vital consideration which their Lordships are unable to ignore is the fact that s. 92 has been construed, by a long course of Indian decisions, as conferring, in fit cases, jurisdiction on Civil Courts to deal with the religious side of such offices. This interpretation has a sound basis; no reason has been shown against it and their Lordships are unwilling to take a narrower view of the section, which may make it inadequate to meet Indian conditions.

A grievance was made by the appellant's Counsel that the Courts in India were in error in not giving directions in the decree that the appointment of a successor to the appellant in the office of *mahant* was to be in conformity with the customs and usages of the endowment. The record of the appeal which is before the Board supplies no reason for imagining that the new *mahant* was appointed in violation of such usages. He is not a party to the appeal nor is the scheme, which embodies the rules regulating such appointment, before the Board. It is not, therefore, possible to deal with this question.

It now remains to deal with the plaintiffs respondents' cross-appeal. It relates to the accountability of the appellant for his dealings with the trust properties. It is contended that, on the concurrent findings of the Courts in India that the appellant has been systematically misappropriating the property of the endowment, an order for accounts on the basis of wilful default ought to have been passed by the High Court. Their Lordships are clearly of the view that the evidence leaves no doubt that the appellant has rendered himself accountable for the various acts of malversation and breaches of trust committed in the course of his management. But, as the learned Judges of the High Court have pointed out, there are difficulties in passing at this stage a decree for accounts against the appellant. A scheme for the management of the endowment has been framed which is not before their Lordships. A new *mahant* has been appointed and has taken over charge of the endowment. He is not represented here. Intricate questions of law requiring careful consideration will arise in the course of the determination of this issue and, in their Lordships' opinion, having regard to all these considerations, it is desirable to leave this

question to be determined by the new *mahant*, who will have liberty to apply to the District Judge for the trial of this issue. In doing so, he may consult, if he so desires, those who are associated with him in the management of the institution, but it will be his exclusive responsibility to proceed with the matter or not. Instead of being driven to a separate suit, the new *mahant* will be permitted to have this question determined by an application in this suit, after he has had sufficient time to consider the question in the light of the Board's decision of this appeal. The respondents' Counsel has agreed to this course.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the High Court be affirmed and the appeal dismissed. The appellant will pay the costs of the respondents who appeared of this appeal. The respondents' cross appeal will be dismissed, and they will bear a twenty-fifth share of the costs of the main appeal payable by the appellant.

s Appeal dismissed.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitors for Respondents Nos. 1, 3, 4, 5 and 6:—Messrs. W. W. Box & Co.

RANGOON HIGH COURT

First Appeal No. 144 of 1937

December 9, 1938

DUNKLEY, J.

MARIAM BIBI AND ANOTHER—APPELLANTS
versus

CASSIM EBRAHIM MALIN AND ANOTHER—
RESPONDENTS

*Court Fees Act (VII of 1870), s. 7, Sch. I, Art. 1—
Art. 1 imposes liability and is not merely auxiliary
to s. 7—Cross-objection—Court-fees on.*

Article 1 of Sch. I, Court Fees Act, is not merely auxiliary to s. 7 because, the Schedules to the Act, when read with ss. 4 and 6 of the Act, do impose a liability. Section 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with s. 4 or s. 6 as the case may be. *Nepal Rai v. Debi Prasad* (1) and *Reference under Court Fees Act, 1870* (2), referred to.

A cross-objection must be chargeable with a court-fee calculated *ad valorem* on the amount of "the subject-matter in dispute." "The subject-matter in dispute" means the subject-matter in dispute in the cross-objection. 85 Ind. Cas. 257 (3), relied on.

Mr. Rajagopal for the Advocate-General,
for the Appellants.

Messrs. Clark and P. B. Sen, for the Res-
pondents.

Judgment.—The question referred to me for decision, under the provisions of s. 5, Court Fees Act, arises out of a cross-objection which has been filed by the respondents in Civil First Appeal No. 144 of 1937. The suit out of which this appeal arises was a suit for the administration of the estate of a deceased person and accounts. By the preliminary decree the respondents (who were the defendants), have been ordered to pay to the appellants, (who were the plaintiffs) a sum of Rs. 2,380 as special costs in any event, the ordinary costs being ordered to abide the passing of the final decree. The cross-objection contains seven grounds. The first four grounds relate to the findings in the suit. The remaining three grounds relate to the order that the respondents shall in any event pay this amount of special costs to the appellants. The taxing master has held that the cross-objection so far as it relates to these special costs is chargeable with court-fees *ad valorem* on the amount of the costs, *viz.*, Rs. 2,380, under Art. 1 of Sch. I, Court Fees Act; but at the request of the respondents he has made a reference under s. 5 of the Act.

The argument which had been advanced on behalf of the respondents is that Sch. I, Court Fees Act, does not impose any liability and that it must be read in relation to s. 7 by which the liability is imposed, that is that s. 7 is the charging section and Art. 1 of Sch. I is merely auxiliary to that section. I am unable to accede to this argument, because, in my opinion, it is clear that the Schedules to the Act, when read with ss. 4 and 6 of the Act, do impose a liability. Section 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with s. 4 or s. 6 as the case may be. See on this point *Nepal Rai v. Debi Prasad* (1) at p. 449 and *Reference under Court Fees Act, 1870* (2) at p. 369. Now, the only place in the Court Fees Act where cross-objections are mentioned is Art. 1 of Sch. I, Column 1 of this Article reads as follows:

"1. Plaint: written statement pleading a set-off or counter-claim, or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in s. 3:"

(1) 27 A 447 at p. 449; 2 A L J 105; A W N 1905; 40.

(2) 29 M 867 at p. 369; 16 M L J 287.

and Column 2 reads: "when the amount or value of the subject-matter in dispute . . ." Consequently, it is clear that a cross-objection must be chargeable with a court-fee calculated *ad valorem* on the amount of 'the subject-matter in dispute.' With the greatest respect, I agree with the observations of Robinson, C. J. in *Ma Shin v. Maung Shwe Hnit* (3) at page 640 where he says:

"In my opinion it is wrong to assume that the words 'amount or value of the subject-matter in dispute' mean, in reference to a cross-objection, 'the amount or value of the subject-matter in dispute in the suit'".

In my view 'the subject-matter in dispute' means the subject-matter in dispute in the cross-objection. The subject matter in dispute in this cross-objection is clearly whether the special costs awarded are to be payable by the respondents to the appellants in any event. The appellants expect to be paid these special costs irrespective of the final result of the suit. The respondents, on the other hand, hold that these special costs should abide by the final decree in the suit. Hence, so far as the grounds raised in the last three paragraphs of the cross-objection are concerned, a court-fee calculated *ad valorem* under Art. 1, Sch. I, is payable by the respondents on the amount of the special costs, *viz.* Rs. 2,380.

D.

Order accordingly.

(3) 2 R 637 at p. 640; 85 Ind. Cas. 257; A I R 1925 Rang. 145.

NAGPUR HIGH COURT

Second Appeal No. 333 of 1937

August 24, 1939

GRILLE, J.

OHHOTELAL—DEFENDANT—APPELLANT
versus

GOPALDAS—PLAINTIFF—RESPONDENT

Partnership Act (IX of 1932), s. 69—Suit by plaintiff in respect of money due to him from defendant on basis of transactions in unregistered partnership between them—Partnership claimed to be dissolved before suit—Sum specified—Suit, if maintainable.

The language of sub-ss. (1) and (2) of s. 69, Partnership Act, is wide enough to cover suits relating to a dissolved firm and sub-s (1) covers a suit by a plaintiff suing in respect of a right vested in him or acquired by him as a partner in a firm, and it is not essential that the firm should be actually in existence at the date when the suit was instituted. The words in sub s. (1) "suing as a partner in a firm" include a suit on a cause of action which is based on a right acquired solely as a partner in a firm, and where the firm was unregistered, no such suit can be brought.

The plaintiff sued the defendant in respect of money which he alleged was due to him on the basis of transactions in an unregistered partnership into which he and the defendant had entered. It was claimed that the partnership was dissolved and that on a calculation, as the venture had been unprofitable, the defendant owed the plaintiff a specified sum of money :

Held, that the suit was barred under s. 69, Partnership Act. 189 Ind. Cas. 424 (1), relied on.

S. A. from the appellate decree of the Court of the District Judge, Nimar, dated March 9, 1937.

Mr. V. V. Kelkar, for the Appellant.

Mr. K. B. Tare, for the Respondent.

Judgment.—The plaintiff sued the defendant in respect of money which he alleged was due to him on the basis of transactions in an unregistered partnership into which he and the defendant and one other had entered for the sale of cotton seed. Profit and loss were to be shared equally, and the capital was advanced by the plaintiff in the shape of calculation of the amount used with interest. No capital appears actually to have been provided since the business was to be done on the basis of a number of *pallas* of cotton and the capital was to be calculated on the cost of the cotton dealt with in this specified quantity. Profits were to be shared equally and so were losses. It is claimed that the partnership was dissolved and that on a calculation, as the venture had been unprofitable, the defendant owed the plaintiff a specified sum of money.

The defence was that the terms of s. 69 of the Partnership Act rendered the suit untenable as the partnership was unregistered. Both the Courts below have concurred, although for different reasons, in holding that s. 69 of the Indian Partnership Act afforded no bar and decreed the plaintiff's claim. This is a second appeal by the defendant.

The trial Court assumed that the suit was one for accounts of a dissolved firm and held that there was no bar as s. 69 (3) of the Indian Partnership Act provided that the provisions of sub-ss. (1) and (2) should not affect the enforcement of any right to sue for accounts of a dissolved firm (sub-s. (3) (a) of s. 69). The lower Appellate Court considered the reasoning of the trial Court wrong in that the suit was not for accounts of a dissolved firm. It held, however, that the section could have no application as sub-ss. (1) and (2) deal only with subsisting firms and sub-s. (3) with firms which had been dissolved

before the institution of the suit. The firm now in question is such a firm, but the learned Judge has considered that as the sum due to the plaintiff was already ascertained after the dissolution of the partnership, the relations between the parties were those of creditor and debtor. The learned Judge interprets the first two sub-sections of s. 69 as relating in the present tense alone and considers it essential for these two sub-sections to operate that "firm" should be "existing firm."

Only one case has been cited before me in the course of arguments, and that has been cited by the learned Counsel for the appellant, and it is a case which appears to me to be entirely in point. It is *Patel v. Husseinbhai Mohammad* (1) where Beaumont, C. J. held that the language of sub-ss. (1) and (2) of s. 69 is wide enough to cover suits relating to a dissolved firm and that sub-s. (1) covers a suit by a plaintiff suing in respect of a right vested in him or acquired by him as a partner in a firm, and that it is not essential that the firm, should be actually in existence at the date when the suit was instituted. The facts are parallel to those in the case now before me, and I am in respectful agreement with the view there enunciated. I do not consider that the scheme of the Act, is, as the learned District Judge holds, that the first two sub-sections only apply where the firm is still in existence and the last to firms which are not in existence. The scheme rather appears to me to be this : It is impossible to legislate entirely against unregistered partnerships, but the intention of the Legislature was to discourage non-registration as far as possible; to prohibit the enforcement of any right to sue for the dissolution of a firm, even though unregistered, or for accounts in the case of an unregistered firm which had been dissolved, would not have been practicable since the moneys in possession of such a firm would not then be amenable to any realisation after the firm had in fact been dissolved, or the affairs of the firm were in such a state as to render dissolution in fact inevitable. It is for this reason that sub-s. 3 (a) has been enacted. But it does not follow that a claim in respect of an ascertained sum, a sum which could only be ascertained on the terms of the partnership, should come within this necessarily excepted catalogue of rights to sue, and I am of opinion that

(1) I L R 1937 Bom. 638; 189 Ind. Cas. 424; 39 Bom. L R 260; A I R 1937 Bom. 225; 10 E B 26.

the words in sub-s. (1) "suing as a partner in a firm" include a suit on a cause of action which is based on a right acquired solely as a partner in a firm, and as the present firm was unregistered, no such suit can, in my judgment, be brought. The argument which has been addressed to me on behalf of the respondent relating to the fact that the case was sought to be brought in the Court of Small Causes, which in view of the entry in Art. 29 (c) of Sch. II of the Provincial Small Cause Courts Act declined to try it and remitted the suit for trial by a regular Court is, in my opinion, irrelevant and not in any way germane to the question whether the suit is barred by s. 69 of the Indian Partnership Act or no. As I propose to reverse the decision in the Courts below, the question of the action taken under s. 35 (a) of the Civil P. O. will not need any discussion.

The appeal succeeds, the decree of the lower Appellate Court is reversed and the plaintiff's suit is dismissed. The plaintiff will pay the defendant-appellant's costs throughout.

D.

Appeal dismissed.

PATNA HIGH COURT

Miscellaneous Judicial Case No. 17 of
1939

November 22, 1939

WORT, J.

Rai Sahib ANANDI PRASAD AND OTHERS—
PETITIONERS

versus

Mst. DULHIN KISHORI KUER

—EXECUTRIX—OPPOSITE PARTY

Succession Act (XXXIX of 1925), s. 302—Application under, to recover annuity payable under will—Maintainability—Will—Absolute estate given by testator to his widow—Direction to widow to pay certain annuity—Validity of such bequest—Limitation Act (IX of 1908), Sch. I, Arts. 123, 120—Application to recover annuity under will—Article applicable.

An application under s. 302, Succession Act to recover an annuity payable under a will is maintainable. 159 Ind. Cas. 329 (1), referred to.

Where a testator by his will gives an absolute estate to his widow and the will contains directions to the widow that it would be proper on her part to pay a certain amount annually to a certain institution out of the income of the property and that the said amount shall all along be continued to be paid every year by the widow, the condition does not cut down the estate and the bequest to the institution is not invalid.

Article 123, Lim. Act, applies to an application for recovering an annuity payable under a will and not Art. 120. 151 Ind. Cas. 283 (3), followed.

App. for annual payment to the Nalanda College of Rs. 700 which was provided by the will of Babu Jadunandan Prasad Singh deceased of village Murawra, P. S. Bihar, District Patna, to the trustees of the College.

Mr. C. P. Sinha, for the Petitioners.

Dr. D. N. Mitter and Mr. B. N. Mitter, for the Opposite Party.

Judgment—This is an application taken out under s. 302 of the Indian Succession Act with regard to annuity payable under a will dated February 19 1930. The testator died in the same year, indeed the next day, leaving an absolute estate to his widow subject to a payment to the petitioning College of a sum of Rs. 700 per annum. The relevant words in the will are :

"It shall be 'proper' on the part of the *Musammat* to continue to pay, after my demise, a sum of Rs. 700 (seven hundred rupees) out of the income of my properties to the Nalanda College at Bihar annually and make over every year a sum of Rs. 700 to the Trustees of the said college for expenses of the school department"

and then follows "and this amount of rupees seven hundred shall all along be continued to be paid every year by the said *Musammat*."

The first point taken was the question of jurisdiction and it was contended that the application did not lie under s. 302 of the Indian Succession Act which contains provisions merely for the purpose of determining questions raised by the executor or trustees calling the assistance of the Court as regards the administration of the estate. At first I felt inclined to hold that that was the correct view to be taken of s. 302; but it seems to me perfectly clear that this point has been decided, if not directly, by inference, by their Lordships of the Privy Council in *Secretary of State for India-in-Council v. Srimati Parijat Debi* (1). One of the main questions which came to be decided in that case was whether it was necessary for the applicant, who was the mother of a beneficiary under the will, was bound to take out a succession certificate, as against a debtor under s. 214 of the Indian Succession Act. It was held by the Courts in India and by their Lordships of the Judicial Committee that the Administrator-General of Bengal, against whom the application was made was not a debtor within the meaning of that section.

(1) 63 I A 61; 159 Ind. Cas. 329; 1935 O L R 665; 1935 O W N 1274; 8 R P O 77; A I R 1935 P O 203; 1936 A L R 1; 2 B R 139; 40 C W N 185; (1936) M W N 10; 43 L W 16; (1936) A L J 12; 38 Bom. L R 125 (P O).

I said that the matter of s. 302 was decided by inference if not expressly. The short answer to the case would have been that the application did not lie under the section. But their Lordships expressly mentioned the section and there was no argument suggesting that the application could not be maintained. It may be that I am not correctly stating the decision of their Lordships with regard to s. 302, as it would appear at p. 73* of the Report that this very question was at least mentioned. Their Lordships observed as follows:

"Their Lordships are of opinion that there is nothing in the order of Costello, J. dated March 17, 1931, which does not come within the material words of s. 302"

and then quoting:

"in regard to the estate or in regard to the administration thereof."

Dr. Mitter, who appears on behalf of the person who is entitled to the absolute estate in this property, does not seriously contend that the decision to which I have referred is not an authority on this point. I overrule, therefore, the objection with regard to s. 302 of the Indian Succession Act.

The second contention is that the bequest contained in para. 5 of the will is invalid, or, in the alternative, merely a pious wish on the part of the testator, and therefore not binding on the widow. There was some suggestion that the translation is not correct. In Appeal from Original Decree No. 11 of 1934, where the matter of probate came before this Court, the will is translated in these words:

"It shall be 'incumbant &c.' Dr. Mitter would ask me to construe the clause in this way; it shall be 'proper' on the part of the *Musammat*." But even had it been open to me to do that, I would still have the clause which I have already read and which is in para. 5 of the will to this effect: "and this amount of rupees seven hundred shall all along be continued to be paid every year".

But it is not open to me to put the construction which Dr. Mitter suggests on the clause of the will. If there is any objection on the part of the respondent to the only translation of the will which is before me, there is a certain procedure to adopt to have the matter put right. That procedure has not been adopted, and I am unable to accept the suggestion made by Dr. Mitter in this behalf.

The question whether the estate is cut down by para. 5 does not seem to me to arise. It is a misconception to say that

the absolute estate in all the properties given to the widow is cut down by such directions as are contained in para. 5 of the will. The absolute estate is still there, and, if I may use the expression (which is not strictly applicable to this country) the fee simple is in the widow, but subject to certain conditions which in this case is a payment of Rs. 700 per annum to the college which payment does not cut down the estate. Therefore, in my judgment, it could not be said that the bequest to the college is invalid. The question whether this is merely a pious wish on the part of the testator has already been dealt with by me with regard to the matter of translation. If the words in the will are "it shall be incumbent" and later "this amount shall all along be continued to be paid," there is no doubt that there is an obligation on the part of the widow to pay over to the college this annual sum of Rs. 700.

Some argument was addressed to me on s. 173 of the Indian Succession Act which provides:

"Where an annuity is created by a will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the will."

I must say with great respect to Dr. Mitter I fail to see what connection that has with the will before me. There is no question arising as to the validity of the gift being a gift to the college, and therefore, in my judgment, that part of the case necessarily fails.

A further argument was presented under s. 114 of the Act and it was contended that the bequest in cl. 5 of the will was invalid as it would vest beyond the period provided for by the section. Section 114 provides:

"No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period."

In other words, it is the rule against perpetuity. There is no question here that the bequest vests beyond the lifetime of one or more persons living but immediately upon the death of the testator. It is first contended that the annual sum of Rs. 700 is not chargeable upon the corpus of the estate but merely on its income. The argument as I understand it is that the widow has not at the present moment in her possession the arrears which were payable as from the date of the probate of the will. It is impossible for me to deal with the question because it does not

arise. The petitioners here (who are trustees) are not asking for a charge on the corpus of the estate, but merely for a payment over of the annuity payable under the terms of the will. Whether it is a charge on the income of the property or not in these circumstances, as I have already stated, does not arise. The decision of the Court of Appeal in England in *Re Collier's Deed Trusts: Collier v. Collier* (2) was relied upon. At the moment in any event I need not trouble myself with the question, because as I have already stated, it does not arise.

The last point is the question of limitation. Shortly stated, Dr. Mitter's argument is that Art. 120 of the Lim. Act applies, as the word "annuity" does not occur in Art. 123 which reads:

"For legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate."

It certainly was not the last, it might be the second and certainly not the first, because this is not a legacy but an annuity. I see the force of the argument addressed to me in this regard, but the matter has been finally disposed of by a case which, so far as I am concerned, is binding on me. I refer to the decision of Manohar Lall, J. in *Srimati Hemangini Devi v. Anil Krishna Banerjee* (3). That was a case of annuity and it was held by the Court that Art. 123 of the Lim. Act applied. Until that decision is reversed—a decision which, as I have already said, is binding on me, the point taken by Dr. Mitter cannot be entertained.

In the result, the petitioners, who are trustees of the Nalanda College in Bihar, are entitled to a direction against the *Musammats* (Mst. Dulhin Kishore Kuer, the widow and the executrix) for the payment over of the sum of Rs. 700 per annum from February 20, 1930, with interest at the rate of 6 per cent. per annum under s. 353.

The petitioners are entitled to costs: the hearing-fee is assessed at five gold mohurs.

S.

Order accordingly.

(2) (1939) 1 Ch. 277

(3) 19 P. L. T. 202; 181 Ind. Cas. 283; 17 Pat. 350; A. I. R. 1938 Pat. 600; 5 B. R. 551; 11 R. P. 563.

MADRAS HIGH COURT

Civil Revision Petition No. 811 of 1937

August 10, 1938

ABDUR RAHMAN, J.

AYANOHARI KOVILAKATH

SANAKARA VARMA RAJA—PETITIONER
versus

AYANOHARI KOVILAKATH OHERIA

RAMA VARMA RAJA AND OTHERS—

RESPONDENTS

Malabar Law—Tarwad—Right of member to sue for removal of karnavan—Other members, if should be joined—Petition by one for leave to sue in forma pauperis to remove karnavan—Fact that suit would result in other member functioning as karnavan—Petition, if not bona fide.

Every member of a *tarwad* has a right to see that the *tarwad* affairs are conducted by the *karnavan* properly, and if he finds that a *karnavan* has not been acting in the interests of the *tarwad*, he would have a right to sue for his removal. In such a suit other members need not be joined as plaintiffs. It is obvious, however, that when a member sues a *karnavan* for his removal, he is trying to enforce a right in which he is interested with the other members of the *tarwad* jointly, and he would apparently be doing so not only in his individual interest but in the interest of all the members of the *tarwad* as well or at all events he is taking a step which will not affect him alone but the other members of the *tarwad* also. It is, therefore, only proper that if he has not filed the suit in a representative capacity, he should implead them as parties to the action.

Where a member of a *tarwad* makes a petition for leave to sue *in forma pauperis* to remove the *karnavan*, the petition cannot be held to be not bona fide, merely because, as a result of the success of the suit, the other member would have to function as *karnavan*.

O. K. P. to revise order of the Sub-Judge, Tellicherry, in O. P. No. 15 of 1936.

Mr. D. A. Krishna Wariar, for the Petitioner.

Messrs. O. T. G. Nambiar and A. Achutha Menon, for the Respondents.

Order.—This is a petition for revision against the order passed by the Subordinate Judge of Tellicherry granting leave to the petitioner to sue as a junior member of a *Malabar tarwad* for the removal of a *karnavan* from his office and for certain other incidental reliefs *in forma pauperis*. It has not been contended before me that the petitioner, who is student in the Zamorin's College at Calcut, is in a position to pay the requisite court-fees. Learned Counsel for the petitioner has confined his attack mainly on the grounds that the petition discloses no cause of action, and even if it did, the petition should be held not to have been presented in good faith, the object of the petition is to ne-

defendant No. 3 to become a *karnavan* and not for securing any benefit to the petitioner for himself. In other words, the petitioner is alleged to have been instigated by defendant No. 3 to fight his cause and it has been contended that it would be wholly against public policy to permit him so to do.

In order to substantiate his argument that the petition disclosed no cause of action, Mr. Krishna Wariar contended that a junior member of a *tarwad* had no right to maintain an action for the removal of a *karnavan* and he could do so only in conjunction with all the other members of the *tarwad* against whom no relief was sought in the suit. No satisfactory answer was given when a question was put to him as to what would happen if the other members of the *tarwad* happened to have either conspired with the *karnavan* or did not wish to array themselves as plaintiffs either because they took no interest in the affairs of the *tarwad* or were not inclined to exhibit any hostility to the *karnavan* openly. Reliance was placed in this connection by the Counsel for the petitioner on certain observations made by Mr. Sundara Ayyar in his work on Malabar Law (Ch. 7), where the learned author has referred to the members of the *tarwad* in plural wherever he has stated that they had a right to sue for the removal of a *karnavan*. I was not impressed by this argument. Every member of a *tarwad* has a right to see that the *tarwad* affairs are conducted by the *karnavan* properly, and if he finds that a *karnavan* has not been acting in the interests of the *tarwad*, he would have a right to sue for his removal. What the learned author was trying to convey to his readers was that the right to maintain an action for removal of a *karnavan* vested in the members of the *tarwad*; but there is no justification to construe those words to mean that they could only do so jointly. It is obvious, however, that when a member sues a *karnavan* for his removal, he is trying to enforce a right in which he is interested with the other members of the *tarwad* jointly, and he would apparently be doing so not only in his individual interest but in the interest of all the members of the *tarwad* as well or at all events he is taking a step which will not affect him alone but the other members of the *tarwad* also. It is therefore only proper that if he has not filed the suit in a representative capacity, he should implead them as parties to the

action. It is not denied that all the other members of the *tarwad* are parties to the suit. I am therefore of opinion that the plaintiff has a *locus standi* to maintain the suit and it cannot be held that the plaint discloses no cause of action.

There is no merit in the other objection either. If the petitioner has a right to sue for the removal of the *karnavan*, what does it matter if as a result of his success, defendant No. 3 or anyone else would have to function as such? If a particular *karnavan* has failed to act in accordance with the well-recognized rules and custom and has behaved in a manner that justifies his removal and the next member — let me assume this for the sake of argument — is found not to be fit enough to act as a *karnavan*, the office will have to devolve on the next person in the order of precedence in the ordinary course. In the absence of any other reliable evidence, it is impossible to come to the conclusion, as the learned Counsel for the petitioner wants me to do, that this circumstance alone is sufficient for a finding that the petition for leave to bring the suit *in forma pauperis* is not *bona fide*. It was alleged on behalf of the contesting defendant that the petitioner had entered into an agreement in regard to the subject-matter of the proposed suit. After a full consideration of the evidence led on behalf of the parties, the lower Court came to the conclusion that the contention had not been made out. Had it been found that this petition was filed in consequence of an arrangement or agreement as alleged by defendant No. 1, one would be called upon to determine whether the agreement related to the subject-matter of the proposed suit. But in the absence of a finding of fact in favour of defendant No. 1, it is unnecessary for me to take that aspect of the case into consideration. In the circumstances, it must be held that the petition for leave to sue *in forma pauperis* has not been filed in bad faith. A number of authorities were cited on behalf of the petitioner before me but inasmuch as there is no valid reason to hold that the petition before the lower Court was not *bona fide*, they need not be referred to here.

The contentions that the petition for leave to file the suit *in forma pauperis* was not made *bona fide* or that it would be against public policy for the petitioner to be permitted to sue in that form are based on the assumptions that the petitioner is not alone entitled to maintain an action even in his own interest and for his own

benefit, and secondly, that he is doing so to help defendant No. 3. There appears to be no reasonable basis for these assumptions and the petition for revision must, therefore, be rejected with costs.

N-D.

Petition dismissed.

PATNA HIGH COURT

Criminal Reference No. 41 of 1939

November 7, 1939

ROWLAND, J.

THE MUZAFFERPUR MUNICIPALITY—
versus

TARA PRASAD AND OTHERS

Bihar and Orissa Municipal Act (VII of 1923), ss. 259 (1) (3), 264, 354—Resolutions by Municipality under power conferred by s. 259 (1) and (3) requiring licences and fixing its fee for working surkhi mill—Whether rules or bye-laws—If require confirmation under s. 354—Criminal Procedure Code (Act V of 1898), s. 438—Reference to be decided on basis of position on date of proceedings.

Resolutions passed by a Municipality under powers conferred by s. 259 (1) and (3), Bihar and Orissa Municipal Act fixing local limits and requiring licences to be taken out in respect of working a surkhi mill are not matters of the same nature as the matters to be provided for by bye-laws under s. 264, and can neither be regarded as bye-laws nor as rules, but are of the nature of an order applying a section of the Act. Hence these orders did not require under s. 354 of the Municipal Act to be confirmed by the Local Govt. as a condition precedent to their taking effect. [p. 631, col. 2.]

A reference made under s. 438, Criminal P. C., is to be decided on the basis of the position as it was on the date when the proceedings began. [p. 632, col. 1.]

Or. Ref. made by the District Magistrate of Muzafferpur, in his letter No. G-6412, dated September 18, 1939.

Mr. Baldeva Sahay, for the Reference.

Mr. Hareshwar Prasad Sinha, against the Reference.

Judgment.—This is a reference by the District Magistrate of Muzafferpur under s. 438 of the Criminal P. C. asking this Court to revise the judgment and order of a Magistrate of the Third Class in Muzafferpur whereby the accused Tara Prasad was acquitted of an offence, punishable under s. 263 read with s. 259 of the Bihar and Orissa Municipal Act, consisting in the keeping without a licence within the Muzafferpur Municipality of a place used for the trade or business of a surkhi mill.

It is not denied that the opposite party had been for some time past working a surkhi mill within the Municipality and was operating his surkhi mill in the month of March 1939, in which the present complaint was presented. There was formerly no

prohibition under s. 259 of the keeping of a surkhi mill within the Municipality without a licence. It is not one of the trades or businesses referred to in s. 259, sub-s. (1), cls. (i) to (xiii), but the section can be made applicable to other manufactures, processes or businesses which are declared by the Local Govt. by notification to be dangerous or offensive under cl. (xiv). In pursuance of this clause the Local Govt. by Notification 1181 L. S. G. dated March 15, 1937, declared that the running of surkhi mills was offensive. The notification was duly published. As a result of this the provisions of s. 259, sub-s. (1) became operative, that is to say, it was now within the power of the Commissioners at a meeting to fix local limits within which no place might be used for the purpose mentioned without a licence. In that connection sub-s. (3) of s. 259 also became operative whereby the Commissioners at a meeting became empowered, subject to a maximum to be fixed by the Local Govt. to levy a fee. The Local Govt. fixed as maximum fee for such a licence the sum of Rs. 100 by Notification 1182 L. S. G., dated March 15, 1937. The Commissioners at a meeting held on July 29, 1938, resolved that within the whole area of the Municipality no place was to be used for a surkhi mill without a licence. They also resolved that the fee for a license for a surkhi mill should be Rs. 100. These proceedings of the Municipal Commissioners are said to have been published and it is certain that the opposite party, the present accused, had knowledge of them, for there are on the record two petitions by way of protest, one presented by this opposite party alone and one by himself and some other owners of surkhi mills, against the magnitude of the fee. The point raised in the trial Court which succeeded there was that the resolutions of the Municipality which require licences to be taken out for running surkhi mills and which fixed the fee to be levied are rules framed by the Municipal Commissioners to which s. 354 of the Municipal Act is applicable. In this Court for the respondent it has been contended that they are rules or bye-laws, and in either case subject to the provisions of s. 354. That section enacts in two subsections that the power of the Commissioners to make rules and to make bye-laws shall be subject to the condition of such rules not taking effect until they have been confirmed by the Local Govt. In the

case of bye-laws, previous publication and Gazette publication are also conditions precedent to the taking effect of the bye-laws. But the fixing of local limits (s. 259, sub-s. (1)) is not the making of a rule. It is more of the nature of an order applying a section of the Act. The nature of a rule under the Act can in general be gathered from a reference to the various sections in which the rule-making power is conferred. Such sections occur in various parts of the Act which is thus arranged that power to make rules governing a particular subject is placed at the end of that part or chapter of the Act dealing with the particular subject. Thus we find the Local Govt. is given power to make rules regulating Municipal fund and accounts in s. 81 which is at the end of Chap. III, power to make rules in connection with assessment and collection of taxes under s. 163 which is at the end of Chap. IV, power to make rules regarding drainage schemes, water works, etc., under s. 325 which is at the end of Chap. IX; and so on. The Commissioners are given power to make rules in ss. 38, 42 and 52, and these rules deal with limited matters affecting the internal administration of the Municipality and its office. Thus s. 38 authorises rules for pensions and Provident Funds of Municipal servants, Section 42 authorises rules as to the duty, appointment, punishment and removal of municipal officers and servants, and s. 52 authorises rules governing the election of Chairman, Vice-Chairman and President of Municipal meetings and the conduct of business. So, the order making a licence necessary for owners of surkhi mills is not in any way analogous to any of the rules which either the Local Govt. or the Commissioners at a meeting are authorised by the Act to make, and I am quite clear that such an order is not a rule at all.

Now I turn to the alternative submissions put forward here that the order is to be regarded as a bye-law. The scheme of the Act in the matter of empowering the Commissioners to make bye-laws is somewhat similar to that in the matter of powers to make rules; that is to say, at a number of places in the Act power is given to make bye-laws dealing with a particular subject such as in s. 153 for the registration of dogs, in s. 195 to make bye laws for the regulation of buildings, in s. 234 to make bye-laws regulating the use of public water supply, and so on. The power to make bye-laws in connection with

offensive and dangerous trades, occupations or processes is conferred by s. 264, and the bye-laws which may be made under this section may provide for inspection and regulation of the conduct of business in a place used for any of the purposes mentioned in s. 259 and also generally for the prevention of nuisance affecting the public health, safety or convenience. The order requiring licences to be taken out and the order fixing a fee in respect of the licences are not matters of the same nature as the matters to be provided for by bye-laws under s. 264, and in my view, these orders can no more be regarded as bye-laws than they can be regarded as rules. The resolutions were passed not under the powers conferred by s. 264 but under the powers conferred by s. 259, sub-s. (1) and s. 259, sub-s. (3). That being so, these orders did not require under s. 354 of the Municipal Act to be confirmed by the Local Govt. as a condition precedent to their taking effect. It follows from this that to use any place without a licence for the purposes of a surkhi mill within the Muzafferpur Municipality is an offence within s. 263, sub-s. (1) of the Bihar and Orissa Municipal Act. This may be sufficient to dispose of the point of law directly raised in the reference so far as the requirement of taking out a licence was concerned and the contention that this requirement had not become effective in law for want of confirmation by the Local Govt.

A further point has been argued with reference to a resolution taken at the same meeting of the Municipal Commissioners imposing certain conditions on the grant of a licence. It was resolved by the Municipal Commissioners that conditions be imposed on the grant of licences to the effect that no mill of the aforesaid nature shall be erected within the Municipal limit if it lies within a distance of 300 yards from the nearest habitation. Other conditions included provision for proper arrangements for effective removal of all offensive or unwholesome matter for inspection by Municipal Officers and for keeping raw materials safe from damp or rain. These are matters of the kind which s. 264 empowers the Commissioners to regulate by bye-laws; and had this been a prosecution for breach of those conditions, under s. 263 (2) the question might arise whether their confirmation by the Local Govt. was necessary to make them

effective. But this being a prosecution under s. 263 (1) the question does not arise.

It is represented that the respondent, who in May 1939 in pursuance of an application by him for a licence remitted by money-order, the licence fee of Rs. 100 has been treated as ineligible for such a licence on the ground that the position of his mill is not beyond the distance of 300 yards from the nearest habitation, and I am asked to pronounce that the conditions laid down for the grant of licence are of the nature of rules or bye-laws, that they are ineffective unless and until confirmed by the Local Govt. and that this point is not unsubstantial because the Local Govt. itself in recommending the Municipalities to introduce licencing of oil, flour and surkhi mills had expressly cautioned Municipalities that the requirement of 300 yards clear distance from the nearest habitation ought to be enforced in the case of mills already existing. It is also suggested that to attach such a condition precedent to the grant of a licence is in contravention of sub-s. (2) of s. 259 which enacts that a licence for any of the purposes mentioned in sub-s. (1) is not to be withheld unless the Commissioners have reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to persons residing in or frequenting the immediate neighbourhood. The question of the propriety of a prosecution might arise if at the date of the institution of the proceedings before me the respondent's position had been that of a person who had applied and paid the fee for a licence which the Commissioners were not legally justified in withholding from him, on the ground that any restriction on the grant of licences in contravention of s. 259, sub-s. (2) would be *ultra vires* of the Commissioners. Had that been the position of the respondent, the argument might require serious consideration. But the respondent's application for a licence was not presented till after these proceedings against him had commenced and the present reference is to be decided on the basis of the position as it was on the date when the proceedings began. On that date if the respondent without having a licence and without having applied for a licence was carrying on the business of the surkhi mill, his legal liability under s. 263, sub-s. (1) cannot be negatived on the grounds given by the trial Magistrate.

It is further represented that though the

respondent had not, before these proceedings started, applied for a licence, he had presented a petition for a reduction of the licence fee, and had not received orders on that petition. This fact does not alter the legal position, though it is open to him in the event of a conviction to put it forward as a matter to be considered in extenuation of the sentence to be passed.

The reference is accepted, the acquittal of the respondent is set aside, and the case remanded to the Sub-Deputy Magistrate, who will dispose of it according to law after giving the parties an opportunity of being heard and either party who may wish it, an opportunity of adducing further evidence.

s.

Reference accepted.

LAHORE HIGH COURT

First Civil Appeal No. 11 of 1939

March 31, 1939

ADDISON and RAM LALL, JJ.

MUL RAJ and OTHERS—PLAINTIFFS

—APPELLANTS

versus

TULSI RAM—DEPENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 104—Private reference to arbitration—Subsequent application to Court under Para. 17 (1), Sch. II, Civil Procedure Code (Act V of 1908), for filing agreement—Out of three arbitrators, two making one award and third making different award—Court finding majority award bad and refusing to make it decree—Appeal, if maintainable.

Certain persons after making a private reference to arbitration, made an application to the Court under para. 17 (1) of Sch. II of Civil P. C. that the agreement to refer to arbitration should be filed in Court. The Court dismissed the application, but on appeal under s. 104 (1) (d), Civil P. C., the High Court directed the application to be filed. There were three arbitrators. Two of them made one award and the third made another award. The Judge found that the award of the majority was bad. He accordingly refused to make that award a decree of the Court:

Held, that no appeal lay from the order of the Court. 34 Ind. Cas. 192 (1), dissented from. 28 Ind. Cas. 60 (2), referred to.

F. C. A. referred by Skemp, J., by his order, dated March 23, 1939.

Mr. Vishnu Datta, for the Appellants.

Mr. Jhanda Singh, for the Respondent.

Addison, J.—There was a private reference to arbitration made by the parties on May 1, 1937. On October 23, 1937, the appellants made an application to the Senior Subordinate Judge under para. 17 (1) of Sch. II, Civil P. C., that the agreement to refer should be filed in Court.

The application recited that the value of the subject-matter in dispute was Rs 5,110. On November 27, 1927, the Senior Subordinate Judge dismissed the application and there was an appeal to this Court under s. 104 (1) (d), Civil P. C. The Single Judge, who heard the appeal, directed the filing of the agreement in Court and the case went back to the Senior Subordinate Judge. There were three arbitrators. Two of them made one award and the third made another award. Objections were preferred and the Senior Subordinate Judge found that the award of the majority was bad. He accordingly refused to make that award a decree of the Court and then went on to say that he dismissed the petition under para. 17 of Sch. II, Civil P. C. Against this decision the appellants have preferred this appeal which has been referred to a Division Bench by a learned Judge of this Court. The part of the order of the Senior Subordinate Judge to the effect that he dismissed the application under para. 17 of Sch. II is obviously wrong. That had already been done by him at a previous stage but on appeal to this Court under s. 104 (1) (d) the agreement had been filed in Court and the Senior Subordinate Judge thereafter had directed the arbitrators to make their award. Now if after the agreement to refer to arbitration had been entered into, the arbitrators had made an award without the intervention of the Court and one of the parties had applied under para. 20 of Sch. II that the award should be filed in Court and the Senior Subordinate Judge had refused to do so, then undoubtedly an appeal would have lain under s. 104 (1) (f), which is to the effect that an order filing or refusing to file an award in an arbitration without the intervention of the Court is subject to appeal. Thus, if an agreement to refer is ordered to be filed or the Court refuses to file such an agreement put in under para. 17 of Sch. II, an appeal lies under s. 104 (d) while, if an award is put into Court under para. 20 and the Court either files it or refuses to file it, an appeal lies under s. 104 (f) as it was made without the intervention of the Court. The question, however, is whether an appeal lies in the present case where the award was made through proceedings taken in Court.

To answer this question, it is necessary to go to the provisions of Sch. II. Where an agreement to refer to arbitration is put into Court under para. 17 and the

Court is asked to have it filed in Court, an appeal lies under s. 104 (1) (d), Civil P. C., if the award is filed or if the Court refuses to file it. That stage has passed in the present case. The next appropriate paragraph of Sch. II is para. 19, which enacts that the foregoing provisions (of Sch. II), so far as they are consistent with any agreement filed under para. 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon. This paragraph therefore makes all the provisions prior to para. 19 of Sch. II applicable to proceedings in Court when an agreement is filed under para. 17. There is, of course, this difference; where there is a regular suit, it must either be decreed or dismissed; where there is a reference filed under para. 17, there can only be a decree if the award is held to be a good one. This did not happen in the present case as it was held that the award was bad. This takes us to para. 16 of Sch. II, which enacts that where a Court holds the award to be a good one, it shall proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with the award. It follows from this that, if the trial Court had in the present case accepted the award as given and had pronounced judgment according thereto, no appeal would have lain on the merits. The only appeal that could have been made would have been that the decree was in excess of, or not in accordance with, the award. It would thus be anomalous that, where the award is held to be bad, an appeal should lie on the merits. The only other paragraph which need be referred to is para. 15 of Sch. II which provides for the grounds on which an award shall be set aside or become void and further enacts that where an award becomes void or is set aside under cl. (1), the Court shall make an order superseding the arbitration, and in such cases, shall proceed with the suit. This is all right for an ordinary suit and it is perfectly clear that in it no appeal would lie from the order superseding the arbitration. In the present case, as there is no regular suit, the order that the Court should have passed, should have been an order superseding the arbitration and stating that the proceedings had therefore become infructuous. No right of appeal is

given under s. 104, Civil P. C. from such an order, and it is clear that no right of appeal was intended because it would be most improper not to allow an appeal except to the limited extent set out in para. 16 (2) of Sch. II when an award is held to be good and to allow an appeal when the award is held to be bad or void. In these circumstances it would seem to follow that no appeal lies.

The only difficulty is the decision given in *Ram Jawaya Mal v. Devi Ditta Mal* (1). There it was held that no appeal lay either under s. 104 (d) or (f), Civil P. C. but that an appeal lay from the order as that order amounted in law to a decree and was as such appealable. It seems to me with all respect that it is impossible to hold that the order superseding the arbitration under para. 15 (2) of Sch. II, which is the only order the Court could have passed, is a decree. It makes no difference that the Court has not used these words as under Para. 19, these are the words which the Court should have used in its order. Having superseded the arbitration, there was no suit to proceed with, so that the matter came to an end by the order superseding the arbitration, no appeal being allowed from that order. It is unnecessary to refer to other decisions on this matter except *Seumal Nihal Chand v. Mulomal Rahumal*, 28 Ind. Cas. 60 (2) where the matter is discussed at length. For the reasons given, I would dismiss this appeal as incompetent, making no order as to the costs of this Court.

Ram Lall, J.—I agree.

D. *Appeal dismissed.*

(1) A I R 1916 Lah. 89; 34 Ind. Cas. 192; 117 P R 1916; 107 P W R 1916; 70 P L R 1917.

(2) 28 Ind. Cas. 60; A I R 1914 Sind 122; 8 S L R 260.

CALCUTTA HIGH COURT

Appeal No. 190 of 1936

May 31, 1938

COSTELLO AND BISWAS, JJ.

JNANADA GOVINDA CHAUDHURY

AND ANOTHER—APPELLANTS

versus

BIRENDRA NATH GOSWAMI

AND ANOTHER—RESPONDENTS.

Probate—Wide divergence in case put up in petition and case made in evidence—Strict scrutiny of will is required—Will—Attesting witness—Scribe, when can be attesting witness—Witness—Credibility—Old age, if guarantees truthfulness—Practice—Evidence—Question of appraising oral testimony of witness—Opinion of trial Court, value of.

Where the case of petitioners for grant of probate, carries certain elements of suspicion, the Court should, in such circumstances, insist on a very strict standard of proof, and ought not to make a grant unless it is satisfied that the suspicion has been removed. Where a wide divergence between the case put up and the case made in evidence is found, strictest scrutiny of will is required.

A scribe may no doubt be an attesting witness to a will but it must be shown that the signature of the scribe was put down for the purpose of attesting the document. 114 Ind. Cas. 84 (1), relied on. [p. 636, col. 1.]

The fact that a witness is an old man of 75, by itself carries no guarantee of truthfulness, if his evidence is otherwise unworthy of credence. [p. 636, col. 2.]

Where it is a question of appraising the oral testimony of a witness, the Court of Appeal will no doubt attach a great deal of importance to the opinion of trial Judge regarding the value of such testimony unless facts and circumstances render it unsafe to do so.

A. from the original decree of the District Judge, Rajshahi, dated May 27, 1936.

Messrs. Bireswar Bagchi and Binayak Nath Banerji, for the Appellants.

Mr. Mohendra Kumar Ghose, for the Respondents.

Mr. Suryya Kumar Aich, for the Deputy Registrar.

Biswas, J.—This is an appeal from a decision of the District Judge of Rajshahi granting letters of administration with copy of the will annexed. The substantial question in the appeal is whether the will is genuine or not. The will was propounded more than 33 years after the death of the testator. The testator was one Mayananda Goswami who died in or about the month of February 1903, and the will is said to have been executed five months before his death, namely on September 5, 1902. He left two widows, Shama Sundari and Khemankari, and three sons, one by the first wife, named Bipin, and the other two by his second wife, named Sures and Murari, who were both minors at the time. He also left two unmarried daughters. The will makes no provision for the marriage of these daughters and the whole object of it appears to be to ensure the due performance of the *sheba* of the family deity Sri Sri Iswar Lalji Deva Thakur and certain religious festivals. It recites that the properties of the testator shall remain in charge of his eldest son, and he is enjoined to perform the *deb-sheba* and the other religious services out of the income as also to maintain the minor sons, unmarried daughters and wives of the testator. It is then provided that after the minor sons came of age, all the three sons shall equally

"inherit" the properties and carry on the *deb-sheba*, etc., out of the income. If the sons should fail or refuse to perform these religious duties, they shall not be entitled to enjoy the properties, and in that case, a near kinsman shall inherit the estate and carry on the *deb-sheba*. In the last clause it is laid down that none of his sons shall be entitled to sell, encumber or make a gift of any of the properties and that the properties shall not be liable to be sold in auction for their debts. The appellants suggest that the will made an absolute bequest in favour of the sons subject only to a charge for *deb-sheba*, etc., while the propounders contend that the properties were given away to the idol with only rights of management to the sons and rights of maintenance to the sons' daughters and wives. This is a question of construction of the will, and is pertinent in these proceedings only in so far as it may be supposed to throw any light on the question of its genuineness. As will be seen later, the respondents' own case in their application for letters of administration is that their object in propounding the will was to save the properties from the hands of creditors on the ground that the properties had been made *debutter* by the will. The will is attested by three witnesses, Pran Govinda Goswami, Gopal Chandra Sircar and Kedareshwar Chakrabarti, and the scribe is one Praneswar Chakrabarti, all residents of Bajurbhag, the village where the testator lived.

Of the sons of the testator, Sures and Murari both died before Bipin. They died unmarried and intestate, and left Bipin as their heir. Bipin died in 1931, leaving two sons, Birendra and Hirendra, who are the petitioners for the grant and respondents in this appeal. Birendra is a young lad of 19, and his brother Hirendra is much younger. In support of the execution of the will, the petitioners examined the scribe Praneswar, the attesting witnesses being all dead. It is mainly on the strength of the evidence of the scribe that the learned District Judge has made the grant. In a case where it is a question of appraising the oral testimony of a witness, the Court of Appeal will no doubt attach a great deal of importance to the opinion of trial Judge regarding the value of such testimony. All the same, there are certain facts and circumstances in this case which cannot be overlooked, and though the learned Judge relied on the evidence of Praneswar, we do not think it would be quite safe to act on that testimony. The petitioners' own case carries

certain elements of suspicion, and it is hardly necessary to point out that the Court should, in such circumstances, insist on a very strict standard of proof, and ought not to make a grant unless it was satisfied that the suspicion had been removed.

In the first place, it is to be observed that there is a remarkable variance between pleading and proof. The application for letters of administration, again, is itself remarkable in this way that without attempting an explanation of the undoubted delay which had occurred in making it, it complacently stated that it had become necessary to put forward the will in order to defeat the claims of certain creditors. It is not the petitioners' case as set out in the application that they or their father had been unaware of the will until about the time when the application was made. On the other hand, the petition after reciting the fact of the execution of the will goes on to state in detail how Bipin, and after his death his sons, the petitioners themselves, had been acting as *shebais* and carrying on the worship and other services of the family deity in accordance with the directions of the will. Then at the end it is stated that one Jnanada Govinda Chaudhuri (the appellant before us) having recently obtained a mortgage decree in respect of a debt contracted by Bipin and put the mortgaged properties to sale in execution of such decree, it was necessary to try and protect the said properties on behalf of the *debutter* estate, and it was for this purpose that the will was being propounded. This case made in the petition is supported by an affidavit which was affirmed by the scribe Praneswar. In the affidavit also, it is categorically stated that Bipin and after him his sons were carrying on the *deb-sheba*, etc., as directed by the testator in his will. In the evidence which was led on behalf of the petitioners, however a new story was set up for the first time and it was to the effect that the will had been lying in a box unknown to the parties till quite by an accident it happened to come to light about the month of September 1935. We shall have occasion to refer to this later on; we are only concerned to point out at this stage why on the petitioners' own showing the case with which they come to Court demands the strictest scrutiny.

The learned Judge in our opinion allowed himself to be too easily satisfied about the reliability of the scribe. Praneswar is an old man of 80 or 81 years of age; he

was deposing to events which had taken place more than 33 years ago, "might have been about 40 years back" according to his own statement. In his examination-in-chief he was very definite and stated that the testator had signed the will, then he signed it in his presence, and then it was signed by the attesting witnesses. In cross-examination, however his memory suddenly failed him, and he did not remember the details of the writing and entries of the will. He did not remember whether he had signed before or after the testator signed. In the will he describes himself as a scribe and his signature does not find a place among the signatures of the attesting witnesses. A scribe may no doubt be an attesting witness to a will as pointed out by Rankin, C. J. in *Abinash Chandra v. Dasarath Malo* (1), but it must be shown that the signature of the scribe was put down for the purpose of attesting the document. It is not clear from Praneswar's evidence that he had put his signature with any such object. In the affidavit he calls himself both a scribe and an attesting witness. This affidavit, we may point out, was admittedly signed and affirmed by him without knowing what it contained. On his attention being drawn to the last paragraph of the affidavit, he had to say that this part of the affidavit had not been brought to his notice before he signed it. Here was a man who on his own admission put his signature to an affidavit and swore to the truth of its contents without caring to find out what it was that he was swearing to. The learned Judge calls this "reprehensible" conduct, but did not think, it affected the credibility of the witness. We are afraid we cannot accept such an easy view. There is another important fact which was also admitted by him in his evidence and it is that he had lent some money to Sures and obtained a decree against him and then in execution of such decree, purchased Sures's one-third share in the dwelling house. This was clearly action on his part which, he should have known, was wholly contrary to the provisions of the will.

According to his reading of the will, the properties had been all bequeathed by the testator to the deity; how then could he, knowing that there was the will, have purchased the one-third share of the dwelling house as if it was the secular property of

the testator's sons? On his own showing, therefore, he was a man who was prepared to say and do whatever it might suit his interest to say and do, and we should hesitate to accept the evidence of such a witness without the strictest scrutiny. The only reason which the learned Judge gives for believing Praneswar, is that he is an old man "on the brink of the grave." This is a fact which might excite sympathy for him, but we do not see how it can enhance his credibility in a Court of law. In cross-examination it was put to the witness that shortly after making the affidavit, he had taken a promissory note from Birendra, one of the petitioners, and one Kasi who was presumably the father-in-law of Birendra. This he did not deny, but he denied the suggestion that the promissory note was without monetary consideration. But it is difficult to dismiss the suggestion as altogether unfounded. According to his own statement he was himself a debtor to one Naren Pandit who had not yet been re-paid, and it was hardly likely in these circumstances that he should be advancing money to Birendra and Kasi for no particular reason. Taking all these facts into consideration, we are therefore unable to accept the evidence of Praneswar. If that evidence goes, there remains but little to support the case of the petitioners.

Another witness on which the learned Judge relies is P. W. No. 3, Sasi Kanta Chakrabarti. He, again, is an old man of 75, but that by itself carries no guarantee of truthfulness, if his evidence is otherwise unworthy of credence. It is remarkable that this witness was put forward to prove the signatures of any number of persons whose signatures required to be formally proved on behalf of the petitioners in the case. Thus, he proves the signatures of Mayananda, the testator, and of the three attesting witnesses, and also of two other persons, Bipin, the eldest son of the testator, and Madan Goswami. What opportunities he had of knowing the handwriting of all these persons he does not choose to explain. We have in fact nothing but his bare statement that he recognized these signatures. We find it difficult indeed to accept the testimony of such an omnibus witness. If this evidence is also discarded, it is not disputed the petitioners have nothing else to fall back upon to prove execution or attestation of the will.

Turning now to the case made in evidence regarding the discovery of the will, as already pointed out, there was not the

(1) 56 O 598; 114 Ind. Cas. 84; A I R 1929 Cal 123; 32 O W N 1228; 48 O L J 281; Ind. Rul. (1929) Cal 180.

faintest suggestion of such a case in the petition for letters of administration. In the petition it was stated with almost cynical frankness that they found it to their interest now to make out that the estate had been made *debutier* and that it was therefore necessary to set up the will. It was probably thought prudent later on to offer a more plausible explanation. The story, however, they put forward is on the face of it so utterly improbable and so inconsistent with their case as made in the petition that it would strain one's credulity to the utmost to accept it. The story is that Bipin, shortly after his mother's death which took place in 1915, sent away a wooden box belonging to the testator from his house to the house of a neighbour named Jogesh, witness No. 4 for the petitioners. A few months later, Bipin took away certain utensils from the box, but left it at Jogesh's house with the other articles which were in it. The box remained in Jogesh's house from that time until 1935. In or about the month of September that year, it is said, Jogesh happened to meet Birendra one day, when he suddenly remembered to tell Birendra about this box. Birendra then went to Jogesh's house to fetch it. But before Birendra was allowed to take away the box, Jogesh felt it necessary to have an elaborate ceremony to witness the transaction. A number of persons were accordingly called in, and in their presence the box is supposed to have been opened before it was removed. It was then for the first time that the will was unearthed from inside the box. One of these witnesses Bijoy has been examined (P. W. No. 5); he is the adopted son of one of the attesting witnesses Pran Govind Goswami.

The story is so improbable, as we have said, that we have no hesitation in rejecting it. It is not explained why the box should have been removed by Bipin to Jogesh's house in 1915 shortly after his mother's death. If Bipin knew about the will (as the petition suggests), and if he also knew that the will was contained in the box, it is not likely that he should part with the custody of it. On the other hand, if the box merely contained utensils and other articles, it is not understood why it could not have been left in the family dwelling house. It is no doubt stated by some of the witnesses that Bipin lived at his maternal grandfather's house at Bhabni, which is half a mile from Bajurbhag, the testator's village: still that would

not explain why Bipin should wish to remove the box to the house of Jogesh, much less why he should do so in 1915. It is not again clear why Jogesh should not have spoken to anybody about the box for all these years. Even if he did not think it necessary to ask Birendra or anybody else to take away the box in Bipin's lifetime, why should he not have informed Bipin's sons about it after Bipin's death that they might take it back? The learned Judge himself was unable to find any explanation why Bipin should have left the box with Jogesh: all the same, he thought this story was sufficient to account for the delay in making the application for letters of administration. It is not, however, a mere question of explaining the delay, requiring explanation as it does, but what is more material, it is, as we have already remarked, one of wide divergence between the case made in the petition and the case made in evidence, and this undoubtedly throws a cloud of suspicion on the whole story of the will which certainly evidence of the kind led by the petitioners does not at all help to lift.

We have no doubt in our mind that the petitioners, one of whom is only 19 and the other still a minor, must have been put up to make this application by interested parties. According to the evidence, Birendra's father-in-law (he is probably the man referred to as Kasi by some of the witnesses) is the person who took a leading part in the whole affair. Birendra says he was present in Court on the date the petition was filed, but that it was filed by his father-in-law. It is also his evidence that his father-in-law was looking after the case and bearing all expenses. If Kasi is the name of the father-in-law, then he is also the person who passed the promissory note jointly with Birendra in favour of the scribe after the scribe had made the affidavit which accompanied the petition. According to the petition filed by the objector, Jnanada Govind Chowdhury, Birendra's father-in-law is a man of Natore and never lived at the village Bajurbhag, and if that is so and if, as there is reason to suspect, he is the person who inspired the present application, it is not shown how he could have any knowledge of the facts which are set out in the application or in the affidavit of Praneswar. In our opinion, all the facts and circumstances of the case point to the conclusion that the will set up in this case is a fabricated document.

The learned Judge in the Court below

persuaded himself that the heirs of Mayananda had adequate grounds for ignoring the will. This, of course, assumes that the existence of the will has known to them. At the same time, the learned Judge appeared to believe the story of the will having come to light for the first time out of the wooden box in Jogesh's house. It seems to us somewhat difficult to reconcile the two positions. It may be said that if the petitioners were putting up a forged will, they might easily have worded it differently, that is to say, in such a way as would have suited their purpose more effectively. In other words it might have used language making a clean dedication of the estate to the deity rather than leaving the matter in a state of uncertainty as to whether the properties were made *debutter* or were bequeathed to the sons with only a charge for *deb-sheba*. The argument is plausible, but the fact remained that the heirs of the testator dealt with the estate as their secular property all along, and it might have been considered necessary therefore to frame the will in terms which, on a particular construction, might afford some justification for such course of dealing.

It is not necessary to discuss the evidence any further. We are convinced, as already stated, that the will propounded in this case is a false document. In appearance it looks like an old document, but it is common experience in these Courts that an appearance of age may be easily given to a fabricated document. We consider it a serious matter that persons should come forward to set up forged wills in this way. There are not sufficient materials on the record to make it possible for us to say with certainty who was responsible for bringing the false will into existence in this case. But the matter ought not to be left in this unsatisfactory state. We desire to invite the special attention of the District Judge to it, and desire that he should make further investigations in order to track down the real culprit or culprits and bring them to justice, if possible. It is clear also that some of the evidence in the case is perjured evidence, and the District Judge should also consider if the persons who gave such evidence should not be dealt with according to law. With these observations, we accordingly allow the appeal, set aside the judgment and decree of the learned Judge, and dismiss the application for letters of administration. The appellants are entitled to their costs in all Courts, to be paid by respondent No. 1, Birendra

Nath Goswami. We assess the hearing-fee in this Court at ten gold *mohurs*.

Costello, J.—I agree.

D.

Appeal allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 588 of 1938

October 11, 1939

FAZL ALI AND QUATTERJI, JJ.
DOMAN SAHU AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
GANGU NAYEK—DEFENDANT
—RESPONDENT

Bengal Land Registration Act (VII of 1878), s. 78—No registration under Act—Effect—Right to sue for rent if taken away—Suit within limitation—Registration beyond limitation—Effect—Civil Procedure Code (Act V of 1908), s. 100, O. XLI, r. 33—Powers of second Appellate Court—Suit dismissed under s. 78, Bengal Land Registration Act by Appellate Court—Plaintiff getting registered during pendency of second appeal—Decree, if can be passed in second appeal.

Under s. 78, Land Registration Act, the right to the rent of an estate being in the proprietor, although not registered, his right to sue for the rent is not taken away; but this section merely puts an impediment in the way of his realising the rent until he had complied with the law by obtaining registration of his name as proprietor. [p. 639, col. 2.]

Where therefore a mortgagee who is not registered under the Act institutes a suit for rent within period of limitation the mere fact that he gets registered beyond the period of limitation for the suit will not affect the position and the suit is within limitation. 110 Ind. Cas. 469 (1) and *Alimuddin Khan v. Hira Lal Sen* (2), relied on. 134 Ind. Cas. 824 (5), 172 Ind. Cas. 935 (4) and *Satyid Ekram Hussain v. Satyid Ali Hussain* (5), explained.

The provisions of O. XLI, r. 33, Civil P. C., are wide enough to enable the Court to take into consideration the entry in the land registration record made since the institution of the second appeal. In special circumstances the Court of second appeal can take notice of facts material to the decision of a case which have arisen subsequent to the decision of the suit. Section 100 must be read with O. XLI, r. 33. Order XLI, r. 33, applies not only to appeals from original decrees but also to appeals from appellate decrees. [p. 640, col. 2; p. 611, col. 1.]

Where, therefore, a suit for rent instituted by a mortgagee has been rightly dismissed by the trial as well as the first Appellate Court under s. 78, Ben. Land Reg. Act, and during the pendency of the second appeal the mortgagee has been registered under the Ben. Land Reg. Act, the Court of second appeal can pass a decree in his favour on the basis of the registration. 110 Ind. Cas. 469 (1), relied on; 50 Ind. Cas. 857 (6) and 152 Ind. Cas. 611 (7), referred to.

A. from the decision of the Subordinate Judge, Gaya, dated July 15, 1938.

Messrs. S. M. Mullick and P. Misra, for the Appellants.

Mr. Raj Kishore Prasad, for the Respondent.

Fazi Ali, J—This appeal arises out of a suit brought by the plaintiff-appellants to recover *bhaoli* rent for the years 1343 and 1344 *Fasli*. As the claim for the year 1343 *Fasli* is not pressed, the only question to be determined in this appeal is whether the appellants are entitled to recover *bhaoli* rent from the defendant for the year 1344 *Fasli*.

The appellants base their claim upon a *sadhaua-pataua* deed executed in their favour by one *Mst. Sona Dei* on December 11, 1933, in respect of her proprietary share in the estate in which the respondent's holding is situated. Both the Courts below have held that this deed is a usufructuary mortgage and the appellants not having been registered in Register D are not entitled to recover rent from the respondent. The appellants, however, have tendered in evidence in this Court a copy of Register D which has been marked as Ex. A without objection. This document shows that the appellants were recorded as usufructuary mortgagees after the institution of the present appeal and on the basis of it they now claim a decree for the rent of the year 1344 *Fasli*.

Now the points which arise in this appeal are precisely those which arose in *Umeshwardhari Singh v. Neman Singh* (1). In that case there being a difference of opinion between *Kulwant Sahay* and *Macpherson, JJ.* the following questions were referred to *Mullick, J.*

(1) Whether a mortgagee, whose suit for rent had been rightly dismissed in appeal by reason of the provisions of s. 78 of the Land Registration Act, 1876, could secure a decree for rent sued for from the Court of second appeal, if he has during the pendency of the second appeal been registered under that Act, and (2) if he could do so, whether the rent was barred by limitation if his name was registered in the Collector's register after the expiry of the period of limitation for bringing a suit for rent, and (3) whether having regard to the provisions of s. 100, the Court of second appeal could reverse the decree passed by the Courts below on the ground that the plaintiff had after the institution of the appeal got himself registered. *Mullick, J.* agreeing with *Kulwant Sahay, J.* answered all these questions in favour of the plaintiff and it seems to me that in view of the decision in that

(1) 7 Pat. 690; 110 Ind. Cas. 469; 9 P L T 357; A I R 1928 Pat. 410.

case, there is hardly any room for argument in this appeal. It being suggested, however, that the decision of *Mullick, J.* has not been followed in its entirety in two subsequent cases, I wish to examine briefly the arguments advanced by the respondent on this point.

Dealing with the question of limitation, the first point to be considered is what is the effect of s. 78 of the Land Registration Act, 1876. That section runs as follows:—

"No person shall be bound to pay rent to any person claiming such rent as proprietor, or manager, of an estate or revenue free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act."

It is contended on behalf of the respondent that by reason of this section, the liability of the tenant to pay rent does not arise until the landlord claiming to be entitled to the rent is registered as such and consequently the appellants had no cause of action when they brought the suit. The argument is a plausible one, but it appears that the view which has been consistently taken in a number of cases which cannot now be dissented from is that under this section the right to the rent of an estate being in the proprietor, although not registered, his right to sue for the rent is not taken away; but this section merely puts an impediment in the way of his realising the rent until he had complied with the law by obtaining registration of his name as proprietor. This view was set out very clearly in the Full Bench decision of the Calcutta High Court in *Alimuddin Khan v. Hira Lal Sen* (2) and was accepted as the correct view by *Kulwant Sahay, J.* and *Mullick, J.* in *Umeshwardhari Singh v. Neman Singh* (1). It is suggested on behalf of the respondents that a contrary view has been expressed in at least three subsequent cases of this Court. The first case is that of *Sharafat Karim v. Harangi Singh* (3) which was decided by *Jwala Prasad and Wort, JJ.* It appears that both the learned Judges did not agree in that case with the view of *Mullick, J.* (which they characterised as *obiter dictum*) that even where the plaintiff landlord has not got his name registered in Register D, a conditional decree can be passed in his favour imposing a condition that he will be able to execute it upon his name being registered. The learned Judges, however, have nowhere

(2) 23 C 87 (F B).

(3) 12 P L T 693; 134 Ind. Cas. 624; Ind. Rul. (1931) Pat. 480; A I R 1931 Pat. 417; 11 Pat. 30.

suggested in their judgment that the case was not correctly decided on its own facts, which, it is conceded were quite similar to those of the present case. On the other hand, the distinction which they drew between that case and the case before them was that whereas in the first case the proprietor had been registered before the second appeal was heard, in the case before them no such registration had taken place. It was pointed out to us that one of the observations made by Wort, J. in his judgment was that where a proprietor was not registered under the Ben. Registration Act, such non-registration "would be a bar to the plaintiff's cause of action"; and, it was contended that this observation supports the view propounded on the respondent's behalf that the plaintiffs had no cause of action until their names were registered. Now, the actual observations made by Wort, J. are these:

"Consequently no action by a person not registered under the Act can succeed; in other words, it is a bar to the plaintiff's cause of action."

If we bear in mind the first part of the observation, it is quite clear that what his Lordship really meant was that the plaintiffs could not sue successfully if their names were not registered under the Ben. Registration Act.

The next case which was relied on by the respondent was that of *Sheikh Dildar Hussain v. Sheikh Saddiq* (4). In that case also the name of the plaintiffs who sued as proprietors of a village for recovery of rent had not been recorded as such and Wort, J. observed at the end of his judgment—"I should have mentioned that they were precluded from suing by reason of s. 78 of the Land Registration Act". In my opinion if these remarks are construed in the light of the remarks made by Wort, J. in the previous case, the expression "suing" must be interpreted in the above sentence also to mean "suing successfully", this view being consistent with the view expressed in a number of cases of the Calcutta High Court which have never been dissented from by this Court. It must be observed that in none of the two cases referred to above the question as to whether the plaintiff had a cause of action at the time of the suit properly arose, because the plaintiff not being registered even at the time when the second appeal was heard, his suit had to be dismissed in any event; and in the first case Jwala Prasad, J. who was of the same opinion as Wort, J. made the following

(4) 18 P L T 925; 172 Ind. Cas. 935; A I R 1938 Pat. 35; 4 B R 206; 10 R P 366,

remarks:

"Neither s. 78 of the Land Registration Act nor s. 60 of the Ben. Ten. Act prohibits a suit being instituted for rent by a plaintiff without having his name registered under the Land Registration Act. These sections prohibit recovery of rent unless the plaintiff has his name registered. Therefore although the plaintiff is entitled to bring a suit without his name having been registered, he is not entitled to recover rent unless he gets his name registered".

The last case cited on behalf of the respondent was that of *Saiyid Ekram Hussain v. Saiyid Ali Hussain* (5) in which James, J. while dealing with the effect of s. 78 of the Bengal Registration Act incidentally observed that under that section no person whose name is not entered in the register can maintain a suit for recovery of rent. This section was referred to by the learned Judge only to show that the entry in the Register D was evidence of the fact that the person whose name appears in the register is the person who is in possession of the property and in the case before him the question as to whether s. 78 bars a suit or merely bars the right to recover rent was not raised at all. Thus the view expressed by this Court in *Umeshwardhari Singh v. Neman Singh* (1) still stands good and I am unable to hold that the appellant's suit is barred by limitation. This suit was instituted on September 22, 1937, within a year of the date when the plaintiffs' right to rent accrued and the mere fact that the plaintiff was registered more than a year after the accrual of that right will not affect the position. Section 78 does not bar the right to sue if the rent was due; its only effect is that the liability for rent cannot be enforced.

The second point raised on behalf of the respondent is also concluded by the decision of this Court in *Umeshwardhari Singh's case* (1) (*supra*). In that case the question as to whether the Court of second appeal was entitled to take into consideration the effect of the registration of the plaintiff's name during the pendency of the second appeal was expressly referred to Mullick, J. and he substantially agreed with the view taken by Kulwant Sahay, J. The point was not dealt with fully by Mullick, J. but as was pointed out by Kulwant Sahay, J. the provisions of O. XLI, r. 33, are wide enough to enable the Court to take into consideration the entry in the Land Registration record made since the institution of the second appeal. It has been held in a number of cases that in special circumstances the Court of second appeal

(5) 17 P L T 423,

can take notice of facts material to the decision of a case which have arisen subsequent to the decision of the suit: See *Hill v. Setan Singh* (6), *Sawan Singh v. Haveli Shah Sardari Lal* (?). It is true that it is stated in s. 100 of the Civil P. O. that an appeal shall lie to the High Court from a decree passed in appeal by any Court subordinate to it on certain specified grounds only and s. 101 provides that no second appeal shall lie except on grounds mentioned in s. 100. This section, however, must be read with O. XLI, r. 33, which provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The only limitation which has been put upon the powers of the Court in this section is that

"the Appellate Court shall not make any order under s. 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order".

This provision applies not only to appeals from original decrees but also to appeals from appellate decrees, and so, in my opinion, this Court is quite competent to pass a decree in favour of the plaintiffs on the basis of the entry in Register D which shows that the bar imposed by s. 78 has now been removed.

The only other point which was put forward before us on behalf of the appellant was that the document upon the basis of which the plaintiffs have instituted the suit is in essence not a usufructuary mortgage but a lease. In my opinion, it is unnecessary to discuss this question in view of the fact that the plaintiffs themselves have obtained an entry in Register D on the footing that they are the usufructuary mortgagees of the property.

I would, therefore, allow this appeal, set aside the decrees of the Courts below and direct that a decree be made in favour of the plaintiffs for the produce rent of the year 1344 Fasli in accordance with the decision of the Munsif as to the quantity of

produce which is not challenged by either party. The produce of the holding is to be calculated at the rate of ten *kachcha* maunds of paddy per *bigha* and the price of the produce should be calculated on the basis of the rates published in the *Gazette* and if such rates are not available or are less than the rate admitted by the defendant, then at the rate of ten *kachcha pasuris* per rupee as admitted by the defendant in his written statement. The plaintiffs will not be entitled to any damage and the parties will bear their costs throughout.

Chatterji, J.—I agree.

s.

Appeal allowed.

RANGOON HIGH COURT

First Appeal No. 127 of 1938

June 7, 1939

ROBERTS, C. J. AND DUNKLEY, J.

BAKER ALI AND ANOTHER—

APPELLANTS

versus

AMIR ALI MEAH AND OTHERS

—RESPONDENTS

Deed—Construction—It is a matter of law—Duty of Judge—Description partly correct and partly incorrect—Correct description sufficient to identify subject-matter—Land described by boundaries and area—Which prevails.

The construction of a document is a matter of law, and it is the duty of the Judge to construe the terms of the grant in accordance with law, and on his independent construction of its terms, to come to his own conclusion as to whether the lands in suit were included within the grant or not. He is in no way bound by the opinion of the Financial Commissioner, which is based upon considerations which are irrelevant in a Court of law. [p. 642, col. 2.]

When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim *falsa demonstratio non nocet cum de corpore constat*; and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a description of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc., the description in regard to the acreage is considered to be mere false description if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified. 21 Ind. Cas. 750 (1), referred to. [p. 643, cols. 1 & 2.]

F. A. against the decree of the Assistant District Court, Akyab, dated August 18, 1938.

Dr. Ba Han and Mr. Zakharia, for the Appellants;

(6) 4 P L J 312; 50 Ind. Cas. 857; A I R 1920 Pat.

(7) A I R 1935 Lah. 32; 152 Ind. Cas. 611; 7 R L J.

Mr. Hay, for the Respondents.

Dunkley, J.—This appeal arises out of a suit in the Assistant District Court of Akyab, in which the plaintiffs-respondents sued the defendants-appellants for their ejection from certain areas of agricultural land and for mesne profits of that land for a period of three years prior to the suit. The suit has been decreed by the learned Assistant District Judge of Akyab and it is against his judgment and decree that the present appeal has been filed. In their plaint the respondents alleged that the areas of land in suit lay within the area of a larger grant, which had been made to them by the Government of Burma under the Arakan Waste Land Grant Rules, and that on this ground they were entitled to eject the appellants. Paragraph 1 of the plaint is as follows:

"1. That the plaintiffs are the registered grantees of Aungseikpyin Grant, situated in Maungdaw Township. The western boundary of the said grant is the course of Myothit Chaung as it was in 1906."

Paragraph 4 of the plaint reads:

"4. That the three plots marked on the exhibit map in red dotted lines as A, B and C fall within the boundary of the plaintiffs' grant."

These are the three areas of land from which the respondents seek to eject the appellants, and it is clear that their cause of action is based on the averment that the grant of land, which has been made to them by Govt. includes the lands in suit. Yet, strange though it may seem, the deed of grant, which obviously should have been filed with the plaint, has not been produced at all. The respondents have relied upon two orders of the Financial Commissioner of Burma, dated July 21, 1936, and July 26, 1937, certified copies of which have been produced and are filed as Exs. B and C. In the plaint reference has been made to these orders, and it is set out that by his order of July 26, 1937 (Ex. C) the Financial Commissioner decided that the western boundary of the respondents' grant was the Myothit Chaung as it existed in 1906. The defence of the appellants, so far as it is now of any importance, is that the areas of land in suit lie outside the respondents' grant. Consequently, the first issue which was framed in the suit was, "Do the suit plots A, B and C fall within the boundary of Aungseikpyin Grant?" The learned Assistant District Judge, in considering this issue, came to the conclusion that he was bound by the orders of the Financial Commissioner, to which I have already

referred, and therefore held that the lands in suit fall within the respondents' grant. This was not the correct way to view the matter. The Financial Commissioner was deciding a dispute between the Revenue Authorities of the Akyab District and the respondents regarding the western boundary of the respondents' grant, and as a Revenue Court, he was not bound by the strict rules of the law of evidence; but it was his duty to come to that decision which, in his view, would be equitable in consideration of all the materials which were placed before him. He based his decision on the ground that if the boundaries stated in the respondents' deed of grant were strictly adhered to, the area of the land which the respondents would obtain would be much less than the area stated in the grant. The construction of a document is a matter of law, and it was the duty of the learned Assistant District Judge to construe the terms of the respondents' grant in accordance with law, and on his independent construction of its terms, to come to his own conclusion as to whether the lands in suit were included within the grant or not. He was in no way bound by the opinion of the Financial Commissioner, which was based upon considerations which were irrelevant in a Court of law.

The learned Assistant District Judge having failed to construe the terms of this grant, it now falls on us to do so and we are placed in an initial difficulty in that the deed of grant itself is not before us. At one stage, it seemed likely that we should have to remand the case for this document to be produced. However the only part of the document which, for the present purpose, is of importance is the description of the boundaries contained therein, and that description is fortunately set out in full in the order of the Financial Commissioner, dated July 21, 1936 (Ex. B). It is necessary to set out in detail the history of this grant, as this has already been done by the learned Assistant District Judge in his judgment. It appears that the respondents and their predecessors-in-title have obtained a series of grants from the Govt. of Burma of this land which is known as the Aungseikpyin Grant. The grants have in each case been made for a period of 20 years and at the end of each such period a new grant has been issued. It appears that in each successive grant the rent payable by the respondents or their predecessors, has been revised, but we have not been

told whether the other terms have continued to be same in each grant. The last grant was made on March 31, 1936, the agreement apparently being signed some time in 1927. According to the Financial Commissioner's order (Ex. B), the boundaries of the grant land as stated in the deed of 1926 are as follows:

- "North: The right branch of the Padaga Chaung to Mayu Hills.
- South: The Gyt Ohaung from its mouth to its source in the Mayu Hills.
- East: The Mayu Hills.
- West: The Myothit Ohaung."

The order of the Financial Commissioner set out that all these boundaries are described in exactly the same words as were the boundaries in the deed of grant of 1906. But the evidence shows that between 1906 and 1926 the Myothit Ohaung changed its course towards the east, and when the 1936 agreement was signed, its course was considerably to the east of the course which it had taken in 1906. It is common ground that the lands now in suit were on the east bank of the Myothit Ohaung in 1906, but were on the west bank of that Ohaung in 1926. The plain meaning of the description of the western boundary contained in the agreement in 1926 is the course of the Myothit Ohaung as it existed at the date of the agreement. Where the agreement says merely, "west: the Myothit Ohaung," plainly that means that the western boundary is the Myothit Ohaung as it was on the date of the agreement, and these words can have no other meaning. The Financial Commissioner, in his orders, discussed what was the intention of the parties at the time when this agreement was signed, and he came to the conclusion that the intention both of the Govt. and of the respondents was that the western boundary under the 1926 agreement should be exactly the same as the western boundary under the 1906 agreement. That is a construction which was permissible to him but which is not permissible to a Court of law. When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim *falsa demonstratio non nocet cum de corpore constat*, and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a descrip-

tion of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc., the description in regard to the acreage is considered to be mere false description if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified. In *Durga Prasad Singh v. Rajendra Narayan Bagchi* (1) their Lordships of the Privy Council said:

"In their Lordships' opinion, the question as to what had been demised in 1894 turned upon the true construction of the *kabuliyat*, and that construction could not be varied by extraneous evidence as to the negotiations which led up to the contract which was, in fact, made, or by evidence showing that within the boundaries specified in the schedule to the *kabuliyat*, there was not 400 *bighas* of land....."

Consequently, it is plain that under the deed of grant of 1926 the western boundary of the respondents' grant is the course of the Myothit Ohaung as it existed on that date. It has been urged on behalf of the respondents that the orders of the Financial Commissioner amount to a rectification of this grant in consequence of a mutual mistake of the parties thereto. If that were so, then a new grant was necessary. Under direction 13 of the directions under the Lower Burma Land and Revenue Act, grants of land for cultivation must be made in a particular form and entered in a particular register. Nothing of the kind was done after the Financial Commissioner's orders were issued, and it is only necessary to read the second of these orders, Ex. C, to come to the conclusion that is far too vague in its terms to be the basis of a new contract between the parties. There has obviously been no new grant or rectification of the old grant by reason of, or in consequence of, the orders of the Financial Commissioner; but what the Financial Commissioner did was to construe, as between the Govt. and the respondents, the existing grant of 1926, and as I have already said, that construction is not a construction which can be accepted by a Court of law. It would seem that the Financial Commissioner recognized this, for in his order of July 26, 1937 (Ex. C) he said:

"In future therefore for that portion of the grant south of the defined common boundary between Aungseikpyin and the Ohaungbank grant the centre line of the Myothit Ohaung as it stood in 1906 ... will be adopted as the western boundary."

(1) 41 O 493; 21 Ind. Cas 750; 40 I A 223; 18 O W N 66; 19 O L J 95, (1914) M W N 1; 15 M L T 68; 26 M L J 25; 16 Bom. L R 42 (P O).

And it is common ground that by that the Financial Commissioner meant that when a new grant was issued, the description of the western boundary should be in these terms. It is further urged on behalf of the respondents that if the orders of the Financial Commissioner cannot be held to be a rectification of the grant, at any rate they amount to an order that the respondents are to be permitted to occupy the land lying between the old and new beds of the Myothit Ohaung. This land is undoubtedly at the disposal of Govt. as waste land, and of course, under the rules for the occupation of waste lands Govt. can permit any person to occupy it; and without doubt, the Financial Commissioner had authority to direct that the respondents alone should be permitted to occupy this area. In fact, the appellants admit that this view of the Financial Commissioner's orders may be the correct view. But a case based upon a permission to occupy waste lands is not the case which has been set up by the respondents in their plaint. They have seen fit to base their case entirely upon their grant and the averment that the lands in suit fall within the grant, and upon this averment they must stand or fall. Learned Counsel for the appellants has frankly admitted that the appellants are liable to eviction from the lands in suit, at the hands of the Revenue Authorities by appropriate action, but he urges that if and when they are served by the Revenue Courts with notice of eviction, they will then have an opportunity of presenting their case before those Courts, an opportunity which has so far been denied to them. The appellants claim that they cannot be evicted by a decree of a Civil Court passed in the present suit, and in my opinion, this argument is without doubt correct. The suit of the respondents based upon their grant was bound to fail and therefore this appeal is allowed, and the suit of the plaintiffs-respondents is dismissed with costs in both Courts.

Roberts, C. J.—I agree and have nothing to add.

D.

Appeal allowed.

ALLAHABAD HIGH COURT

Second Appeals Nos. 335 and 478 of 1937

April 24, 1939

BAJPAI, J.

KAULESHAR SHUKUL—DEFENDANT—
APPELLANT

versus

RAM KISHORE LAL AND OTHERS,
PLAINTIFFS AND OTHERS—DEFENDANTS—
RESPONDENTS

Hindu Law — Widow — Adverse possession — Property acquired by widow by adverse possession, in her own right, becomes her absolute property — Alienation — Widow — Necessity — Consent of next reversioner though not conclusive proof, is prima facie evidence of legal necessity.

Property acquired by a Hindu widow or other qualified heir by adverse possession of which she takes and retains possession in her own right for 12 years or more becomes her absolute property and that she can dispose of it by means of transfer, *inter vivos* or will, but if the property is not claimed by her adversely it will become an accretion to her husband's estate. But the question has got to be determined in every case whether the widow entered into possession adversely to the reversioners, or as a widow representing her husband's estate. *Lachhman Kunwar v. Manorath Ram* (3), *Sham Koer v. Dah Koer* (4) and 55 Ind Cas. 486 (5), relied on. [p. 146, col. 1.]

When a document of transfer supported by consideration is executed by a Hindu widow and the document is consented to by the next reversioner that consent in itself affords *prima facie* evidence of legal necessity and it is not necessary for the transferee to adduce evidence of legal necessity beyond the evidence of the consent. The next reversioner is the person most interested in disputing the transaction and his consent will naturally afford presumptive proof of legal necessity, and if such proof is not rebutted by contrary proof, the consent, although it will not be conclusive proof of legal necessity, will be of great evidentiary value. 19 Ind. Cas. 273 (1) and 80 Ind Cas. 31 (2), relied on. [p. 645, col. 2.]

S. As. from the decision of the Additional Civil Judge, Gorakhpur, dated November 30, 1936.

Mr. E. V. David, for the Appellant.

Mr. Chaturbhuj Sahai, for the Respondents.

Judgment.—This is an appeal by Kaulashar Shukul, defendant, and is connected with Second Appeal No. 478 of 1937 which is an appeal by Ram Kishore Lal and others, plaintiffs. Both appeals arise out of a single suit which was brought by Ram Kishore Lal and others. As the suit was partly decreed and partly dismissed, there were two appeals before the lower Appellate Court and that is why there are two appeals before me. It appears that there were two brothers Ram Rekha and Bujhawan who were joint. Ram Rekha died first in 1905 and the name of *Mst*

Dula, his widow, was recorded over half the property and Bujhawan made no protest. Bujhawan died in 1908 and *Mst. Dula's* name was recorded over Bujhawan's share as well. There were certain reversioners, but they did not object. In the year 1934, on June 15, *Mst. Dula* executed a perpetual lease in favour of Kauleshar Shukul and his brother Bindeshri Shukul. A day after on June 16, 1934, she executed a deed of gift in favour of these two Shukuls. The present suit has been instituted by the reversioners for possession and in the alternative for a declaration by avoidance of the two documents, namely the perpetual lease and the deed of gift. *Musammatt Dula* is still alive and it is obvious that the reversioners cannot possibly obtain a decree for possession nor have they been given such a decree. They can, if at all, obtain a declaratory decree. The perpetual lease was attested by Gauri Shanker who, it is admitted, is the next reversioner. The plaintiffs have impleaded Gauri Shanker also in the present suit and have alleged that he is in collusion with the widow or has, in any event precluded himself from maintaining the present suit.

The Court of first instance dismissed the plaintiffs' suit so far as the deed of perpetual lease was concerned but decreed the plaintiffs' suit so far as the deed of gift was concerned and regarding that it gave the plaintiffs a declaratory decree declaring that the deed of gift would be ineffective against the rights of the plaintiffs after the death of *Mst. Dula*. The lower Appellate Court on appeals by the parties ordered that both the appeals be allowed and the judgment of the trial Court be set aside and that the plaintiffs' suit be decreed for a declaration that the deeds of gift and lease specified in the plaint will not be binding against the plaintiffs after the death of *Mst. Dula* only to the extent of half the property covered by them. The lower Appellate Court drew a distinction between property which *Mst. Dula* got from Ram Rekha and the property which *Mst. Dula* got from Bujhawan. It held that so far as Ram Rekha's share of the property was concerned, *Mst. Dula's* possession was that of a Hindu widow and the documents would be inoperative unless supported by legal necessity. As regards that share of the property which *Mst. Dula* got from Bujhawan, the lower Appellate Court was of the opinion that *Mst. Dula's* possession was adverse and she

became the full owner having remained in possession from 1908 onwards. That explains the decree which was given by the lower Appellate Court.

Both parties have come up in appeal to this Court and like the lower Appellate Court, I propose to give a consolidated judgment. It has been contended by the lessees that the perpetual lease is attested by the next reversioner and that shows that he consented to the document. The plaint also suggests that the next reversioner consented to the perpetual lease. That being so, the submission is that the lease must be deemed to be for legal necessity and the burden is on the plaintiffs to show that it was not for legal necessity. When a document of transfer supported by consideration is executed by a Hindu widow and the document is consented to by the next reversioner that consent in itself affords *prima facie* evidence of legal necessity and it is not necessary for the transferee to adduce evidence of legal necessity beyond the evidence of the consent: see *Debi Prosad v. Golap Bhagat* (1) and *Darbari Lal v. Gobind Saran* (2). The next reversioner was the person most interested in disputing the transaction and his consent will naturally afford presumptive proof of legal necessity, and if such proof is not rebutted by contrary proof, the consent, although it will not be conclusive proof of legal necessity, will be of great evidentiary value. In the present case there is also the recital in the lease that the money was required for purposes of pilgrimage and there is the evidence of Kauleshar Shukul that the money was utilized for that purpose. The lady *Mst. Dula* was in the witness-box and the plaintiffs did not put any question to her as to why she took Rs. 200 and what became of them. The learned Judge of the lower Appellate Court did not approach the case from this point of view. He did not attach any importance whatsoever to the consent of the next reversioner and he thought that the defendants lessees ought to have enquired from *Mst. Dula* regarding the Rs. 200. He said that no witness had been examined to corroborate the version of the defendant Kauleshar. He did not say that Kauleshar's testimony was false. Without discussing anything further he finished by saying that the deed

(1) 40 O 721; 19 Ind. Cas. 273; 17 O L J 499; 17 O W N 701.

(2) 46 A 822; 80 Ind. Cas. 31; A I R 1924 All. 902; 22 A L J 753.

was not justified by legal necessity. In my judgment the finding of the lower Appellate Court is vitiated by the fact that it did not consider the case of the perpetual lease from the point of view that it was consented to by the next reversioner who was most interested in disputing it. I have, therefore, come to the conclusion that the plaintiffs have no right so far as the perpetual lease of June 15, 1934, is concerned.

I now come to the deed of gift. It is in favour of two Shukuls. Beyond the assertion on behalf of the defendants that they were the *purohits* (family priests) of the lady, there is no other suggestion as to why the deed of gift had been executed. It is obvious that there could be no legal necessity for executing the deed of gift, but it is said that the deed of gift has to be considered from the point of view of spiritual benefit. The trial Court accepting the evidence of *Mst. Dula*—and that is the only evidence in the case—came to the conclusion that the Shukuls were not the family priests of *Mst. Dula* but there were certain *misirs* who were her family priests. That being so, the deed of gift cannot be supported and I agree with the view of the lower Appellate Court that there was no necessity for executing a deed of gift. The lower Court holds the view that when *Mst. Dula* came in possession of Bujhawan's half-share, she came into possession adversely and by the time of the execution of the deed of gift and the deed of lease she had become the full owner of that half-share. There is abundant authority for the proposition that property acquired by a Hindu widow or other qualified heir by adverse possession of which she takes and retains possession in her own right for 12 years or more becomes her absolute property and that she can dispose of it by means of transfer, *inter vivos* or will, but if the property is not claimed by her adversely, it will become an accretion to her husband's estate. To that effect are the cases in *Lachhman Kunwar v. Manorath Ram* (3), *Sham Koer v. Dah Koer* (4) and *Satgur Prasad v. Raj Kishore Lal* (5). But the question has got to be determined in every case whether the widow entered

into possession adversely to the reversioner or as a widow representing her husband's estate. The evidence in this case is very meagre and we have to rely to a great extent upon what *Mst. Dula* herself says on this point. She says that when *Ran Rekha Lal* died she got possession over his property and Bujhawan did not make any interference and this was for her maintenance and when Bujhawan died then again she obtained possession and there was no *pattidar* of hers. She does not even suggest that she took possession of Bujhawan's estate adversely to anybody and I think the facts of this case are very similar to the facts of the case reported in *Bindraban v. Ram Narain* (6), where it was held that there being absolutely nothing before the deed of transfer to show that there was any assertion of any adverse title by the widow in herself, namely title adverse to her husband's estate and to the estate that would go to the reversioners her possession previous to the transfer must be held to be permissive and not adverse to the reversioners. In the present case also it appears that she obtained possession of the property held by her husband as well as by her husband's brother for *parwari* as she says in clear terms herself in her evidence.

The position, therefore, is that there is no justification for drawing any distinction between the property which she obtained from her husband and the property which she obtained from her husband's brother; but I have held above that the deed of lease cannot be challenged by the next reversioners. From what I have said above, it is clear that the plaintiffs are not entitled to any relief so far as the document of perpetual lease is concerned but they are entitled to relief so far as the *dan patra* or the deed of gift is concerned. I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. Parties will bear their own costs in all Courts. Leave to file an appeal by way of Letters Patent is allowed to both parties.

3.

Appeal allowed.

(6) AIR 1925 All. 330; 85 Ind. Cas. 449; L.R. 127 Civ.

(3) 22 O 445; 22 I A 25; 6 Sar. 523; 5 M L J 1 (P.O.).

(4) 29 O 664; 29 I A 133, 8 Sar. 280; 6 O W N 657; 4 Bom. L.R. 547 (P.O.).

(5) 42 A 152; 55 Ind. Cas. 486; AIR 1919 P C 60; 46 I A 197; 11 L W 384; (1920) M W N 3; 24 O W N 394; 38 M L J 259; 18 A L J 233; 2 U P L R (P.O.) 55; 22 Bom. L.R. 451; 27 M L T 200 (P.O.).

MADRAS HIGH COURT

Appeal No. 34 of 1937

May 9, 1938

LEACH, C. J. AND KRISHNASWAMI

AYYANGAR, J.

T. SIVASANKARA MUDALIAR—**APPELLANT***versus***RADHABAI AMMAL AND ANOTHER****—RESPONDENTS**

*Guardians and Wards Act (VIII of 1890), s. 25—
 • Father delivering his infant daughter to another and
 taking no more interest in her for over 15 years—He
 is not entitled to order under s. 25 in his favour—
 Hindu father is not entitled to apply under s. 25 for
 being appointed guardian of his own minor child.*

Where a father delivers his infant daughter to the custody of another and for over 15 years takes no interest in her, but allows others to do what he as a father should do, he is not fitted to exercise the rights of a father. He is certainly not a person in whose favour the Court should pass an order under s. 25, Guardians and Wards Act.

A Hindu father is not entitled to apply under the Guardians and Wards Act, for an order appointing him guardian of the person or property of his minor child. Under Hindu Law, the father is the lawful guardian of his child and a declaration by the Court cannot increase his powers. 160 Ind. Cas 878 (1), followed.

A. from the judgment of Gentle, J., dated April 9, 1937.

Mr. A. Srirangachari, for the Appellant.

Mr. M. S. Venkatarama Iyer, for the Respondents.

Leach, C. J.—This appeal raises a question of the right of a Hindu father to the custody of his minor daughter, the allegation being that he had abandoned the minor. The appellant is the father of the minor who was born in 1922. Her mother suffered from tuberculosis and died a few months after the child was born. Before the mother's death, the appellant entrusted the minor to his sister Gnanambal who was married to one Subramania Mudaliar. Subramania died in August 1931 and Gnanambal in October 1932. After the death of Gnanambal, respondent No. 1 who is another sister of the appellant, took charge of the minor and has had charge of her ever since. In 1927 respondent No. 1 went to live with Gnanambal and her husband. Gnanambal owned the house in which she, her husband, respondent No. 1 and the minor were living and by her will left the house to respondent No. 1 and the minor jointly. She further provided that on the death of respondent No. 1 the minor should have the property absolutely. The appellant married a second time in 1923 and had a daughter by his second wife. It is said

that up to 1934 he used to visit the minor, but it is common ground that he has not visited her since 1934. It is also common ground that she never returned to her father's house. In January, 1937, respondent No. 1 arranged to marry the minor to respondent No. 2. The appellant's case is that he was not consulted about this and as he disapproved of the marriage, he instituted the proceedings out of which this appeal arises. He applied under the Guardians and Wards Act for an order appointing him the guardian of the person and property of the minor. He also asked that respondent No. 1 should be directed to hand over the custody of the minor to him and that respondent No. 1 should be restrained by an injunction from giving away the minor in marriage to respondent No. 2. The application was heard by Gentle, J. who treated it as one falling within s. 25, Guardians and Wards Act, and on the ground that the appellant had abandoned the minor dismissed it. The appeal is from this order.

The appellant is not entitled to apply under the Guardians and Wards Act for an order appointing him guardian of the person or property of the minor. Under Hindu Law, the father is the lawful guardian of his child and a declaration by the Court cannot increase his powers. I had to consider this very question in *Venkateswaran v. Saradambal* (1) when sitting as a Judge of the Rangoon High Court and I see no reason to change the opinion I expressed there. In fact the learned Advocate for the appellant has not challenged the correctness of this decision.

The important question is whether the appellant is entitled to an order under s. 25, Guardians and Wards Act. I consider that the learned Judge was right in refusing to pass such an order. I have already referred to the fact that the minor was brought up by her aunts and that she has never been received again in her father's house. It is admitted that he has not contributed anything to her support since he delivered the child to Gnanambal and that he has taken no part in ceremonies which are so important to a Hindu girl, namely, the ear-boring ceremony and the ceremony which takes place when she reaches the age of puberty. The appellant has never even given her a present. The invitation to the ear-boring ceremony was issued by Gnan-

(1) 13 R 590; 160 Ind. Cas. 878; A I R 1936 Rang. 67; R Rang. 442.

ambal and her husband Subramania Mudaliar. The invitation referred to the minor as the daughter of Gnanambal and her husband and no objection was taken to this by the appellant. The minor has always referred to her father as "uncle" and to Gnanambal and her husband as "mother" and "father." If the fact that the minor referred to her father as "uncle" was all the Court had to consider; it might not be a point against the appellant but it can be taken into consideration in the circumstances of this case. While the appellant may have visited the house where the sisters were living, he has not visited the minor since 1934 and throughout the minor's life he has not taken the slightest notice of her. His character can be gauged from the fact that in the course of the evidence he alleged that dissolute persons were in the habit of frequenting the house where respondent No. 1 and the minor were living.

There is not the slightest foundation for this statement. The learned Judge was satisfied, as we are, that he made this unwarranted allegation thinking that if he attacked the character of the respondent, it would strengthen his case. The learned Judge also held and again we agree with him, that this application was filed because he had not been consulted about the marriage and he wished to annoy respondent No. 1. Where a father delivers his infant daughter to the custody of another and for over 15 years takes no interest in her, but allows others to do what he as a father should do it is evident that he is not fitted to exercise the rights of a father. He is certainly not a person in whose favour the Court should pass an order under s. 25, Guardians and Wards Act. It is abundantly clear in this case that the minor will be in far better custody if she remains with respondent No. 1. The learned Advocate for the appellant contends that even in these circumstances he should be granted an injunction restraining respondent No. 1 from marrying the minor to respondent No. 2. I fail to see how we can pass an injunction of this nature when the main part of the application has failed. The learned Advocate for the appellant has been unable to point to any section in the Guardians and Wards Act under which he can ask the Court to issue an injunction in these circumstances. If the appellant wishes to take other proceedings, he is at liberty to do so, but having failed in his application under s. 25, Guardians and Wards Act, he is not entitled to any order

on the present application. The appeal will be dismissed with costs in favour of respondent No. 1.

N.-S.

Appeal dismissed.

CALCUTTA HIGH COURT

Civil Rule No. 1478 of 1933

June 7, 1939

HENDERSON AND KHUNDKAR, JJ.
STAR TRADING AND INVESTMENT, LTD.
—PETITIONER
versus

ASHUTOSH MUKHERJEE AND OTHERS—

PLAINTIFFS—OPPOSITE PARTY

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suit under—Power of Court to raise valuation—Such power, when can be exercised.

In a suit coming within s. 7, sub-s. (iv) (c), Court Fees Act, being a suit to obtain a declaratory decree where consequential relief is prayed for, the plaintiff is bound to pay *ad valorem* court-fee according to the amount at which the relief sought is valued in the plaint. The plaintiff has not an absolute right to value the relief at any sum he pleases but the Court may enquire into the matter and raise the valuation if it finds the relief claimed as under-valued. Until however reasonable standards for such valuation are laid down by appropriate rules framed under s. 9, Suits Valuation Act, it would not be possible for the Court to exercise this power except in certain defined cases. 149 Ind. Cas. 3 (1), relied on.

Messrs. *Hiralal Chakravarty* and *Rabindra Nath Bhattacharjee*, for the Petitioner.

Mr. Rama Prasad Mukherjee, the Assistant Govt. Pleader. Messrs. *Gunada Charan Sen* and *Kali Kinkar Chakravarty*, for the Opposite Party.

Henderson, J.—This is a Rule calling upon the opposite party to show cause why an order of the learned Subordinate Judge directing the petitioner to pay additional court-fees should not be set aside. There is no difficulty in discovering the nature of the suit. The basis of the plaintiff's case is that a compromise decree in a partition suit was obtained by fraud. He therefore desired to get rid of it, and to have the property partitioned by the Court. The plaint was drafted on these lines and the prayer is for a declaration and for partition. The suit accordingly comes within s. 7, sub s. (iv) (c), Court Fees Act, being a suit to obtain a declaratory decree where consequential relief is prayed for. Under that sub-section, the plaintiff is bound to pay *ad valorem* court-fee according to the amount at which the relief sought is valued in the plaint. The opposite parties raised an objection that the court-fee paid was not sufficient and

this was tried as a preliminary issue. The opposite parties adduced no evidence whatever in support of their case that the relief was undervalued. The Subordinate Judge merely took the value of the relief to be the total value of the joint property as it merged in the original partition suit. The question whether the plaintiff has an absolute right to value the relief at any sum he pleases or whether the Court may enquire into the matter and raise the valuation was considered by a Full Bench of this Court in *Narayangunj Central Co-operative Sale & Supply Society, Ltd. v. Mafijuddin Ahmed* (1). The conclusion reached was that the Court has such power. Until however reasonable standards for such valuation are laid down by appropriate rules framed under s. 9, Suits Valuation Act, it would not be possible for the Court to exercise this power except in certain defined cases. It seems to be difficult to say that the value of the relief setting aside this decree can possibly be the total value of the joint property. There is really no objective standard of valuation at all, and it is almost impossible to say with any show of reason that the relief sought is worth any particular sum of money. As rules have not yet been made under s. 9, Suits Valuation Act, it is impossible to say that the relief has been undervalued by the plaintiff. We accordingly make the Rule absolute and set aside the order of the learned Subordinate Judge calling upon the plaintiff to pay additional court-fees. The opposite party will pay the costs of this Rule to the petitioner. We assess the hearing-fee at five gold mohurs.

Khundkar, J.—I agree.

s.

Order set aside.

(1) 61 O 796; 149 Ind. Cas. 3; A I R 1934 Cal. 448; 38 O W N 589; 59 O L J 223; 6 R O 533 (F B).

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 38 of 1938

August 11, 1939

THOM, C. J. AND GANGA NATH, J.

RANI DHANDEI KURER—PLAINTIFF—

APPELLANT

versus

FATMA ZUHRA AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXII,
r. 4.—Cause of action for suit—Joint act of defendants
and joint relief claimed against all defendants—Suit*

*dismissed—One defendant dying during pendency of
appeal and his legal representative not brought on
record—Appeal abates as whole.*

If the absence of the legal representatives of a deceased party from the record will result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectually to execute a decree that may be passed in an appeal, the appeal must fail.

Where a joint relief is sought for by the plaintiff against all the defendants, on whose joint act the cause of action for the suit is based, and during the pendency of an appeal from the dismissal of the suit one of the defendants dies and his legal representative is not brought on record, the appeal abates as a whole and must be dismissed as there would be two inconsistent decrees if the appeal were allowed.

L. P. A. from the decision of Mr. Justice Rachhpal Singh in S. A. No. 567 of 1936, dated May 11, 1938.

Mr. Harnandan Prasad, for the Appellant.

Mr. A. M. Khwaja, for the Respondents.

Ganga Nath, J.—This is a plaintiff's appeal against the decision of a learned Single Judge of this Court. The appeal arises out of a suit brought by her against the defendants respondents and *Mst. Zenab Bibi*, since deceased, for an injunction to restrain them from allowing a grain market to be conducted on their plot No. 683 in *mauza* Dilawarpur and not to open any bazar in the said village or at any other place in Tahsil Madiahun, and to recover Rs. 50 for damages. The plaintiff's case was that under the terms of an award made in 1884 between Durga Prasad, predecessor-in-title of the plaintiff, and Mohamad Mehdi, predecessor-in-title of the defendants, the defendants were precluded from allowing any market to be conducted in these villages. The defendants contended *inter alia* that the award was invalid, that they were not bound by it and that they were entitled to hold the market on their land. Both the lower Courts decreed the suit. On appeal by the defendants to this Court, the learned Single Judge allowed the appeal and dismissed the suit. During the pendency of this appeal respondent No. 13, *Mst. Zenab Bibi* died. Her representatives were not brought on the record in her place. A preliminary objection is taken by the learned Counsel for the respondents that the appeal must be held to have abated and should be dismissed. If the absence of the legal representatives of a deceased party from the record will result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectually to execute a decree that may be passed in an appeal, the appeal must fail. The decisions

will naturally depend on the relief granted by the decree appealed against. In this case the plaintiff based her claim on an act alleged to have been jointly committed by all the defendants. A relief against the defendants jointly was claimed by the plaintiff in these terms:

"A perpetual injunction may be issued ordering the defendants to close the Gola Bazar, known as Qutubganj, which they have newly opened on *abadi* plot No. 683 in *mosa* Dilawarpur, Pargana Madiahun, district Jaunpur, and not to open any bazar as against the plaintiff's *gola* in the said village, or at any other place in Tahsil Madiahun, in future."

If this relief were granted to the plaintiff against the remaining respondents, it would not be within their power to comply with the decree and to close down the market, because the legal representatives of the deceased would still be entitled, under the decree of the learned Single Judge, to maintain the market on the land in dispute, and it would not be possible for the respondents to make them join with them in closing it down. It would not therefore be possible to execute the decree of this Court if the appeal were allowed. As already stated, the dispute was as to whether the award which was made in 1884 was binding on the heirs of Mohamad Mehdi. The respondents' contention was that the award was void and illegal and was not binding on them. On the other hand, the plaintiff's case was that the award was perfectly valid and binding on the heirs and successor-in-title of Mohamad Mehdi. The learned Single Judge has held that the award was void and illegal and was not binding on the successors-in-title of Mohamad Mehdi. This decree has become final so far as the legal representatives of the deceased respondent are concerned. If this appeal were allowed therefore there would be two inconsistent decrees in the same case. A joint relief is being sought for by the plaintiff against all the defendants, on whose joint act the cause of action for the suit is based. In the absence of the legal representatives of *Mst. Zenab*, it is not possible to grant this relief, because it involves the taking of action which cannot be completed without their joining in it. These difficulties are insurmountable. The appeal as it stands is imperfectly constituted and it is not possible to proceed with it. It is therefore ordered that it be dismissed with costs.

s.

Appeal dismissed.

OUDH CHIEF COURT

Execution of Decree Appeal No. 46
of 1937

November 27, 1939

RADHA KRISHNA J.

Lala RAMJI LAL—DECREE-HOLDER—

APPELLANT

versus

MANDAI—JUDGMENT-DEBTOR—RESPONDENT

Execution—Limitation—Implied adjudication of question of limitation—There was held no implied adjudication.

The answer to the question whether in a particular case there has been implied adjudication of the question of limitation depends upon the circumstances of each case. If the execution Court had passed any effective order for further execution to the detriment of the judgment-debtor, it might safely be inferred that there had been an implied adjudication of the question of limitation. Mere awarding costs of execution to the decree-holder and noting the balance due under the decree are mere formal matters and of a ministerial character and do not involve any adjudication of the question whether the application is capable of being proceeded with or not.

An application for execution was beyond limitation. Although the notice was served on the judgment-debtor he did not appear and the decree-holder having expressed a desire that his application should be consigned to record room, the Court passed an order to that effect awarding costs to the decree-holder and noting the balance due under the decree:

Held, that implied adjudication of question of limitation in favour of decree-holder could not be inferred from the order. 33 Ind. Cas. 663 (1) and 93 Ind. Cas. 833 (2), referred to.

Ex. D. A. against the order of the District Judge of Lucknow, dated July 9, 1937.

Mr. Ganesh Pershad, for the Appellant.

Mr. P. N. Asthana, for the Respondent.

Judgment.—This is a decree-holder's appeal arising out of an execution case. The facts are that the decree-holder obtained a decree for money on August 28, 1928, under O. XXXIV, r. 6 of the Civil P. C. There were several execution applications by the decree-holder. One of these applications was consigned to records on August 1, 1932. The next application for execution was made by the decree-holder on August 2, 1935, and it is apparent that it was beyond limitation by one day. Notice was issued to the judgment-debtor under O. XXI, r. 22 of Civil P. C. for August 22, 1935. On this date the judgment-debtor, although served with the notice, did not appear. The decree-holder expressed a desire that his application be consigned to records and thereupon the execution Court passed the following order:

"Let the case be consigned to records as de-

sired by the decree-holder's agent. The decree-holder shall get costs of the application. Balance is Rs. 439-13-0."

The present application for execution was made on January 11, 1937. The *Munsarim* reported that the present application, although it was within three years of the order on the previous application was time-barred because the previous application itself had been filed beyond time.

The two Courts below have held that the present application is beyond limitation, and the decree-holder has come up in appeal to this Court.

The learned Counsel for the appellant has argued that as the Court in consigning his previous application for execution to records allowed him costs for execution and laid down in the order the balance due to him, therefore it must be held that the Court impliedly decided that his application was within time. That the judgment-debtor had been served with a notice to appear and to show cause why the decree should not be executed, and had failed to appear. Now he is debarred by the provisions of s. 11 from raising that question at the time of the present application.

The question that an *ex parte* order passed by an execution Court allowing the execution to proceed is as much binding upon the judgment-debtor as an order on contest, is not open to dispute.

The real question for decision is whether the order dated August 22, 1935, can be said to have impliedly decided against the judgment debtor that the application was within time and that the execution was to proceed. It is contended that the execution Court could not award costs to the decree-holder and strike the balance due on that date unless it had impliedly decided that the application for execution was within time. In my opinion the answer to the question whether in a particular case there has been implied adjudication of the question of limitation depends upon the circumstances of each case. If the execution Court had passed any effective order for further execution to the detriment of the judgment-debtor, it might safely be inferred that there had been an implied adjudication of the question of limitation. In my opinion awarding costs of execution to the decree-holder and noting the balance due under the decree are mere formal matters and of a ministerial character and do not involve any adjudication of

the question whether the application is capable of being proceeded with or not.

The learned Counsel for the appellant has cited several cases in support of his contention, amongst which I may mention 1. *Gauri Shankar v. Musammatt Lachhmin Kunwar* (18 O. C. 374) (1) and 2. *Raghubar Singh v. Gokaran* (3 O. W. N. p. 241) (2).

These cases, in my opinion, support the view that I have expressed above. In the former case 18 O. C. 374 (1) Mr. Stuart (later Sir Louis Stuart, Chief Judge of this Court) laid down as follows :

"In order to enable a decree, to be executed in spite of the fact that execution is time-barred, it is necessary to establish that notice requiring the judgment-debtor to show cause why the decree should not be executed against him has been served on him, and that he has thus been in a position to raise the plea of limitation, that a Court has expressly or impliedly decided by a final order the question of limitation in favour of the decree-holder, and that there has been an effective order of adjudication."

In the present case it is established that the notice requiring the judgment-debtor to show cause why the decree should not be executed against him was served on him and he was in a position to raise the plea of limitation. There was no express adjudication of the question of limitation in favour of the decree-holder. It is not possible to infer any implied adjudication of that question, because at the request of the decree-holder himself, the application was consigned to records and no order for further execution was passed. This decision in my opinion does not help the contention of the learned Counsel for the appellant.

In *Raghubar Singh v. Gokaran* (3 O. W. N. p. 241) (2) a Bench of this Court took the same view that implied adjudication of the question of limitation can be inferred only in those cases where the Court executing the decree, orders the execution to proceed for the simple reason that an order to proceed with further execution, although made in the absence of the judgment-debtor, implies an adjudication of the fact that the application is within time. In the present case I have shown above that no such inference can be drawn from the order for costs or from the fact that the balance due to the decree-holder was noted in the order.

The result is that I agree with the view

(1) 18 O. C. 374; 33 Ind. Cas. 663; A I R 1916 Oudh 278.

(2) 3 O. W. N. 241; 93 Ind. Cas. 833; 13 O. L. J. 111; A I R 1926 Oudh 291; 1 Luck. 171.

taken by the Courts below and dismiss the appeal with costs.

s.

Appeal dismissed.

LAHORE HIGH COURT

Second Appeal No. 1721 of 1938

April 12, 1939

SKEMP, J.

GOBIND RAM—DEFENDANT—APPELLANT
versus

KAJU RAM—PLAINTIFF—RESPONDENT

Malicious prosecution—Suit for damages—Mere acquittal of accused whether absolves plaintiff from proving that prosecution was malicious and without reasonable cause—Second appeal—Finding of fact—Available evidence not considered—Whether binding.

The mere acquittal of the accused in a criminal case does not absolve the plaintiff in a suit for compensation for malicious prosecution from his duty of proving independently of the acquittal that his prosecution was malicious and without reasonable and probable cause. 122 Ind. Cas. 760 (1), dissented from, 144 Ind. Cas. 387 (2), relied on. [p. 653, col. 2.]

Finding reached by lower Court without considering all available evidence is not binding on second appeal.

S. A. from the decree of the District Judge, Ambala, dated October 19, 1938.

Mr. Tek Chand, for the Appellant.

Mr. Ram Lal Anand, for the Respondent.

Judgment.—This second appeal has arisen from a suit for malicious prosecution which in its turn had its origin in the sale of a motor car. On November 3, 1935, at Kasauli, Kaju Ram bought a second hand Studebaker car from Gobind Ram for Rs. 1,003. He gave Gobind Ram a cheque for the price dated November 5, 1935, and also handed a letter dated the 5th stating that he had received the car and that if the cheque was not cashed, he would be responsible. The defendant gave a stamped receipt for the cheque. Although admittedly the transaction took place on November 3, all the documents, the cheque, the receipt and a certificate of transfer of ownership were dated the 5th. On November 6, 1935, Kaju Ram stopped payment of the cheque. On the 8th there was a telephone conversation between Gobind Ram in Kasauli and Kaju Ram in Simla. Gobind Ram asked why the cheque had not been paid and Kaju Ram replied that he had stopped payment because the permit for run the car on the Simla-Kalka Road had not been transferred to his name. Kaju Ram went on to say that if Gobind Ram

could get the permit transferred, the cheque would be cashed or otherwise Gobind Ram could take back the car. This account of the matter is based on Kaju Ram's evidence at p. 367 of the record. On November 9, 1935, Gobind Ram sent a telegram to Kaju Ram to the effect that unless Kaju Ram settled he would take legal proceedings. On November 15, Gobind Ram gave a formal notice threatening Kaju Ram with legal proceedings which Kaju Ram states he received on the 19th and to which he made a reply dated the 20th. This reply states that a transfer of the permit was a condition of the contract and that without the permit he did not want the car and he suggested that Gobind Ram should take the car back.

On November 21, 1935, Gobind Ram lodged a complaint which had been drafted on the 19th and which after setting forth the facts said that the accused with intent to cheat had taken possession of the car and given the complainant a fictitious cheque; he would not have given possession of the car if he had known that the cheque would not be honoured. This complaint was tried out, a charge was framed, but Kaju Ram was acquitted by a Magistrate of the First Class on July 4, 1936. On November 24, 1936, Kaju Ram lodged the present suit for Rs. 2,500: Rs. 2,380 damages for malicious prosecution and Rs. 120 for motor garage hire. The learned Senior Subordinate Judge of Simla found that the car had been purchased by Gobind Ram for Rs. 800 two years (this is a slip for one year) previous to the transaction in suit, whereas the plaintiff Kaju Ram agreed to pay Rs. 1,003 and this supported the conclusion that the real object of the transfer was that the hill permit between Kalka and Simla should pass to the plaintiff. He also found that Kaju Ram had no intention to defraud because although on the 3rd his Bank balance was only Rs. 780 he made deposits on November 4 and 5, which brought it up to nearly Rs. 1,200. He referred to the telephone call of November 8, and found that the defendant's statement in cross-examination about this matter was evasive in the extreme and tantamount to an admission that the telephone call was made on that date. The learned Senior Subordinate Judge thought that the plaintiff's account of the matter was correct.

The defendant had denied receiving the plaintiff's reply dated November 20, but

after considering the evidence of the plaintiff, the scribe of the notice, the postman and the documents which they produced, the Senior Subordinate Judge came to the conclusion that this reply had actually been delivered to the defendant. The Senior Subordinate Judge did not come to any definite conclusion as to the date on which the car was handed over. Gobind Ram's case is that the car was handed over on the 3rd; Kaju Ram's evidence supported by the driver of the car Kalu, is that it was only on the 5th. The Senior Subordinate Judge concluded that the plaintiff had proved his contention that the transfer of the bill permit between Kalka and Simla was a condition precedent to the sale of the car and that in consequence of this condition precedent not being fulfilled, the transaction fell through. Even if the defendant's contention that the transfer was completed on November 3, 1935, was accepted, the defendant had entirely failed to prove that the conduct of the plaintiff amounted to cheating and the Magistrate was quite right in acquitting Kaju Ram. As to damages, the claim was :

1. Lawyers' fee including *munshiana* ... Rs. 512
2. Journey and motor expenses ... " 428
3. Expenses of witnesses and other miscellaneous expenses, such as, various applications, copies, etc. ... " 135
4. Loss of 30 days' business at Rs. 20 a day ... " 600
5. General damages on account of injury to mind and reputation ... " 708

The Senior Subordinate Judge allowed (1) Rs. 507, (2) Rs. 300, (3) Rs. 105, (4) Rs. Nil, (5) Rs. Nil. On account of garage hire he only allowed Rs. 60, at Rs. 5 a month on the statement of one of the plaintiff's witnesses who gave the average rate of garage hire. He granted the plaintiff a decree for Rs. 972 with proportionate costs against the defendant. Both parties appealed to the learned District Judge who quoted *Kishun Mal v. Sakul Raj Mal* (1), to the following effect :

"The acquittal of the plaintiff of a charge made against him must be taken to mean that *prima facie* he was innocent. The burden would therefore shift on to the defendant to prove in the Civil Court that the charge disbelieved by the Criminal Court was true.... The Civil Court is called upon from a balance of the evidence and after taking into consideration the acquittal of the plaintiff by the Criminal Court to come to a definite finding whether the complaint instituted by the defendant was false or true."

The District Judge proceeded :

"In order to succeed in this appeal therefore it must be shown by the defendant that the evidence

in this case leans towards the inference that the criminal case brought by him against the plaintiff was true."

The District Judge then found, relying on the documents executed on November 3, 1935—the transaction actually took place on that date—that there was no definite condition regarding the permit but that the plaintiff was not criminally liable as there was nothing to show that he had a dishonest intention at the moment when he bought the car. His subsequent conduct had not also been that of a cheat. He had not run away with the car but wished to give it back and have the transaction cancelled. The District Judge, therefore, dismissed the defendant's appeal. He also dismissed the plaintiff's appeal. Both parties have come here in second appeal: the defendant through Mr. Tek Chand, and the plaintiff through Mr. Ram Lal Anand. The defendant's main point is that the law is wrongly laid down in *Kishun Mal v. Sakul Raj Mal* (1), that the onus is on the plaintiff who must prove in the Civil Court (a) that the plaintiff was prosecuted by the defendant; (b) that the prosecution ended in his favour; (c) that the defendant had acted without reasonable and probable cause and (d) that the defendant was actuated by malice. This position is accepted by Mr. Ram Lal Anand and it is not necessary to labour the point. It is sufficient to say that *Kishun Mal v. Sakul Raj Mal* (1), has been dissented from in various rulings, e. g. *Jivandas v. Hukumat Rai* (2), where Jai Lal, J. laid down that the mere acquittal of the accused in a criminal case does not absolve the plaintiff in a suit for compensation for malicious prosecution from his duty of proving independently of the acquittal that his prosecution was malicious and without reasonable and probable cause.

Mr. Tek Chand argues that the District Judge's findings of fact are in his favour and binding on me and that the District Judge's view of the law is wrong. He therefore invites me to reverse the finding or at the worst after stating the law to remand the case for a new finding. Mr. Ram Lal Anand argues that the learned District Judge failed to consider all the evidence, probably because in his view of the law it was unnecessary. Be that as it may, the District Judge's finding that the transfer of the permit was not a definite condition is based merely on the face value of the documents executed on the 3rd and dated

(1) A. I. R. 1929 All. 878; 123 Ind. Cas. 760; Ind. Rul. (1930) All. 312.

(2) A. I. R. 1933 Lah. 461; 144 Ind. Cas. 387; 15 L. 262; 34 P. L. R. 746; Ind. Rul. (1933) Lah. 465.

November 5. The District Judge has not considered at all the evidence as to the telephone conversation of November 8, or the plaintiff's reply to the defendant's notice or a remarkable note Ex. D-16 from the file of the Licensing Officer which is proved by the Licensing Officer's Reader (D. W. No. 1) who wrote it. This note gives the history of the car which was first licensed in 1931 but was sold

"not less than half a dozen times and has been running on the Simla hill roads for the last four years. . . . The present owner appears to have purchased the same simply to secure the Simla hill roads endorsement by replacing the same in the near future."

The note recommended that the permit be not transferred on the ground that there was a waiting list of 50 people who sought passes to run cars for hire on the Kalka-Simla Road. From the evidence of the Licensing Officer's Reader (D. W. No. 1) it appears that Gobind Ram's application to transfer the permit was made on November 5, 1935; his note was dated the 7th; the application was refused by the Deputy Commissioner on the 15th; and this was officially communicated to Kaju Ram and Gobind Ram on the same date. According to Kaju Ram's evidence, which is supported by that of the driver Kalu, he ascertained on the 5th that the permit was not likely to be transferred and he at once stopped payment of the cheque. As already remarked, this evidence was not considered by the learned District Judge probably under a misapprehension of law. In these circumstances, his finding of fact is not binding on me. There is abundant authority on this point collected in Mr. Shamair Ohand's Punjab Courts Act at p. 41. It is sufficient to refer to *Mansa Ram Gordhan Das v. Mangul Sain Duni Chand*, 65 Ind. Cas. 497 (3) at p. 500:

"A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in second appeal".

Considering the whole of the evidence, the telephone conversation, Kaju Ram's reply to Gobind Ram's notice and the facts set forth in the Reader's note of November 7, I have no doubt that the sale of this old car for Rs. 1,003, although it had changed hands previously for only Rs. 800, was made with the object of transferring the permit or getting the permit attached to it endorsed in favour of the purchaser. Mr. Tek Ohand refers to the uncorroborated (3) 65 Ind. Cas. 497 at p. 500; A I R 1922 Lah. 149.

statement of Gobind Ram that he had spent Rs. 500 or Rs. 600 in having the car overhauled as a reason for the increase in price after a year's work on the hill roads, but that leaves me quite unconvinced. Under s. 103, Civil P. O., I hold that the transfer of the permit was a condition precedent known to both the parties. The rest of the case is simple. It is clear that the prosecution was made without reasonable and probable cause and also that it was made maliciously. Here I adopt the well-known dictum of Bowen, L. J., in *Abrath v. The North-Eastern Ry. Co.* (4) at p. 455, that the proceedings were initiated in a malicious spirit, that is from an indirect and improper motive, and not in furtherance of justice. Here, no doubt Gobind Ram's object was not to get Kaju Ram sent to prison but to recover Rs. 1,003; and he acted on the criminal rather than on the civil side because he thought the criminal proceedings would be at once cheaper and more likely to exercise pressure on his opponent. There is, however, no doubt that the difference between the parties was purely a civil one and that if a case was instituted at all, it ought to have been in a Civil Court. In my opinion, Gobind Ram acted in a malicious spirit, not in furtherance of justice but from an indirect and improper motive. He knew that Kaju Ram had not committed the offence of cheating. I would, therefore, dismiss the defendant's appeal. As to the plaintiff's appeal, two Courts are already agreed about the damages. There is no evidence whatever to show that the plaintiff suffered any injury to mind or reputation and the amount he claimed for loss of business in particular is excessive. Mr. Ram Lal Anand contended that there must be an injury to mind and reputation and that there was also danger to his client's liberty, and that some damages should be allowed on this account. Beyond this no detailed criticisms of the amounts allowed by the lower Courts were made; and in particular there was no criticism of the amount allowed for garage hire. Mr. Ram Lal Anand did urge that owing to the impossibility of assessing damages accurately, costs on the full amount sought for should have been allowed and quoted some authorities to this effect, but I see no reason to interfere and dismiss the plaintiff's appeal also. Costs of both these second appeals are to be assessed in accordance with the result.

D. *Appeals dismissed.*

(4) (1883) 11 Q B D 440 at p. 455; 52 L J Q B 620; 49 L T 618; 32 W R 50; 47 J P 692.

BOMBAY HIGH COURT

Second Appeal No. 635 of 1936

April 12, 1939

LOKUR, J.

BAI HAKIMBU AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

DAYABHAI RUGNATH—DEFENDANT—

RESPONDENT

Civil Procedure Code (Act V of 1908), s. 64, O. XXXVIII, r. 7, O. XXI, r. 103—Attachment before judgment—Procedure—Proper procedure not followed—Transfer, if invalidated under s. 64—Suit under O. XXI, r. 103—Right to present possession established—Plaintiff's dispossession pending suit is not material—Order of removal of his obstruction must be set aside—Transfer of Property Act (IV of 1882), s. 53—Transfer by judgment-debtor to delay or defeat his creditor decree-holder—It is voidable at decree-holder's option even if he may subsequently become auction-purchaser—Suit against creditor by transferee—Creditor, if can plead s. 53 as personal defence—Whether must bring representative suit to avoid transfer—Transfer to one creditor in preference to other, when valid.

Unless all the processes of attachment which are required by law to effect a valid attachment have been served, there is no such attachment of the property as would invalidate its transfer under s. 64, Civil P. O. Under O. XXXVIII, r. 7, the attachment before judgment must be effected in the same manner as the attachment in execution of a decree. Under O. XXI, r. 54, the attachment of immovable property is to be made by an order prohibiting the defendant from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order has to be proclaimed in the manner described in sub-r. (2) of r. 54. A mere order of attachment is not enough. 109 Ind. Cas. 626 (1), relied on. [p. 657, col. 2.]

In a suit under O. XXI, r. 103, Civil P. O. the plaintiff must prove not only that he was in possession when he obstructed the defendant in taking possession of the property in suit as its auction-purchaser, but must also "establish the right which he claims to the present possession of the property." If he succeeds in doing so, his dispossession during the pendency of the suit does not matter. If his right is proved, then the order of the removal of the plaintiff's obstruction must be set aside and the *status quo*, as at the date of that order, must be restored, that is to say, the plaintiff must be put back into possession. [p. 656, col. 2.]

Under s. 53, T. P. Act, only a defeated or delayed creditor or a subsequent transferee has the option to impeach the transfer. An auction-purchaser, who is not the decree-holder himself, is not a creditor of the judgment-debtor, and it cannot be said that the transfer was intended to delay or defeat him, since he stepped in after the transfer by operation of law. Nor is he a subsequent transferee within the meaning of sub-s. (2). If, however, a person can prove that he was the creditor and decree-holder of the judgment-debtor and the assignment of the property made by the judgment-debtor was intended to delay or defeat him, then the assignment is voidable at his option, though he may subsequently become an auction-purchaser. A decree-holder does not lose his right to the benefit of s. 53, by himself becoming an auction-purchaser. [p. 658, col. 2.]

It is true that if such a creditor institutes a suit to avoid a transfer, he must do so "on behalf of or for the benefit of all the creditors." The reason of the rule is that the debtor should not be harassed by a multiplicity of suits by each and every creditor. But this does not mean that the creditor, even when he is defendant, must defend the suit on behalf of the whole body of creditors. He may plead s. 53, T. P. Act, as a personal defence to the suit against him, and it is not necessary that he must file a representative suit to avoid the transfer. The addition of para. 4 to s. 53, sub-s. (1), by amendment of 1929 makes no difference, and it has no application to a creditor who has to defend a suit filed against him by a plaintiff claiming under a transfer voidable under s. 53. It is, therefore, open to the defendant to resist the plaintiff's claim on the ground that the assignment taken by him is voidable at his option. 59 Ind. Cas. 947 (4), relied on. [ibid.]

It is open to the debtor to convey his property to either of his creditors in preference to the other, although it is effected to avoid the execution of his decree by the latter. But in doing so he must not reserve any benefit for himself. The transfer of property to one creditor for a price far in excess of the debt due to him and the retention of the excess amount for his own benefit indicate an intent to defeat or delay the other creditors, especially when he has no other property left. 40 Ind. Cas. 242 (5), relied on. [p. 659, col. 1.]

Such an assignment should not be upheld even to the extent of the amount which was actually due to the creditor. 52 Ind. Cas. 682 (7), relied on. *Rajani Kumar Dass v. Gaur Kishore Shah* (6), explained.

S. A. from a decision of the First Class Sub-Judge, Broach, in Appeal No. 80 of 1933.

Mr. J. G. Mody, for the Appellants.

Messrs. G. N. Thakor and B. C. Thakor, for the Respondent.

Judgment.—The appellants' father, who was the plaintiff, died during the pendency of the suit, and the appellants were brought on record as his heirs and legal representatives. For the sake of facility, I shall refer to the deceased plaintiff as the plaintiff in this judgment. He and the defendant were the creditors of two brothers, Fidaali and Nuralli, who were the owners of the property in suit. They separated on September 29, 1927, when the property in suit was allotted to the share of Nuralli who undertook to pay off the joint debts, and also to pay Rs. 2,500 to Fidaali for his share. As Nuralli was unable to pay the amount in cash, he mortgaged the property in suit with possession to Fidaali for Rs. 2,500 on the same day. After they were thus separated, both the plaintiff and the defendant filed separate suits against them to recover their respective dues. The defendant filed suit No. 342 of 1928, on October 25, 1928, and pending the suit he

got the property in suit attached before judgment, as if it belonged to both the brothers. In that suit the defendant got a decree for Rs. 800 on April 25, 1929, and the attachment before judgment was ordered to be continued. In the meantime, the plaintiff also had obtained a decree in his suit on January 20, 1929. The plaintiff presented *darkhast* No. 120 of 1929 on April 27, 1929, to execute his decree against Fidaali alone and to recover the decretal amount by the sale of Fidaali's interest as a mortgagee in the property in suit. Nuralli was not joined as a party to that *darkhast*. The defendant also filed *darkhast* No. 138 of 1929 against both Fidaali and Nuralli on June 13, 1929, to recover his decretal amount by the sale of the property which had been attached before judgment. When the defendant came to know that the plaintiff's *darkhast* was also pending, he made an application on August 12, 1929, that his *darkhast* should be kept along with the plaintiff's *darkhast*, and prayed for a rateable distribution of the amount realized by the sale of the property in the plaintiff's *darkhast*. Accordingly, an order was passed on September 10, 1929, stating that the defendant's *darkhast* for rateable distribution be kept along with the plaintiff's *darkhast* as prayed for.

Thereafter on September 28, 1929, the plaintiff privately purchased from Fidaali his mortgagee right in the property in suit for Rs. 1,999 by the sale deed Ex. 94. That consideration was made up of Rs. 1,230 payable under the decree, and Rs. 769 paid in cash in the presence of the Sub-Registrar. After obtaining this sale deed, the plaintiff dropped his *darkhast* and it was struck off on September 30, 1929. The defendant then amended the prayer in his *darkhast* on December 5, 1929, and asked for the attachment and sale of Fidaali's interest in the property in suit. Nuralli having become an insolvent in the meanwhile, Fidaali's share was then sold by auction and purchased by the defendant himself for Rs. 500 on October 9, 1930. The sale was confirmed on November 18, 1930, and the defendant applied for possession under O. XXI, r. 95, Civil P. O. The plaintiff objected, but his obstruction was removed on January 16, 1931, and the defendant was ordered to be given possession. The plaintiff then filed this suit under O. XXI, r. 103, Civil P. O., for a declaration of the property in his own right and was entitled to it, and for an injunction restraining

the defendant from dispossessing him. The suit was filed on June 15, 1931, and on April 10, 1932, the defendant took possession of the property as the auction-purchaser. The plaintiff therefore amended his plaint on June 6, 1932, and prayed for the possession of the property.

The defendant contended that as the property had already been attached in his suit No. 342 of 1928, the plaintiff's subsequent purchase was void against him, under s. 64, Civil P. O.; and that his purchase was not *bona fide* but intended to defeat and delay the creditors of Fidaali and Nuralli, and was therefore voidable under s. 53, T. P. Act. On the other hand, it was contended on behalf of the plaintiff that the attachment before judgment in the defendant's suit No. 342 of 1928, did not affect Fidaali's mortgagee right in the property, and that the defendant's auction-purchase was vitiated by the want of proper attachment. The trial Court held that the attachment before judgment was not proper and that the defendant, as the auction-purchaser, had no right to challenge the validity of the plaintiff's purchase under s. 53, T. P. Act. It also held that the plaintiff's purchase was not intended to defeat or delay the creditors of Fidaali and Nuralli. The plaintiff's claim was, therefore, decreed; but that decree was set aside in appeal by the learned First Class Subordinate Judge, A. P., who held that although the defendant was an auction-purchaser, he was also a decree-holder, and in that capacity he was entitled to challenge the plaintiff's purchase under s. 53, T. P. Act, and that as the plaintiff had paid Rs. 769 to Fidaali for his benefit, the purchase was fraudulent and intended to defeat the creditors of Fidaali and Nuralli. On this ground it was held that the plaintiff had no title to the property in suit, and was not entitled to evict the defendant. All these contentions have been pressed in this Court by one side or the other.

This suit being filed under the provisions of O. XXI, r. 103, Civil P. O., the plaintiff must prove not only that he was in possession when he obstructed the defendant in taking possession of the property in suit as its auction-purchaser, but must also "establish the right which he claims to the present possession of the property". If he succeeds in doing so, his dispossession during the pendency of the suit does not matter. If his right is proved, then the order of the removal of the plaintiff

iff's obstruction must be set aside and the *status quo*, as at the date of that order, must be restored, that is to say, the plaintiff must be put back into possession. The plaintiff does not claim to be the owner of the property in suit, but claims to be entitled to its present possession as the assignee of Fidaali's mortgagee rights. The assignment is attacked on two grounds: it is said to be void under s. 64, Civil P. O., and to be voidable under s. 53, T. P. Act. Section 64, Civil P. O., provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein shall be void as against all claims enforceable under the attachment. It is alleged that the property in suit was attached before judgment in the defendant's suit No. 342 of 1928, and it was continued by the decree.

It is urged on behalf of the plaintiff that the order of attachment was illegal, not being in accordance with the provisions of O. XXXVIII, rr. 5 and 6, Civil P. O. According to those rules, the defendant should first be directed to furnish security, or to produce the property or its value, or appear and show cause why he should not furnish security. A conditional attachment may also be simultaneously ordered. If the defendant does not show cause, nor furnish security, then the attachment of the property is to be ordered. But in suit No. 342 of 1928, as soon as the defendant made an application for the attachment of the property before judgment (Ex. 61), a prohibitory notice was issued to Fidaali and Nuralli directing them not to transfer the property in any way during the pendency of the suit. They were not given the option of furnishing security. Nor was the order confirmed after a hearing. But I do not think that the plaintiff can take advantage of this irregularity. In spite of the prohibitory notice, Fidaali and Nuralli raised no objection and did not object to that notice. They did not offer to furnish security, and ultimately they allowed a decree to be passed against them whereby the attachment was continued. But in that suit Fidaali's mortgagee rights were not sought to be attached. In his application the defendant prayed for the attachment of the property itself as belonging to both Fidaali and Nuralli. But Nuralli had already become the sole owner of the property and had mortgaged it to Fidaali for Rs. 2,500. It is argued that thereby the property was divided into Nuralli's equity of redemption and Fidaali's mortgagee rights, and both of them must be deemed to have

been attached by the attachment of the property itself. Even if it were so, the property itself was never actually attached. Under O. XXXVIII, r. 7, the attachment before judgment must be effected in the same manner as the attachment in execution of a decree. Under O. XXI, r. 54, the attachment of immovable property is to be made by an order prohibiting the defendant from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order has to be proclaimed in the manner described in sub-r. (2) of r. 54. Nothing of the kind was done in suit No. 342 of 1928. Only one prohibitory notice was served on Fidaali and Nuralli (Ex. 62) and the *rozanama* (Ex. 67) shows that no proclamation was issued nor were all persons prohibited from taking any benefit from any transfer or charge thereafter. A mere order of attachment is not enough. *Muthiah Chetti v. Palaniappa Chetti* (1), the Judicial Committee observed (p. 356):

"In view of these provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would be that a person holding an order could dispense with attachment altogether as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order, the other things prescribed by the rules in the Code have been done."

Unless all the processes of attachment which are required by law to effect a valid attachment have been served, there is no such attachment of the property as would invalidate its transfer under s. 64, Civil P. O. In *Hira Lal v. Jagatpati Sahai* (2), it was held that in the case of land paying revenue to Govt. an attachment was not effective to invalidate a subsequent transfer as a copy of the order of attachment had not been affixed in the office of the Collector of the District. Hence in this case there was no effective attachment of the property, much less of Fidaali's mortgagee rights in it. In this view it is unnecessary to consider whether Fidaali's rights were movable property to be attached under O. XXI, r. 46, or immovable property to be attached under O. XXI,

(1) 51 M 349; 109 Ind. Cas. 626; A I R 1923 P O 139; 55 I A 256; 26 A L J 616; 32 O W N 821; 48 O L J 11; 28 L W 1; 5 O W N 579; 55 M L J 122 30; Bom LR 1353 (P O).

(2) 8 Pat 1; 111 Ind. Cas. 797; A I R 1928 Pat 600; 9 P L T 523.

r. 54. They were not attached under either of these rules, and their assignment in favour of the plaintiff is not void under s. 64, Civil P. C. The next question is whether the assignment is voidable under s. 53, T. P. Act, at the option of the defendant. It is contended for the plaintiff that the defendant cannot get the benefit of that section since he is not a creditor of the assignor, but an auction-purchaser, and since he does not represent all the creditors. In support of the first contention reliance is placed on the ruling in *Vasudeo Raghunath v. Janardhan Sadashiv* (3), s. 53, sub-s. (1), provides:

"Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed."

Sub-s. (2) of s. 53 provides:

"Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee."

From the very wording of these sub-sections it follows that only a defeated or delayed creditor or a subsequent transferee has the option to impeach the transfer. An auction-purchaser, who is not the decree-holder himself, is not a creditor of the judgment-debtor, and it cannot be said that the transfer was intended to delay or defeat him, since he stepped in after the transfer by operation of law. Nor is he a subsequent transferee within the meaning of sub-s. (2). In *Vasudeo Raghunath v. Janardhan Sadashiv* (3), Shah, J. observed (p. 512*):

"But the defendant is an auction-purchaser at a Court sale, and not a transferee by any act of the original owner. Having regard to the preamble as well as s. 5 of the Act, it seems to be clear that a person, who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of s. 53. He is clearly not a person having an interest in the property within the meaning of the section, which apparently refers to interest, which exists in fact at the time of the transfer objected to."

This was the interpretation of the section as it stood before 1929, but the view expressed above is in no way affected by the amendment of the section by the Amending Act of 1929. But in this case the defendant was a creditor of Fidaali and was holding a decree against him when he assigned his mortgagee rights to the plaintiff. If that assignment was intended to defeat or delay the defendant, he can challenge its validity, although he subsequently became an auction-purchaser of the

same property. He cannot challenge it as a "subsequent transferee" under sub-s. (2) of s. 53, but can do so as a "creditor" under sub-s. (1), which says, in effect, that whenever a creditor (or decree-holder) is delayed or defeated by the transfer of the property of his debtor (or judgment-debtor), the transfer is voidable at the option of such creditor (or decree-holder). If the defendant can prove that he was a creditor of Fidaali and that the assignment taken by the plaintiff from Fidaali was intended to delay or defeat him, then the assignment is voidable at his option, though he may subsequently become an auction-purchaser. A decree-holder does not lose his right to the benefit of s. 53, T. P. Act, by himself becoming an auction purchaser, and if the property purchased by him at the auction had been transferred by the judgment-debtor with intent to delay or defeat him, the transfer is voidable at his option. It is true that if such a creditor institutes a suit to avoid such a transfer, he must do so "on behalf of or for the benefit of all the creditors." The reason of the rule is that the debtor should not be harassed by a multiplicity of suits by each and every creditor. But this does not mean that the creditor, even when he is defendant, must defend the suit on behalf of the whole body of creditors. He may plead s. 53 T. P. Act, as a personal defence to the suit against him, and it is not necessary that he must file a representative suit to avoid the transfer. It was so held by a Full Bench of the Madras High Court in *Ramaswami Chettiar v. Mallappa Reddiar* (4) before the section was amended by the Amending Act of 1929. I do not think that the addition of para. 4 to s. 53, sub-s. (1), makes any difference, as it has no application to a creditor who has to defend a suit filed against him by a plaintiff claiming under a transfer voidable under s. 53. It is therefore open to the defendant to resist the plaintiff's claim on the ground that the assignment taken by him is voidable at his option.

If the plaintiff was a transferee in good faith and for consideration, the transfer is not voidable even though it has resulted in the delaying or defeating the other creditors of the transferor. At the date of the transfer the *darkhasts* of both the plaintiff and the defendant were pending against Fidaali. Nuralli had become an insolvent

(3) 39 B 507; 29 Ind. Cas. 497; A I R 1915 Bom 89; 17 Bom L R 522.

*Page of 39 B.—[Ed.]

(4) 43 M 760; 59 Ind. Cas. 947; A I R 1920 M 748; 39 M L J 350; (1920) M W N 572; 28 M L T 1; 12 L W 475 (F B).

It was, however, open to Fidaali to convey his property to either of his creditors in preference to the other, although it was effected to avoid the execution of his decree by the latter. As observed by Sir Lawrence Jenkins in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* (5) (p. 671):

"A debtor, for all that is contained in s. 53, T. P. Act, may pay his debts in any order he pleases, and prefer any creditor he chooses."

But in doing so he must not reserve any benefit for himself. The transfer of property to one creditor for a price far in excess of the debt due to him and the retention of the excess amount for his own benefit indicate an intent to defeat or delay the other creditors; especially when he has no other property left. The circumstances under which the plaintiff obtained the assignment from Fidaali are significant. The plaintiff filed his *darkhast* on April 27, 1929, and the defendant filed his *darkhast* on June 13, 1929. On August 12, 1929, the defendant made an application for the rateable distribution of the amount to be realized in the plaintiff's *darkhast*. That application was granted, and on September 10, 1929, the defendant's *darkhast* was kept pending, the realization of assets by the sale of Fidaali's mortgagee rights in the plaintiff's *darkhast*. The plaintiff must have come to know this: and he quietly got Fidaali's mortgagee rights assigned to him privately for Rs. 1,999, out of which Rs. 1,230 went towards the satisfaction of his decree and Rs. 769 were paid in cash to Fidaali. Had these tactics not been resorted to, Rs. 1,999 would have been rateably divided between the plaintiff and the defendant. By this fraudulent transfer, Fidaali got Rs. 769 for his own benefit, and the plaintiff got his decree fully satisfied. The plaintiff cannot therefore be regarded as a transferee in good faith. Had the only purpose of the plaintiff been to recover his debt and the property purchased by him was not worth substantially more than the amount of the debt, then the transaction could not be treated as fraudulent though he knew that the defendant's claim would thereby be defeated. But here the plaintiff knowingly paid Rs. 769 to the judgment-debtor in cash, which otherwise would have been available for the defendant's claim. This was not a case of a mere preference of one creditor to another, but a

mischievous device to benefit one creditor and the debtor at the expense of the other creditors. The assignment is, therefore, voidable at the option of the defendant, and he is not bound by it. The plaintiff's claim based on such an assignment must fail.

Lastly, it is urged that the assignment should be upheld at least to the extent of Rs. 1,230, the amount which was actually due to the plaintiff. Under para. 1 of s. 53, sub-s. (1), the transfer is voidable *in toto* if its intent is to defeat or delay, the transferor's creditors; but para. 2, which is the same as para. 3 of the section as it stood before the amendment in 1929, provides:

"Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration."

As the plaintiff is held not to have taken the assignment in good faith, he cannot get the benefit of this paragraph. He relies upon the ruling in *Rajani Kumar Dass v. Gaur Kishore Shaha* (6) but it does not mean to lay down that a transferee under a fraudulent document intended to defeat or delay creditors should have any lien for the amount actually due to him before the transfer. Scott, O. J., after considering the effect of that case in *Bhikabhai Muljibhai v. Panachand* (7) held (p. 713*):

"The inferences deducible from the established facts show that both the transferor and the transferee had the intention of defeating or delaying the creditors of the transferor, and under those circumstances it appears to us that the document must, at the option of his person, defeated or delayed be treated as void *in toto*, and not merely as void in so far as there is no consideration."

Paragraphs 1 and 2 of s. 53, sub-s. (1) are not capable of any other interpretation. When the transferee is a party to the fraud, there can be no equity in his favour. It being held that the plaintiff is not a transferee in good faith, the transfer is wholly void since the defendant, the defeated creditor, has challenged its validity, and the plaintiff is not entitled to any relief in this suit. In view of this finding, it is not necessary to consider whether the defendant has acquired a valid title to the property by his auction-purchase, or whether the auction-purchase is vitiated by the want of a valid and subsisting attachment of the property when the auction was held. It is argued that this is not strictly a suit in ejectment, but a suit under O. XXI, r. 103, Civil P. O., and if the

(6) 35 O 1051; 7 O L J 586; 12 O W N 761.

(7) 43 B 707; 52 Ind. Cas. 682; A I R 1919 Bom 99; 21 Bom L R 770.

* Page of 43 B.—[Ed.]

(5) 44 O 662; 40 Ind. Cas. 242; A I R 1916 P O 238; 44 I A 72; 1 P L W 423; 5 L W 711; 32 M L J 425; 21 O W N 585; 21 M L T 344; 15 A L J 382; 25 O E J 508; 19 Bom L R 421; (1917) M W N 43 (P O).

defendant's auction-purchase be not legal and valid, he had no right to dispossess the plaintiff. The reply to this is that the plaintiff, as the assignee of Fidaali's mortgagee rights, had no *locus standi* to obstruct the auction-purchaser, since the assignment is held to be void. The order of the executing Court removing his obstruction was, therefore, proper and cannot be set aside in this suit. The appeal is, therefore, dismissed with costs.

S.

*Appeal dismissed.***ALLAHABAD HIGH COURT**

Second Appeal No. 609 of 1937

April 19, 1939

BAJPAI, J.

BHUDEO PRASAD—PLAINTIFF—**APPELLANT***versus***SRI NATH AND OTHERS—DEFENDANTS—****RESPONDENTS**

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 62, 66—Order under r. 62, effect of—Third person attaching mortgaged property in execution of money decree—Application by mortgagee that his mortgage should be notified in sale proclamation—Court dismissing application holding that mortgage was discharged—Order, whether under r. 62—Part of mortgaged property put up for sale in execution of money decree, by third person—Mortgagee's objection dismissed under r. 62—Order relates only to part put up for sale.

If a mortgagee without possession chooses to prefer an objection under O. XXI, r. 58, on the strength of his alleged mortgage, and an adverse order is passed against him in the objection proceeding, such decision is conclusive against him unless he brings a declaratory suit within one year. 88 Ind. Cas. 332 (1), 102 Ind. Cas. 792 (2) and 120 Ind. Cas. 679 (3), relied on.

A decree-holder who had obtained a money decree against a mortgagor attached the mortgaged property in execution. The mortgagee applied to the executing Court stating that the attached property was mortgaged to him and praying that at the time of the auction sale notification of his mortgage should be made. Upon this application the mortgagor alone led evidence and the Court dismissed the application concluding that the mortgage had been discharged:

Held, that the order passed by the execution Court amounted merely to refusal to notify the mortgage in the proclamation for sale, and was not an order under O. XXI, r. 62, Civil P. C. and the mortgagee was not in any way debarred from contending in the subsequent case that the mortgage had not been paid up.

Where in execution of a money decree obtained against a mortgagor by a third person, a part of the mortgaged property is put up for sale and the mortgagee applies under O. XXI, r. 58, Civil P. C., but his objection is dismissed under r. 62 and the third person purchases the part of the mortgaged property, the order of the Court under r. 62 operates only in respect of that portion and the third person

cannot take advantage of this order in respect of other part of the mortgaged property purchased by him privately subsequent to the passing of such orders.

S. A. from the decision of the Civil Judge, Muttra, dated January 7, 1937.

Mr. S. B. L. Gaur, for the Appellant.

Mr. N. P. Asthana, for the Respondents.

Judgment.—This is an appeal by Bhudeo Prasad, plaintiff. The facts may be stated in some detail. The suit by the plaintiff was for the recovery of a sum of money on the basis of a mortgage executed by one Babu Lal. The defendants to the suit were the brothers of Babu Lal and one Sri Nath who was a subsequent transferee of 2/3rds of the mortgaged property. The main contesting defendant was Sri Nath and I am concerned with his defence only. His defence was that by reason of an order passed by an executing Court on January 28, 1931, the mortgagee was not entitled to proceed against 2/3rds of the mortgaged property in possession of Sri Nath. It appears that 1/3rd of the mortgaged property was put up to sale in execution of a simple money decree and the property was attached by the Amin on April 13, 1930. On April 23, 1930, Bhudeo Prasad filed a certain petition in connection with which an order was passed by the executing Court on January 28, 1931, and it is said that this was an order passed by the executing Court under O. XXI, r. 62, Civil P. C., and as no suit was filed under O. XXI, r. 63, Civil P. C., the order was conclusive. Some time afterwards, the exact date is not known, Sri Nath purchased another 1/3rd portion of the mortgaged property, and his contention is that the order of the executing Court dated January 28, 1931, affects not only 1/3rd portion of the mortgaged property purchased by him at auction but affects the subsequent 1/3rd portion of the mortgaged property purchased by Sri Nath by private treaty. The trial Court held in favour of Sri Nath's defence so far as 1/3rd portion of the property purchased at auction was concerned but repelled his defence so far as 1/3rd of the property purchased by private treaty was concerned. The lower Appellate Court has upheld the defence of Sri Nath both as regards 1/3rd portion purchased at public auction and 1/3rd portion purchased by private sale, and hence there is this appeal by the plaintiff Bhudeo Prasad before me, and it is contended that the Courts below are wrong and neither the 1/3rd purchased

at auction nor the 1/3rd purchased at private sale by Sri Nath can be saved from the operation of the mortgage. I have already hinted briefly in an earlier portion of my judgment all the circumstances under which the plaintiff filed an application on April 23, 1930, and the Court passed an order on January 28, 1931. When the 1/3rd portion of the mortgaged property was attached in execution of the simple money decree Bhudeo Prasad filed an application on April 23, 1930, which might be quoted *ex inteso*. The application is to the following effect :

"In the abovenamed suit the decree-holder has attached and put up for sale property mentioned below but that property is mortgaged with the petitioner by means of a mortgage without possession dated June 18, 1923, executed by Babu Lal for Rs 2,000 with interest at the rate of Rs. 1-8-0 per cent. per mensem. Therefore it is prayed that at the time of auction notification of the mortgage might be made."

The lower Appellate Court mentions the various steps that were taken by the executing Court in connection with the proclamation for sale. Separate notices were issued under O. XXI, r. 66, Civil P. C., to the judgment-debtor and to the decree-holder and separate notices were issued in connection with this application made by the mortgagee Bhudeo Prasad. Some evidence was taken presumably because it was pleaded by the judgment-debtor that the mortgage had been paid up. The evidence, as far as I can gather, was on behalf of the mortgagor alone and not on behalf of the mortgagee and the executing Court passed the following order on January 28, 1931 :

"The objector alleges that the property sought to be sold is subject to his mortgage. The house was purchased by Babu Lal, brother of judgment-debtor, for Rs. 1,400 on August 29, 1921. He borrowed Rs. 2,000 on the security of this house by mortgage deed dated June 18, 1923. He borrowed this money for the purpose of *thekah* business as it is clear from the mortgage deed itself. Babu Lal started *thekah* business. He took Shiam Lal as his partner. The partnership *rokar* book has entry of payment of Rs. 1,000 on August 29, 1923, and of Rs. 950 on January 9, 1929. The entries were made by the *mumin* at the instance of Babu Lal. The money being borrowed for *thekah* business, out of the *thekah* income, the debt was discharged. Babu Lal is dead. I see no reason to doubt the genuineness of the entries. Rupees 950 being paid within 7 months of the execution of the mortgage deed, the remaining Rs. 50 and interest must have (been) paid. The deed appears to be discharged and so I dismiss the application."

It is said that this was an order passed under O. XXI, r. 62, Civil P. C., and therefore Bhudeo Prasad, against whom the order was made, should have instituted a suit to establish the right which he claimed to the property in dispute, but as he did

not file any such suit within a year of the order, the order was conclusive and it is not open to Bhudeo Prasad to say that the mortgage had not been discharged. As is clear, the order of the executing Court dated January 28, 1931, winds up by saying: "The deed appears to be discharged and so I dismiss the application".—When this case was before me on a former occasion, on December 22, 1938, I remitted an issue to the Court below. The issue was, 'Has the mortgage in suit been paid up,' and the finding returned by the Court below is that the evidence on the record falls short of proving that the mortgage in suit has been paid up. No objections have been taken to this finding by either of the parties and the finding of the lower Appellate Court must be accepted for what it is worth. The position therefore is that there is a finding of a competent Court obtained on the regular side to the effect that the mortgage deed in suit has not been paid up, and there is the contradictory finding of an execution Court in a summary proceeding that the mortgage in suit has been discharged, and I have in this second appeal either to reconcile these two findings, if such a thing is possible, or to give effect to that finding which predominates as a matter of law. It is contended by the plaintiff appellant that the earlier finding of the learned Munsif sitting as an execution Court on January 28, 1931, is of no avail inasmuch as that finding was arrived at in connection with the drawing up of the sale proclamation, whereas on behalf of the defendant-respondent Sri Nath it is said that the finding was given under O. XXI, r. 62, Civil P. C. The real question for determination in a matter like this is whether the petition of April 23, 1930, by Bhudeo Prasad was a petition of objection or claim under O. XXI, r. 58, Civil P. C., or a petition for the purposes of notification under O. XXI, r. 66, Civil P. C., so that the Court might specify fairly and accurately the incumbrances to which the property sought to be sold was liable. Reliance was placed by the learned Counsel for the parties on several authorities to which reference has been made in the judgment of the lower Appellate Court. I have considered every one of these cases save the Oudh cases, and I think that except the cases in *Mohit Narain Jha v. Thakan Jha* (1), *Debi Das v. Rup Chand* (2)

(1) A I R 1925 Pat. 500; 88 Ind. Cas. 333; 4 Pat. 731; 8 P L T 843 (S B).

(2) 25 A L J 609; 102 Ind. Cas. 792; A I R 1927 All. 593; 49 A 903.

and *Nival Kishore v. Khiali Ram* (3), the others have not a material bearing.

There can be no doubt that under O. XXI, r. 66, Civil P. C., the Court has got to draw a fair and accurate proclamation of sale and has got to specify the various particulars required to be so specified under that rule and in that connection has got to issue notices to the decree-holder and to the judgment-debtor and has also, for the purposes of ascertaining the matters to be specified in the proclamation, the power to summon any person whom it thinks necessary to summon and to examine him in respect to the matters to be entered in the sale proclamation and can also require such a stranger to produce any document in his possession or power. The notices are not necessarily limited to the judgment-debtor and to the decree-holder. It is the duty of the Court to obtain from all available sources a list of the existing encumbrances, and the petition of April 23, 1930, might well be regarded as one of such sources. At the same time there can be no doubt, as was held in the Lahore case, that

"if a person chooses to take advantage of a summary procedure, he must suffer its disadvantage as well as enjoy its benefit, and therefore if a mortgagee without possession chooses to prefer an objection under O. XXI, r. 58, on the strength of his alleged mortgage, and an adverse order is passed against him in the objection proceeding, such decision is conclusive against him unless he brings a declaratory suit within one year,"

but as was held there, the real question is what is the nature of the petition filed by the mortgagee. In the Lahore case the mortgagee had said that the property was not liable to attachment and sale in execution of the decree in question unless the mortgage money due to the objector was preserved. A somewhat similar decision was obtained in *Debi Das v. Rup Chand* (2), but it is of some importance to note that the application by the mortgagee was not before the Court and their Lordships to a certain extent speculated about the nature of the application. I have not the slightest doubt that if a mortgagee files a petition of objection or claim, then an order adverse to the mortgagee given by the Court will be conclusive unless the mortgagee brings a suit within a year, but did the mortgagee in the present case file any claim or petition; did he ever say that he had an objection to the attachment and sale of the property and did he ever say that the property should be sold subject to the mortgage or

charge of the petitioner. To my mind all that he did was to give an information to the Court about an encumbrance and prayed that the same be notified. As far as I can see, he did not adduce any evidence and it was only the judgment-debtor who contended that the mortgage was paid up and in that connection, it was he who produced some evidence and the Court ultimately dismissed the petition of the mortgagee, that is to say, refused to notify the mortgage in the proclamation for sale.

I have therefore come to the conclusion that the order that was passed by the execution Court on January 28, 1931, was not an order under O. XXI, r. 62, Civil P. C., and the mortgagee is not in any way debarred from contending in the present case that the mortgage has not been paid up. That being so, there is the finding of the lower Appellate Court, a finding of fact which has not been objected to by the parties, that the mortgage has not been discharged. The plaintiff therefore is entitled to have his claim decreed. I might further add that if I had been against the mortgagee as to the interpretation of the application dated April 23, 1930, and the order dated January 28, 1931, I would have held that the order operated only in respect to 1/3rd portion of the mortgaged property. Order XXI, r. 63, Civil P. C., speaks of the claim to the property in dispute and says to that extent the order shall be conclusive. There is no question of *res judicata* in a matter like this and the lower Appellate Court, to my mind, is in error when it says that to that Sri Nath purchased the property at private sale after he had obtained an order to the effect that the mortgage had been discharged. That order related only to 1/3rd portion of the property and that order could not be taken advantage of by Sri Nath in connection with the purchase of the property at a private sale. As I said before, we do not know even the date of the private sale and it may well be that that private sale was held before the expiry of a year from after the order of January 28, 1931. I however do not base my decision on any consideration as to the time when the property was purchased, but on the general ground that the order, if it had been of any avail, could be taken advantage of only in connection with 1/3rd portion of the mortgaged property. For the reasons give above I allow this appeal, set aside the decrees of the Courts below and decree the plaintiff's suit against all the defendants and against the entire property with costs in all Courts

(3) A. I R 1929 Lah. 865; 130 Ind. Cas. 679; 11 L. 389; 31 P. L. R 752; 11 L. L. J 452; Ind. Rul. (1930) Lah. 135.

The decree will be drawn up under O. XXXIV, r. 4, Civil P. O., giving six months' time to the defendants to pay up the mortgage money. Leave to file an appeal by way of Letters Patent is allowed.

D.

Appeal allowed.

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 46 of 1938

February 9, 1939

MYA BU AND MOSELY, JJ.

K. K. N. K. A. R. CHETTYAR FIRM—

APPELLANT

versus

AGA M. SHEERAZEE—RESPONDENT

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. V, r. 20 (3)—"Prevented by any sufficient cause from appearing" in O. IX, r. 13, meaning of—"Effectual" in O. V, r. 20 (3), meaning of—"Limitation Act (IX of 1908), Sch. I, Art. 164—"Due service of summons" in Art. 164 and O. IX, r. 13, *Civil Procedure Code (Act V of 1908) meaning of.*

The words "prevented by any sufficient cause from appearing" in O. IX, r. 13, Civil P. O., clearly mean causes other than lack of knowledge of the proceedings. [p. 666, col. 1.]

The word "effectual" in O. V, r. 20, sub-r. (3) does not mean due service. The order for substituted service is made *ex parte*, and obviously it should be open to the defendant when he appears to show that the method employed was not calculated to effect the purpose which the Court had in view, namely informing the defendant of the institution of the suit. The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. The basis of the order on which the Court orders substituted service to issue is either that the defendant is either deliberately keeping out of the way to avoid process or that it cannot be served in the ordinary way, perhaps through no fault of his own. In the latter case, the defendant may always show that the proceedings could not have come to his knowledge. In the former case the order of the Court is only relevant to the question whether the defendant was in a position to have knowledge of the proceedings, for obviously if a defendant keeps out of the way to avoid service of process on him either on account of the suit in question or of other suits that have been or may be filed against him, he cannot afterwards be heard to argue that he had no knowledge of the proceedings as he has deliberately put himself in a position where he can have no such knowledge. 136 Ind. Cas. 609 (1) and 134 Ind. Cas. 1203 (2), relied on. [p. 666, col. 2.]

In Art. 164, Lim. Act, and O. IX, r. 13, Civil P. O., "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except of course in the case where the defendant had purposely put it out of his power to have such knowledge. [*ibid.*]

Mr. Kalyanwalla, for the Appellant.

Mr. Aiyangar, for the Respondent.

Mosely, J.—The appellant K. K. N. K. A. R. Chettyar Firm of Hlawga by its agent Kanappa Chettyar applied under O. IX, r. 13, Civil P. O., for setting aside an *ex parte* decree passed against it in Civil Regular Suit No. 29 of 1931 of the District Court of Insein. The learned District Judge dismissed the application holding that the applicants had been duly served once by a summons which was refused by their clerk and posted on their place of business, and secondly, by substituted service. In appeal it is now contended that these findings were wrong, and that the appellants were never properly served, and it is also argued that in any case they were unaware of the summonses and the proceedings in the suit. Their case in the trial Court was that the summonses and subsequent notices in the case were kept from their knowledge by fraud or, if not, by irregularities or carelessness in the service of them. The suit in question was one instituted by the present respondent Aga M. Sheerazee for an equitable mortgage decree. The property in that suit was very large and the property now in question is some 130 acres. There were nine defendants in that suit. The facts there were briefly that the lands in question originally belonged to one Ko Po Myo and his wife who mortgaged them in 1921 to the appellants, the K. K. N. K. A. R. Firm. In 1922 Po Mya sold the lands to O. A. P. O. T. Shanmugam Chettyar. In 1923 Shanmugam Chettyar mortgaged them by an equitable mortgage to Sheerazee. In 1924 the K. K. N. K. A. R. Firm obtained a mortgage decree against Po Mya and Shanmugam Chettyar and the Firm bought the lands in execution. Then in 1931 Sheerazee brought this mortgage suit against Shanmugam Chettyar and eight other defendants, one of whom was the appellant firm and another was the so-called K. K. N. K. A. P. Veerappa Chettyar. Veerappa Chettyar died in 1935 and the suit was continued against his son of the same name Veerappa alias Somasundaram Chettyar.

A decree was passed against all nine defendants, *ex parte* against Veerappa Chettyar and the appellant firm. There is evidence in the present case which has not been rebutted or even denied that there never was such a firm as the K. K. N. K. A. P. and Veerappa appears to have

been impleaded by mistake merely because he was a previous agent of the appellant K. K. N. K. A. R. Firm. The appellant firm was sued in that suit as subsequent transferees of the property. It is said now, and it is not denied, that they never were such subsequent transferees of the property but merely prior encumbrancers. On referring to the case I find that there was no issue on the point whether they were subsequent transferees. That perhaps is natural as the case was decided *ex parte* against them; but there was no evidence on the subject and no reference to it, much less any finding on the point in the judgment. All that there is in the case is a pleading in the plaint that they were subsequent transferees and the decree was one against them as well as the other defendants. No attempt was evidently made to execute it as against them. It is perhaps doubtful whether anything is *res judicata* against the present appellants. Even had they been proved to have been subsequent transferees, there would have been no merger of their interest in the property as prior mortgagees: s. 101, T. P. Act, as altered in 1929. But they have chosen to file the present suit if only by way of greater caution, and the matter must now be decided.

The appellants also filed another application under O. XXI, r. 90, to have the sale of certain land set aside on the ground that they had no notice of the terms of the proclamation and that the proclamation itself did not disclose the previous encumbrance, which was a registered mortgage, of which Sheerazee must have had constructive notice. But this application which was rejected by the trial Court in another part of its order which is also appealed against need not now be considered in view of the orders which I propose to pass on the application to set aside the *ex parte* decree in that suit. The defendant-respondent sought to prove certain notices issued to the appellants in execution to rebut the allegation that they did not know of the sale; but these notices, it is now argued, are relevant here to show the appellants' knowledge of the proceedings. The trial Court in the shorter portion of its judgment which relates to the question of setting aside the *ex parte* decree merely found that two summonses were served: one, as has been said, refused by a clerk and posted and the other by substituted service. The first of these two summonses was not accepted as duly served

by the learned Judge who was trying the suit in question. The present Judge merely remarked that the summons fulfilled all the details required by O. V, para 17. He did not say that he believed the oral evidence given to prove proper service. This was a summons of May 23, 1933, the endorsement on which was signed by the process-server Mya Myun on May 25. It reads as follows:

"I not knowing the defendant personally was accompanied by Maung Htiike (plaintiffs clerk) to Hlawga village. He pointed out (the house). Karuppan Chetty was not found. His agent Koorandan Chetty also was not found. The summons was tendered but the said clerk did not take it. So the summons was posted on the house."

It should be explained here that throughout the original suit the appellant firm was sued by its agent Karuppan Chettyar. It is in the evidence for the defendants and it has not been denied that Karuppan was the agent from 1926 to 1929. After that the principal took charge. Then in 1931 Kanappa became the agent. The summonses, however, in the suit and the subsequent notices after the decree were issued throughout to the appellant firm by its agent Koorandan Chettyar. It is said by the appellants, and not denied, that there never was such an agent of the firm as Koorandan Chettyar. So in the original suit in question we have one non-existent firm of K. K. N. K. A. P. sued and another the K. K. N. K. A. R. firm sued by its agent who had left long ago and then summonses issued throughout on a non-existent Koorandan Chettyar. These circumstances, which have been ignored by the trial Court are, in my opinion, extremely important to decide the question whether the appellant firm was ever properly served or ever had any knowledge of the proceedings. It may be added also that a decree was passed against the appellant firm as subsequent transferees of the property when there is no doubt that they were merely prior encumbrancers who had bought in the property prior to the suit. So we have a decree against the summonses issued to non-existent persons on pleas unfounded on any facts. Maung Mya Nyun (D. W. No. 2) was examined in May 1938 and could only speak to what happened from his report of 1933, five years before. There is a curious air of unreality in the proceedings, for the house or place of business of the Chettyar or its locality and surroundings are never described by either side. I do not know how many Chettyars there are in Hlawga, but the evidence discloses

that Veerappa's place of business is next door but one to the K. K. N. K. A. R. firm. So there were at least two Chettys in Hlawga. There is no indication who the clerk in question was in the endorsement. He may not have been the appellants' clerk at all, and it is significant that the report says that Koorandan was not found. It would be thought that any enquiry would have revealed that there was no such person. Maung Htike (D. W. No. 1) in his evidence does not add anything to Mya Nyun's evidence on the point. I have no doubt that the previous Judge was justified in saying that the summons was not properly served.

The Judge also discussed the summons by way of substituted service and held that service was effected on the appellants. Application for issue of substituted service was made on an affidavit filed by Maung Htike, p. 101 of suit No. 29. (I note that the references to this and some other summonses in the judgment of the lower Court were wrong). This affidavit does not say the K. K. N. K. A. R. firm were avoiding service of summons, but merely that three summonses had been issued on the appellant firm and on the K. K. N. K. A. P. firm that the clerks had refused the summonses which were posted and that summonses could not be served in the ordinary way. So substituted service was allowed to be issued not merely on the K. K. N. K. A. R. firm but also on the K. K. N. K. A. P. non-existent firm. The summons to the K. K. N. K. A. P. Veerappa Chettyar, p. 79 of Part 1 of the process file to which Mya Nyun refers in his evidence bears an endorsement of May 2, to the effect that "Karuppan" Chettyar was not found. The summons to Veerappa Chettyar which was reported to have been refused by his clerk is the one referred to by Mya Nyun on p. 90 of the process file, part 1. As to the summons by substituted service, this is to be found on p. 102 (h) in the main proceeding of suit No. 29. The process-server here was Maung Pyant (D. W. No. 4). The report says:

On June 28, 1933 at about 3 p. m. I went to Hlawga. I do not know personally. The plaintiff did not accompany (me) to point out. I made enquiry and looked for and posted the summons by way of substituted service on the house where Koorandan Chettyar had lived before."

There was a pencil endorsement in the corner of the headman's name. This merely appears to mean that the headman vouched for the process-server having

come to the village. It will be noticed that the house on which the summons was posted was one where the non-existent Chettyar Koorandan had lived before. Maung Pyant says in his evidence that he went to the headman's house and the headman's "people," (not the headman himself as is said in the judgment of the lower Court) told him to go and enquire at the place itself. The Judge thought this meant that he must have been informed where he was. I think the contrary,—that he could not get any information. All these summonses were issued in the name or initials of the K. K. N. K. A. R. firm, but it is admitted at the Bar that Burmans commonly know of Chettys by the agent's name only. This process-server professed first to remember from five years before that he did not see some servants on the premises, then he denied it and then he repeated it. He said that he asked where the agent had gone to and was told that he had gone to India. This looks as if he did not ask in the house itself and received some vague information about the former agent Karuppan having gone to India. The process-server did not make any effort to go back to see if he could serve the summons again. He says he was told that the clerk had gone to the jungle. The headman is not a witness.

The present application to set aside the *ex parte* decree was made on January 21, 1938, and the appellant says that he had notice of the proceedings against him only on January 8, 1938, when he found that his tenants were being asked by the respondent Sheerazee to pay the rent to him. Under Art. 164, Lim. Act, the limitation for an application by the defendant for an order to set aside a decree passed *ex parte* is 30 days from the date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree. The meaning of this Article was discussed in *Ram Bharose v. Ganga Singh* (1) by a Full Bench and in *Gyanammal v. Abdul Hussein Sahib* (2) by a Bench of Judges. The question before those Courts was whether summons by substituted service effected in proper form was necessarily due service for the purpose of Art. 164, Lim. Act. Order V,

(1) 54 A 154; 136 Ind. Cas. 609; A I R 1931 All 727; (1931) A L J 1049; Ind. Rul. (1932) All. 225 (F B).

(2) 55 M 223; 134 Ind. Cas. 1:02; A I R 1931 Mad. 813; 61 M L J 920; 34 L W 496; (1931) M W N 1069; Ind. Rul. (1932) Mad. 18.

r. 20, sub-rr. (1) and (2), read as follows:

"(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally."

Order IX, r. 13 says:

In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree....."

The words "prevented by any sufficient cause from appearing" here clearly mean causes other than lack of knowledge of the proceedings, so that this rule is in the same terms as Art. 164. I would respectfully agree with the conclusions arrived at in those two rulings. The object of issuing a summons is to inform the party against whom a suit is being instituted of the fact that there is a suit against him and if he so chooses he may contest. The order for substituted service is made *ex parte*, and obviously it should be open to the defendant when he appears to show that the method employed was not calculated to effect the purpose which the Court had in view, namely informing the defendant of the institution of the suit. The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. Where the summons has issued against the defendant personally and it has been reported that personal service has been effected, the defendant may always come forward to show that that has not been the case. Summons by way of substituted service is obviously the least satisfactory of all methods of service only to be used by the Court as a last resort when other means are unavailable, and the defendant should be given an opportunity of contesting that the summons has been served in a way which did not in effect bring the proceedings to his notice. The basis of the order on which the Court ordered substituted service to issue is either that the defendant is either

deliberately keeping out of the way to avoid process or that it cannot be served in the ordinary way, perhaps through no fault of his own. In the latter case, the defendant may always show that the proceedings could not have come to his knowledge. In the former case the order of the Court is only relevant to the question whether the defendant was in a position to have knowledge of the proceedings, for obviously if a defendant keeps out of the way to avoid service of process on him either on account of the suit in question or of other suits that have been or may be filed against him, he cannot afterwards be heard to argue that he had no knowledge of the proceedings as he has deliberately put himself in a position where he can have no such knowledge. In *Gyanammal v. Abdul Hussein Sahib* (2) at p. 231* Reilly, J. draws attention to the judgment of Srinivasa Ayyangar, J. in *Vitta Venkatachalam v. Sivapuram Subbiah* (3). In the words of Reilly, J.:

"There Srinivasa Ayyangar, J. suggested with great force, I think, that the provision that, when the summons is not duly served, the period runs from the date when the applicant had knowledge of the decree implies that due service within the meaning of that Article is service which brings the claim to the knowledge of the defendant."

What Srinivasa Ayyangar, J. said was this:

"I do not for my part believe that the Legislature really intended in enacting col. 3 of Art. 164 to confine the scope of the section only to cases where the actual service directed by the Court is shown not to have been effected at all in that manner. We may also have regard to what is obviously the object of the Legislature in providing that in cases where the summons is not duly served, the time begins to run from the date on which the applicant has knowledge of the decree. The implication seems to be clear that in cases where [the summons is duly served, the presumption may well be that he has knowledge of the decree, or at any rate if he does not get knowledge of the decree, it was ascribable only to some fault on his part or on the part of those near about him who ought to have known better."

I would respectfully agree that the word "effectual" in O. V, r. 20, sub-r. (2) does not mean due service, and that it has the meaning given to it by the learned Judges in these rulings. I would also agree that in Art 164, Lim. Act, and O. IX, r. 13, "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree

(3) 54 M L J 448; 108 Ind. Cas. 883; A I R 1928 Mad. 653.

against him; except of course in the case where the defendant had purposely put it out of his power to have such knowledge. On the evidence in this case, however, I do not think it could possibly be held that either of these summonses were served in due form, that is to say, that one was refused by the appellant firm's clerk and then posted, or that the other was posted on the appellant firm's house.

It remains to consider whether it can be satisfactorily inferred from the other summonses and notices proved in this application that the defendant had knowledge of the decree, and that therefore the present application is time-barred. Mr. Aiyangar for the respondent has invited the Court to refer also to still other summonses and notices filed in the proceedings. Not only are there no translations of these on the record but the originals even have not been put in evidence and I consider that for the purposes of this case that they could not be put in evidence by the oral testimony of the process-servers who made the reports and affidavits who could be subjected to cross-examination by the other side. A notice to contest an application for a final decree (p. 5 of the Process File, Part II) was issued to K. K. N. K. A. R. Chettyar on April 11, 1935. The report on this was made by Maung Pein (D. W. No. 3) and reads as follows: "On April 27, 1935, at 11 a. m. the within named Chetty's agent Mutu signed and took (the notice)." This bears at the bottom the English initials "K. K. N. K. A. R." followed by the Tamil equivalents of these initials. That is not an ordinary method of signature. The plaintiff had testified that his firm never had an agent or clerk called Mutu and this evidence is un rebutted. The notice so far from proving the respondent's case goes to throw extreme doubt on whether this notice was ever served at all.

The next notice is p. 116 of the Process File, Part II. It is also proved by Maung Pein. This is a notice to both K. K. N. K. A. P. Veerappa Chettyar and K. K. N. K. A. R. Karuppan Chettyar by his agent Koorandan *re* amendment of the preliminary decree. The endorsement does not state that any effort was made to tender service or that service was refused, but merely that copies were posted on the house of the defendants—and of course it must be admitted that the K. K. N. K. A. P. firm had no house and did not exist. The next notice is p. 151 of Part II of

the Process File. This is a notice *re* sale of the mortgaged properties to the appellant firm, dated December 3, 1936. The endorsement of December 12, says:

"On December 6, 1936, at about 7 o'clock I without knowing the defendant personally and without being accompanied by the plaintiff to point out, went to tender (the notice)—the headman pointing out (the place). The within named Chetty was not found. His clerk was found, I tendered the notice. He refused to sign. So the notice was posted....."

This again is a summons to the appellants by their agent Koorandan and the headman has merely signed in the corner and has not given any evidence. The process-server Maung Sein said in cross-examination that there was no one at the address before he recollected himself and added that there was a clerk. Then he said that this clerk said that the Chettyar and his agent had gone to India; but there was nothing about that in the report. I do not think it can be held on this that the process-servers went to the right place or effected service. Then there is another notice in duplicate to K. K. N. K. A. P. and K. K. N. K. A. R. Chettyars, p. 179, Part II of the Process File, dated March 13, 1937, notice against sale of the mortgaged properties. The endorsement says:

"I not knowing the defendants personally was accompanied by the plaintiff's clerk Po Htika who pointed out the defendant. Veerappa died about a year ago. The notice was posted on the house where he had lived before. The remaining defendant Karuppan Chetty's clerk was found. The notice was tendered, refused and posted."

The attesting witness to this Po Kyaw, has not been called. Thus, Maung Pein says about Veerappa's successors, and Karuppan of course had gone to India long before while this notice was again issued to the agent Koorandan. For the applicant Kanappa Chettyar, two of his clerks, Elan Kannu (P. W. No. 2) and Katappan (P. W. No. 3) said that no notices or summonses had been received by them. Kanappa said that since 1931 he stayed sometimes at Hlawga and sometimes at Rangoon but afterwards left a clerk authorized to receive summonses. The clerks on the other hand said that the agent Kanappa never spent the night out of Hlawga. In the original suit it would seem that another address of the appellant firm was given as Mogul Street, but it is proved in this application that they had no such address or place of business. I do not think it was proved that any of these notices or summonses was tendered to or refused by the appellant

firm or posted on their house or place of business. There is something suspicious about the serving of the summonses or notices. What is perhaps the most important feature in the case is this, that the appellant firm had no possible reason whatever to avoid service of summonses on them. They had a perfectly good answer to the suit and had merely to say that they were not subsequent transferees but prior mortgagees who had bought the property in execution of their mortgage decree. They had only to produce their mortgage or the record of the previous proceedings. I am bound to comment on one unsatisfactory feature in the present appeal and that is the failure to translate one or two of the documents relied on in the application and put them on the Bench copy and also what is more important, the failure to put any copies of the defence evidence at all on the Bench copy which has caused the Court considerable inconvenience. I consider that the appellant should be deprived of part of his costs for this. For the reasons that I have given, the decree of the trial Court will be reversed with costs throughout, the appellants to obtain two-thirds of what would otherwise have been awarded them as their Advocate's fee in this Court (for their failure to translate two documents and failure to put any copies of the defence evidence on the Bench copy; which caused the Court considerable inconvenience), Advocate's fee six gold mohurs, and it will be directed that the *ex parte* decree against the appellants in Civil Regular Suit No. 29 of 1931 of the District Court of Insein be set aside.

Mya Bu, J.—I agree.

D. Decree reversed.

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 41 of 1938

July 27, 1939

THOM, C. J. AND GANGA NATH, J.

MAN SINGH AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

BAIJ NATH SAHAI—PLAINTIFF—

RESPONDENT

Agra Tenancy Act (III of 1926), s. 227—Collecting co-sharer can only deduct amount proportionate to his share in khewat—Collecting co-sharer not acting as agent of other co-sharer—Right conferred by s. 227, if affected—His liability to account, whether depends on it—Co-sharer making collections on behalf of himself and also as guardian of other

minor co-sharer—Whether entitled to deduct on account of his share as well as that of his ward.

The collecting co-sharer is entitled to retain out of what he has collected from a tenant only a share proportionate to his share in the *khewat*. He is only entitled to appropriate from his realizations an amount proportionate to his share in the *khewat*. 138 Ind Cas 415 (1), relied on.

The right conferred by s. 227, Agra Tenancy Act, is not affected by the fact that the co-sharer who has collected has not acted as the agent of the co-sharer who is seeking to recover his share of the profits. The co-sharer who has collected is liable to account and the extent of his liability is not dependent upon whether he acted in his individual capacity or as agent in making collections.

Where a co-sharer has made collections on his own behalf and also on behalf of a minor co-sharer, as his guardian, the collections can be credited both towards his own account and also that of his ward and he is entitled to deduct not only the amount payable to him on account of his share but also on account of the share of his ward.

L. P. A. from the decision of Mr. Justice Iqbal Ahmad, reported in 177 Ind. Cas. 454.

Mr. Nanak Chand, for the Appellant.

Mr. Jognandan Lal, for the Respondent.

Thom, C. J.—This is a defendants' appeal against the decision of a learned Single Judge of this Court. The appeal arises out of a suit under s. 227, Agra Ten. Act of 1926. The plaintiff's claim is in respect of his share of profits for the years 1337 to 1339 *Fasli*. The sum claimed is Rs. 570. The suit was contested by two defendants, namely, the present appellants who filed a joint written statement. It was denied in the written statement that they had made any collections of rents from tenants for the years in question and it was averred that the plaintiff himself had realized his share of rents from the tenants. The main question for consideration in this appeal is as to the extent of the liability of Man Singh who made certain collections during the years in question. It was contended for Man Singh that he was entitled to deduct from the collections which he had made his total share of the profits in the whole *jamabandi*. On the other hand, it was maintained for the plaintiff that Man Singh was only entitled to deduct a proportionate amount from his collections corresponding to his share in the rent due by each tenant. The question which is one of law was considered in *Kanhaiya Lal v. R. H. Skinner* (1). In that case Pullan and Mukerji, JJ. held that a collecting co-sharer was entitled to deduct the full

(1) (1932) A L J 129; 138 Ind. Cas. 445; A I R 1932 All. 98; 54 A 240; L R 13 A 65 Rev.; 16 R D 132; Ind. Rul. (1932) All. 408.

amount of the rent due to him from his collections and not merely a proportionate share corresponding to his share in the *khevat*. This view was based upon the principle that a collecting co-sharer does not act as the agent of the other co-sharers. Niamatullah, J. held on the other hand that a collecting co-sharer was only entitled to deduct from his realizations a proportionate share corresponding to his share in the *khevat*. Under s. 227, Agra Ten. Act :

"A co-sharer may sue another co-sharer for a settlement of accounts and for his share of the profits of a *mahal* or any part thereof."

The right conferred by this section is not affected by the fact that the co-sharer who has collected has not acted as the agent of the co-sharer who is seeking to recover his share of the profits. The co-sharer who has collected is liable to account and the question is, what is the extent of his liability? The extent of his liability is not dependent upon whether he acted in his individual capacity or as agent in making collections. In our judgment the collecting co-sharer is entitled to retain out of what he has collected from a tenant only a share proportionate to his share in the *khevat*; to hold otherwise would be to permit a practice which would, in most cases, result in chaos and confusion. As Niamatullah, J. has observed in his judgment in *Kanhaiya Lal v. R. H. Skinner* (1), at p. 135* :

"To hold otherwise would be to open a door for endless scramble. An influential and resourceful co-sharer may, in disregard of the power of the *lambardar*, steal a march over him and other co-sharers by collecting from the best tenants to the extent of his share of the gross rental and leaving irrecoverable rents for the rest. This state of things, if permitted by law, would be intolerable and will lead to gross abuse in certain cases."

We find ourselves in agreement with Niamatullah, J. in his exposition of the law in the case above referred to and we hold that a collecting co-sharer is not entitled to deduct his entire share in the whole *jama-bandi* from collections which he has made from some of the tenants in the *khevat*. He is only entitled to appropriate from his realizations an amount proportionate to his share in the *khevat*. On this point therefore we uphold the decision of the learned Single Judge. There is a further point in issue. It was contended by the defendants that the collections which were made were made by Man Singh on behalf of himself and by him on behalf of Darya Singh, a minor. It was claimed that Darya Singh's share was collected by Man Singh as his guardian. As

the learned Single Judge has remarked in the course of his order :

"The question whether Man Singh was entitled to deduct from the collections made by him, only the amount payable to him by the tenants on account of his share of the rent or also on account of the share of Darya Singh does not appear to have been debated or discussed in the trial Court. . . . If it be a fact that in the year 1337 *Fasli* Man Singh was the guardian of Darya Singh, no exception can be taken to the decision of the learned District Judge directing that the collections made by Man Singh be credited both towards the accounts of Man Singh and Darya Singh. But no finding has been recorded by the learned District Judge on the question whether or not Man Singh was the guardian of Darya Singh in the year 1337 *Fasli*. This matter will have to be inquired into and decided by the lower Appellate Court."

In the result the learned Single Judge remanded the case for the decision of the questions as to whether Man Singh was the guardian of Darya Singh in the years in suit; and further, whether Man Singh made collections in the year in suit only on his own behalf or also on behalf of Darya Singh. In the circumstances we consider this was an appropriate order to pass and we see no reason whatever to interfere with that order. In the result, the appeal is dismissed with costs.

S.

Appeal dismissed.

BOMBAY HIGH COURT

Civil Revision Application No. 353 of 1938

March 20, 1939

LOKUR, J.

KESHAV RAMKRISHNA BHATT

PHADKE—PLAINTIFF—APPLICANT

versus

SUBBA MANGA NAIK AND OTHERS—

DEFENDANTS—OPONENTS

Civil Procedure Code (Act V of 1908), s. 151—Compromise decree proper on face of record—If can be set aside on application under s. 151—Legal practitioner—Vakalatnama—Vakalatnama not giving specific authority to negotiate and settle terms of compromise but merely to sign compromise application to be presented to Court—Consent of party to its presentation not obtained—Compromise decree is unauthorized.

If a decree is sought to be set aside on the ground of fraud, misrepresentation or mistake, then several complicated questions would arise and they have to be decided in a separate suit. If on the face of the record the compromise decree is proper, then the Court which passed the decree cannot set it aside in an application under s. 151, Civil P. C. [p 67], col. 1.]

Where a *vakalatnama* given to a Pleader does not give any specific authority to negotiate with the defendants and settle the terms of the compromise, but merely to sign the compromise application to be presented in Court and if the consent of the party to such an application being presented to the

Court had not been obtained the compromise resulting in the decree is unauthorized. [*ibid.*]

O. R. App. from the order passed by the First Class Sub-Judge, Karwar, in Miscellaneous Application No. 82 of 1935.

Mr. S. V. Palekar, for the Applicant.

Mr. S. R. Parulekar, for Opponent No. 3.

Order.—This is an application in revision against the order passed by the First Class Subordinate Judge of Karwar refusing to set aside the consent decree in Suit No. 221 of 1932, on the ground that the compromise application had been presented by the petitioner's Pleader without any authority from him and without consulting him. The petitioner was the plaintiff in the suit. He sued for possession of certain property which had been purchased by him for Rs. 51. In the course of the suit a compromise application, Ex. 38, was put in, whereby it was agreed that the plaintiff should give up his claim on being paid Rs. 31 within three months. The application was signed by his Pleader Mr. Nadkarni, and just above his signature he made a note "duly authorized by plaintiff." A decree was then ordered to be drawn up in terms of the compromise on October 5, 1935. The plaintiff presented this application on November 21, 1936, stating that he had not authorized his Pleader, Mr. Nadkarni, to enter into a compromise with the defendants, or to present the compromise application, and requesting that the consent decree should be set aside and the suit should be re-heard.

The lower Court found from the *vakalatnama* given by the plaintiff to Mr. Nadkarni that the latter had been authorised "to sign a compromise petition." The lower Court interpreted this clause to mean that Mr. Nadkarni was authorized to effect a compromise, and present a compromise application in the suit, and, therefore, following the ruling in *Yusuf Ismailbhai Abdullabhai Lalji v. Abdullabhai Lalji* (1) the lower Court held that if any fraud had been practised by the Pleader on the plaintiff, the latter's remedy was by way of suit and not an application to have the consent decree set aside. The plaintiff contended in the application that the clause authorizing Mr. Nadkarni to sign a compromise application was not specifically brought to his notice, and that it was one of the many

clauses in the *vakalatnama* which he signed without knowing what those clauses were. The lower Court, however, thought that these matters should be agitated in a suit, as the plaintiff virtually alleged fraud practised by his Pleader on him, and not any fraud practised on the Court.

The plaintiff relied on the ruling in *Basangowda v. Churchigirigowda* (2) which lays down that when a compromise application is filed by a Pleader, who is not specifically authorized to effect a compromise, and a decree is passed in terms of the compromise, the party who has not authorized it can apply to the Court to have the decree set aside and the suit re-heard. In that case the *vakalatnama* did not show that the Pleader had been authorized either to enter into a compromise or to present a compromise application in Court, and it was held that it was the inherent power of every Court to correct its own proceedings where it had been misled, and, as the compromise was not binding on the party who had not authorized the Pleader to sign it, the decree was void against him. It is therefore urged that the proper remedy in a case like this is an application to the Court to correct its own record in the exercise of its inherent powers under s. 151, Civil P. O. The lower Court, however, thought that the terms in the *vakalatnama* empowering the Pleader to put in a compromise application were sufficient to enable the Court to assume that the Pleader had been authorized also to negotiate and settle the terms of the compromise. Thus there was not fraud on the Court, but the fraud, if any, was committed by the Pleader on his client. This matter could not be gone into in an application under s. 151, Civil P. O., but must be fought out by a separate suit. That was the view expressed in *Yusuf Ismailbhai Abdullabhai Lalji v. Abdullabhai Lalji* (1), B. J. Wadia, J. observed (p. 233*):

"It is well settled that a consent decree is a mere creature of the agreement on which it is founded and may be set aside on any ground which will invalidate an agreement between the parties, such as misrepresentation, fraud or mistake. But unless all the parties agree, an application cannot be made to the Court of first instance in the original suit to set aside the consent decree; it must be done by a fresh suit brought for the purpose."

It was brought to my notice that this case was on the original side of the High Court, but I do not think that that makes any difference. If a decree is sought to be

(2) 34 B 408; 5 Ind. Cas. 968; 12 Bom. L R 223.

(1) 56 B 231; 139 Ind. Cas. 845; A I R 1932 Bom, 61; 34 Bom. L R 880; Ind. Rul. (1932) Bom; 559.

*Page of 56 B.—[*Ed.*]

set aside on the ground of fraud, misrepresentation or mistake, then several complicated questions would arise and they have to be decided in a separate suit. If on the face of the record the compromise decree is proper, then the Court which passed the decree cannot set it aside in an application under s. 151, Civil P. O. In this case the lower Court has not recorded a finding that Mr. Nadkarni was authorized by the plaintiff to enter into a compromise. The *vakalatnama* given to him does not give any specific authority to negotiate with the defendants and settle the terms of the compromise, but merely to sign the compromise application to be presented in Court. As observed in *Thenal Ammal v. Sakammal* (3) at p. 235, "it is not the ordinary duty of an Advocate to negotiate terms, without reference to his client, with the opposite party," and in that case it was held that a *vakalatnama* containing a provision authorizing the Vakil "to present, if necessary, petitions for *razinama*, for withdrawal and for referring to arbitration, and to sign the *razinama*, etc, petitions," does not give authority to the Vakil to enter into a compromise without reference to his client. Mr. Nadkarni signed the compromise application, Ex. 38, in his capacity as plaintiff's Pleader, and expressly wrote out above his signature, that he had been duly authorized by the plaintiff. It is not clear whether he was authorized merely to sign the compromise application or authorized to negotiate the terms of the compromise. It is not clear also whether this particular application, Ex. 38, had ever been shown to the plaintiff, and his consent to its being presented in Court had been obtained. If no such consent was obtained, and if Mr. Nadkarni had not been specifically authorized by the plaintiff to negotiate the terms of the compromise with the defendants, then it follows on the principle laid down in *Basangowda v. Churchigirigowda* (2) that the compromise which resulted in the decree was unauthorized. But these questions have not been gone into, and no finding has been recorded, for the simple reason that the *vakalatnama* itself showed that Mr. Nadkarni had been authorized to sign the compromise application. The mere authority to sign the compromise application is not sufficient unless the compromise was arrived at by the plaintiff himself. It is, therefore, necessary to have these points decided

(3) 41 M 233 at p. 235; 41 Ind. Cas. 429; A I R 1918 Mad. 656; 22 M L T 149.

before the plaintiff's application can be disposed of. The trial Court summarily dismissed the application merely on a reference to the contents of the *vakalatnama*, without ascertaining whether the compromise itself was duly authorized by the plaintiff.

The case must, therefore, be remanded for a fresh disposal after considering the issues whether the compromise contained in Ex. 38 was effected by the plaintiff, and, if not, whether he had authorized his Pleader Mr. Nadkarni to effect the compromise without reference to him. If these issues be found in favour of the defendants, the application will necessarily have to be thrown out, and if in that case the plaintiff wants to have the decree set aside on the ground of fraud or misrepresentation, he should be referred to a separate suit. On this ground the Rule is made absolute. The costs of this application will be costs in the cause.

S.

Case remanded.

PATNA HIGH COURT

Appeal from Appellate Decree No. 718 of 1936

September 13, 1939

HARRIS, O. J. AND FAZL ALI, J.
Sheikh MOHAMMAD MURTAZA
AND OTHERS—APPELLANTS

versus

CYRIL INDERNATH DEY AND OTHERS—
RESPONDENTS

Chota Nagpur Tenancy Act (VI of 1908), ss. 211 208, 11—*Transferee of tenant not getting himself recorded in landlord's Sherista—Suit for rent by landlord without impleading transferee—Tenure sold in execution of rent decree—Sale, whether under s. 208—If affects share of transferee in tenure.*

There is nothing in s. 211, Chota Nagpur Tenancy Act to suggest that the non-registration will also defeat the claimant in the suit which he is authorised to bring under s. 211, cl. (2) (which corresponds to O. XXI, r. 63, Civil P. O.). There is also nothing in the section to show that the transferee's failure to get himself recorded in the landlord's Sherista shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants. [p. 675, col. 1.]

A sale therefore held in execution of a rent decree obtained by superior landlord in a suit to which all the tenure-holders were not made parties is not a sale under s. 208 and does not affect the share in the tenure, of persons not parties to such suit even if they have not got themselves recorded in landlord's Sherista. 142 Ind. Cas. 781 (2), relied on, 118 Ind. Cas. 864 (5), 179 Ind. Cas. 834 (6) and S. A. No. 760 of 1937, referred to.

A. from a decision of the Judicial Com-

missioner of Chota Nagpur, Ranchi, dated June 11, 1936.

Messrs. B. C. De, M. Azizullah and L. K. Chaudhari, for the Appellants

Messrs. G. C. Mukherjee, K. P. Upadhaya, Thakur A. D. Sinha and Govt. Pleader, for the Respondents.

Fazl Ali, J.—The facts so far as they are material to this appeal may be briefly stated as follows :—

It appears that in the District of Palamanu there is a tenure which was formerly held by defendants Nos. 9 to 11 and the father of defendant No. 8 under defendant No. 7, the superior landlord. In this tenure defendants Nos. 1 to 6 acquired 12 annas interest before 1927 and 1 anna interest after 1927 and the plaintiffs acquired the remaining 3 annas interest after 1928. In 1927 defendant No. 7 brought a suit for recovery of rent against defendant Nos. 9 to 11 and the father of defendant No. 8; and, in execution of the decree passed in that suit, the tenure was sold and purchased by a *benamidar* of the plaintiffs in 1928. Defendants Nos. 1 to 6 thereupon deposited the decretal amount and the sale was set aside. In 1930 defendant No. 7 brought another suit against defendants Nos. 9 to 11 and father of defendant No. 8 for the rent of the years 1924 to 1927 *Sambat*. The suit was decreed and in execution of the decree the tenure was sold again and this time it was purchased by defendant No. 1. The plaintiffs then brought the present suit to recover possession of their share, their case being that the decree obtained by defendant No. 7 was not a rent decree inasmuch as the suit had been brought without impleading the plaintiffs, defendants Nos. 1 to 6 and certain other persons who were necessary parties to the suit and accordingly the sale held in execution of the decree did not affect their share. The Courts below did not accept the plaintiffs' contention and dismissed the suit. They held amongst other things that inasmuch as neither the plaintiffs nor the defendants Nos. 1 to 6 were recorded as tenants in the landlord's *Sherista*, the latter was entitled to sue the persons who were so recorded and that these persons must be deemed in the eye of law to have represented the plaintiffs and other tenants in the suit. The plaintiffs have accordingly preferred this second appeal.

Before dealing with the points raised on

behalf of the plaintiffs, I wish to dispose of a preliminary objection raised on behalf of the respondents. The objection is that the appeal has abated, because the plaintiffs failed to substitute within the time prescribed by law the heirs of defendant No. 7 who had died sometime after the appeal was filed but before it was heard. On a reference to the record it appears that the appeal was filed on September 21, 1936, and defendant No. 7 died on December 19, 1937, after notice of the appeal had been served on him. The Court was informed of the death of this defendant on October 31, 1938, and on November 16, 1938, the appellants filed an application in which after stating that they had come to know about his death for the first time on October 31, 1938, they prayed that the delay in making the application might be excused and his heirs be substituted in his place. On December 15, 1938, the appeal was put up for hearing before Agarwala, J. who after hearing the parties passed the following order :—

"Let the record be amended by substituting for the name of Kuar Jagatmohan Nath Sahi Deo, the names given in para. 8 of the petition for substitution."

Mr. De states that this will serve his purpose but the legal effect of this amendment will be considered at the time of the hearing."

On February 13, 1938, Agarwala, J. referred this case to a Division Bench.

It appears that at the time when defendant No. 7 died, his estate was being managed under the Chota Nagpur Encumbered Estates Act (VI of 1876) and he was represented in the appeal by a manager appointed under the Act. In *Hukum Chand v. Ban Bahadur Singh* (1), the Privy Council dealing with the status of a manager appointed under the Act has pointed out that he

"is in the eye of the law fully and completely vested in the management of the estate, and the vesting in him continues during the tenure of his office."

The position in law therefore was that after the death of defendant No. 7, the management of the estate continued to vest in the manager who was already on the record and he was the only person who could under s. 21-B of the Chota Nagpur Encumbered Estates Act represent the heir or heirs of defendant No. 7—(the new holders in the appeal. Such being the case, it is argued on behalf of the appellant that no question of abatement

(1) 3 Pat. 625; 80 Ind. Cas. 841; A I R 1924 P C 156; 34 M L T 120; (1924) M W N 710; 47 M L J 562; 22 A L J 935; 5 P L T 639; 21 L W 1; 51 I A 208; L R 5 A (P C) 190; 29 C W N 312; 3 Pat. L R 157 (P C).

arises in the appeal and all that was necessary for them to do was to ask for a formal amendment of the memorandum of appeal by introducing the names of the heirs of the deceased defendant.

In my judgment the answer to this argument is provided by s. 21-B of the Chota Nagpur Encumbered Estates Act which is the very section on which the appellants rely. That section runs as follows:—

"During the period of management

(1) every suit or appeal by the holder shall be instituted in his name by the manager;

(2) in every pending suit or appeal in which the holder is plaintiff or defendant, the Manager shall be named as the representative of the holder for the purpose of suit or appeal; and no application in any such suit or appeal shall be made to the Court on behalf of the holder except by the Manager;

(3) no person other than the Manager shall be ordered to sue or to be sued as next friend or guardian, or be named as guardian of the holder for a pending suit, and

(4) the Court, upon application by the Manager or by any party to a suit, may order that the plaint or memorandum of appeal be amended so as to conform with the requirements of cl. (1), or that the Manager be named as the representative of the holder as required by cl. (2) of this section."

It is to be noted that under this section the suit or appeal is to be instituted in the name of the holder and it is he who is to be described as plaintiff or defendant. No doubt the holder cannot be represented by any other person than the manager nor can he make any direct application so long as the management of the estates vested in the manager. The fact, however, remains that the manager can figure in the suit or appeal only as a representative of the holder and not as a principal. Thus at least technically the substitution of the heirs of defendant No. 7 was necessary and such substitution not having been made in time, the appeal abated as against defendant No. 7. The fact, however, remains that the heirs of defendant No. 7 could not be represented in the appeal otherwise than through the manager who was already on the record and for that reason and also because I fully believe the statement made by the plaintiffs in their affidavit dated November 16, 1938, I am of the opinion, that this is a proper case for setting aside the abatement assuming that it has not been set aside already by the order passed by Agarwala, J. on December 15, 1938.

In the application made by the appellants on November 16, 1938, which was in substance an application for setting aside the abatement, they have clearly stated that they came to know of the death of defendant No. 7 for the first time on October 31,

1938. This statement is supported by an affidavit which I have no reason to disbelieve. It is stated in a counter-affidavit filed on behalf of the respondent that a co-sharer of the plaintiff had attended the *shradh* ceremony of defendant No. 7 after his death and from this we are asked to infer that the plaintiffs must have known about the death of defendant No. 7 long before October 31, 1938. In my opinion, such an inference is wholly unwarranted. There is no statement in the counter-affidavit that the co-sharer of the plaintiffs actually informed them either of the death of defendant No. 7 or his having attended his *shradh*. I am also not prepared to believe that in spite of being aware of the death of defendant No. 7 the plaintiffs did not deliberately take any action to substitute his heirs. In my opinion, the plaintiffs have made out a strong case for excusing the delay in making their application for substitution and the abatement should be set aside.

The next point to be decided is the main question in the appeal, *viz.* whether the sale impugned by the plaintiffs affected their share in the tenure in dispute. It is common ground that at the time when the suit for rent was brought, the defendants of that suit had parted with their interest and the tenure was in possession of the plaintiffs and defendants Nos. 1 to 6. That being so, the present case in my judgment is governed by the decision of the Privy Council in *Jagadishwar Dayal Singh v. Pathak Dwarka Singh* (2). In that case a landlord had brought a suit for rent without impleading the widow of one Maheshanand, one of the tenants, who had died before the institution of the suit and it was found that this widow had neither been recorded in the landlord's *Sherrista* nor had she paid any rent to the landlord as a tenure-holder. Notwithstanding these facts the Privy Council held that the decree obtained in that suit was not a rent decree and the Revenue Court had no jurisdiction to order a sale of the property under s. 208 of the Chota Nag. Ten. Act. Their Lordships referred in their judgment to s. 11 of the Chota Nag. Ten. Act which runs as follows:—

"When any tenure or portion thereof is transferred by succession, inheritance, sale, gift or exchange, the transferee or his successor-in-title shall cause

(2) 12 Pat. 626; 142 Ind. Cas. 781; Ind. Rul. (1933) P O 108; 17 R D 334; L R 14 A 372 Or.; 64 M L J 590; 14 P L T 289; A I R 1933 P O 122; 37 L W 767; 37 C W N 629; 57 C L J 412; (1933) M W N 532 (P O).

the transfer to be registered in the office of the landlord to whom the rent of the tenure or a portion is payable."

The argument which seems to have been put forward before the Privy Council was that the failure of the widow of Maheshahand to have her name entered in the landlord's Sherista as provided by s. 11, along with the fact that she had never paid rent to the landlord or been recognised by him as a tenure-holder entitled him to proceed with the sale of the tenure under s. 20³, without joining her as a defendant. Their Lordships overruled this contention and observed as follows:—

"Their Lordships agree with the High Court. No such sanction as forfeiture of right in the tenure in respect of failure to comply with the provision of s. 11, is provided by the Act; such failure only affects the transferee's power to recover rent from his under tenants as provided in sub-s. (4)."

It is contended by the learned Advocate for the respondent that this decision cannot govern the present case firstly, because in this case it has been found as a fact by the Courts below that the plaintiffs were represented in the rent suit by the persons who were sued as tenants and secondly, because the case before the Privy Council was one affecting a person claiming an interest in a tenure by succession and not as a transferee.

The first point admits of a simple answer: The finding of the Judicial Commissioner as to the representation of the plaintiffs in the rent suit is based on the following two grounds only: (1) that the purchase of the tenure by the plaintiffs in the sale held in 1928 in execution of the decree passed in rent suit of 1927 raised the inference that they had no objection to the suit having been brought against defendants Nos. 9 and 10 and father of defendant No. 8; and, (2) that their failure to get their names recorded in the landlord's Sherista raised the presumption that they were willing to be represented by the persons who stood recorded as tenure-holders in the landlord office.

In my opinion neither of these two grounds can be supported in law. The plaintiff's purchase at the sale of 1928 is wholly irrelevant, because at that time they had no interest in the tenure, and that being so, it is meaningless to say that either in the suit of 1927 or in the execution proceedings which followed the decree passed therein, they had allowed themselves to be represented by the old tenants. The second ground is equally untenable because if that is a good ground, the decision of the Privy Council should have been

quite different in *Jagadishwar Dayal Singh's case* (2) (*supra*.)

The next point to be decided is whether the decision of the Privy Council in *Jagadishwar Dayal Singh's case* (2) (*supra*) applies to the case of a transferee. So far as this point is concerned, the learned Advocate for the respondent relies strongly on certain observations made by Couch, C. J. in *Sham Chand Koondoo v. Brojonath Pal Chowdhury* (3) a case decided under Act X of 1859. The observations were to the following effect:—

"It appears to me taking ss. 105 and 106 together with proviso, that it was intended that the *zamindar* should be at liberty to treat as the holder of the tenure, and the person whom he might sue for arrears of rent, the person who is registered in his book as the owner, unless any one could show that there had been a transfer and that there was sufficient cause for its non-registration."

The learned Advocate for the respondents contends that because s. 211 of the Chota Nag. Ten. Act corresponds exactly to ss. 105 and 106 of Act X of 1859, the rule laid down by Couch, C. J. applies fully to a case governed by the former Act and in support of his argument has referred us to the following observations made by Sir George Lowndes in delivering the judgment of the Judicial Committee in *Jitendra Nath Ghose v. Monmohan Ghose* (4):—

"Before the Act of 1885 (The Ben. Ten. Act) came into force, the duty was laid specifically upon the transferee of a tenure to see that his name was recorded in the landlord's Sherista, and it may well have been that, if he failed without reason to do this, he could not be heard to object to a decree passed against the recorded tenants, even though their interest in the tenure had in fact ceased. But the Act of 1885 made a radical change in this respect."

According to the learned Advocate for the respondent, these observations show that the rule laid down by Couch, C. J. has been approved by the Privy Council and he contends that this is an additional ground for applying it to the present case.

A reference to s. 211 will show that this provision corresponds more or less to O. XXI, r. 58 of the Civil P. O. Clause (1) of the section states that if before the date fixed before the sale of any tenure or holding in pursuance of s. 208 a third party appears before the Deputy Commissioner and alleges that he and not the person against whom the decree has been obtained was in lawful possession or had some interest in the tenure or holding

(3) 21 W R 94.

(4) 34 O W N 821; 126 Ind. Cas. 422; A I R 1930 P O 193; Ind. Rul. (1930) P O 326; 52 O L J 272; 59 M L J 607; 32 L W 736 (P O).

when the decree was obtained, the Deputy Commissioner shall examine such party and if he sees sufficient reason for so doing and if such party deposits in Court or gives security for the amount of the decree, the Deputy Commissioner shall stay the sale and shall after taking evidence adjudicate upon the claim. Then follow two provisos to the section. The first proviso states that no such adjudication shall be made if the Deputy Commissioner considers that the claim was designedly or unnecessarily delayed; and the second proviso runs thus:—

"Provided also that no transfer of a tenure shall be recognised unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner."

It appears to me that the effect of the two provisos is that in the summary enquiry which the Deputy Commissioner is required to hold under s. 211, the claimant can be put out of Court at once, if it appears either that his claim was designedly or unnecessarily delayed, or that he is not registered in the office of the landlord and there was no sufficient cause for non-registration. The effect of the second proviso is merely that the claim cannot succeed before the Deputy Commissioner, if the claimant is not registered in the office of the landlord, but there is nothing in the section to suggest that the non-registration will also defeat the claimant in the suit which he is authorised to bring under s. 211 cl. (2) which corresponds to O. XXI, r. 63). There is also nothing in the section to show that the transferee's failure to get himself recorded in the landlord's Sherista shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants. The view that s. 211 cannot bear the meaning attributed to it by the learned Advocate for the respondent is confirmed by the decision of the Privy Council in *Jagdishwar Dayal Singh v. Pathak Dwarka Singh* (2) wherein their Lordships considered both ss. 11 and 211 of the Chota Nag. Ten. Act. In dealing with s. 11, they expressly dealt with the case of a transferee and observed as follows:—

"No such sanction as forfeiture of rights in the tenure in respect of failure to comply with the provisions of s. 11 is provided by the Act; such failure only affects the transferee's power to recover rent from his under-tenants as provided in sub- (4)."

These observations show that their Lord-

ships decided the case before them on a broad ground and did not intend to draw a distinction between a transferee and an heir. Further the rule laid down in that case has been applied by the Calcutta High Court as well as by this Court to protect transfers in a several cases—see *Faridpur Loan Office, Limited v. Nirode Kishore Ray* (5), *Manki Kanak Ratan v. Sunder Munda* (6) and *Karunamai Pandey v. Pradhan Ram Sewak Lall* decided by a Division Bench of this Court in Second Appeal No. 760 of 1931 on December 19, 1938.

In my opinion the sale impugned by the plaintiffs was not a sale under s. 208 of the Chota Nag. Ten. Act because all the tenure-holders were not represented in the suit. The sale therefore did not affect the plaintiffs' 3 annas share in the tenure and they are accordingly entitled to a decree for possession so far as that share is concerned.

I would, therefore, allow this appeal, reverse the decisions of the Courts below and direct that a decree be passed declaring that the plaintiffs' 3 annas share is not affected by the sale and that they are entitled to recover possession of that share. The plaintiffs will be entitled to costs in the Courts below as well as in this Court as against respondent No. 1 (the principal contesting defendant); but so far as respondents Nos. 7 (a) to 7 (g) are concerned, there will be no order for costs, because the plaintiffs have failed to establish that the sale brought about by defendant No. 7, the predecessor-in-interest of these defendants, was tainted with fraud.

Harries, C. J.—I agree and have nothing to add.

Appeal allowed.

(5) 56 O 462; 118 Ind. Cas. 864; A I R 1929 Cal. 452; Ind. Rul. (1929) Cal. 688.
(6) 20 P L T 346; 179 Ind. Cas. 834; 5 B R 298; 11 R P 413; A I R 1939 Pat. 225.

BOMBAY HIGH COURT

Second Appeal No. 614 of 1935.

March 10, 1939

LOKUR, J.

HUSSAINBI Haji SUBHAN MUJAVAR
AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sayad KHAIRUDDIN KUTUBUDDIN AND
OTHERS—PLAINTIFFS—RESPONDENTS

Muhammadan Law—Wakf—Mujavarship—Succession—Female, if barred.

Under Muhammadan Law, there is no legal prohibition against a woman holding a *mutwalliship*, when a trust by its nature involves no spiritual duties such as a woman could not properly discharge in person or by deputy, and it is always a question of fact whether the duties attached to a particular office are so spiritual that they cannot be discharged by a female.

Where the duties of a *mujavar* consist of sweeping and cleansing the place, reading the *fatiha*, offering prayers and incense, and looking after the general management of the shrine, and on evidence it is found that these duties can be performed by females, then succession of a female to such *mujavarship* is not barred. *Shahoo Banoo v. Aga Mohamad Jaffar Binduneem* (5), relied on, *Mirzamalli v. Hidyathi* (6), explained.

S. A. from the decision of the Assistant Judge, Satara, in Appeal No. 23 of 1933.

Mr. A. G. Desai, for the Appellants.

Messrs. M. G. Chitale and P. B. Gajendragadkar, for Respondents Nos. 1 and 2, respectively.

Judgment.—The suit out of which this second appeal arises was filed by the plaintiffs for a declaration that they are the lawful heirs of the deceased Dada Saheb Shaikh Mire to the property in dispute which is assigned for service as *mujavars* and for an injunction restraining the defendants from interfering with their possession and enjoyment of the said land. The only issue which arises in this appeal is whether a female is entitled to succeed to the *mujavarki* land. Both the lower Courts found in favour of the plaintiffs and decreed their claim. The duties of a *mujavar* are set out by Abdur Rahim, J. in *Munnawaru Begam v. Mir Mahapalli* (1), as follows (p. 1037)

"The word *mujavar* literally means a sweeper or the person who cleans the place, but it is conventionally used to denote a person who is looking after a shrine or tomb of a holy person generally called *astana*. *Astana* is a word which is often used to denote a place inspiring respect and reverence."

From the evidence recorded in this case the lower Appellate Court has held that the duties of the *mujavar* in this case consist of reading the *Fathia*, offering prayers and incense, and looking after the general management of the shrine. There are conflicting rulings of the Madras High Court as to whether a female can be a *mujavar* or can perform the duties of a spiritual nature. In *mujavar Ibrambibi v. Mujavar Hussain Shersif* (2) it is held that a woman is not competent to perform the duties of the *mujavar* of a *durga* which are not of a secular nature. That decision was based on

(1) 41 M 1033 at p. 1037; 51 Ind. Cas. 489; A I R 1919 Mad. 203.

(2) 3 M. 95.

the earlier decision in *Husain Bibee v. Hussain Sharif* (3). The same view was taken in *Sundarambal Ammal v. Yogavanagurukkal* (4). But all these cases were considered by Abdur Rahim, J. in *Munnawaru Begam v. Mir Mahapalli* (1). It is true that, as observed in the judgment of Seshagiri Ayyar, J. in that case at p. 1042*, no objection was taken in that case to the succession of the female to the head *mujavarship* on the ground that by reason of her sex she was not entitled to perform the duties of the head *mujavarship*. It is therefore argued that the observation of Abdur Rahim, J. with regard to the right of a female to succeed to the title of a *mujavarship* are obiter. But the observations, coming as they do from such an eminent Muhammadan Judge as Abdur Rahim, J. regarding the duties of a *mujavar* and the rights of succession to the *mujavarship*, certainly carry great weight. He expresses the definite view that a religious office can be held by a woman under the Muhammadan Law, unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy, and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion. He has also remarked that, although there is no general rule of Muhammadan Law prohibiting a woman from holding a religious office, prohibition may arise by local usage or custom, and that in that particular case he held that a woman was competent to succeed to the office of head *mujavar* of the suit *astana*. The principle, as laid down by the Privy Council in *Shahoo Banoo v. Aga Mohamad Jaffar Binduneem* (5), is that by Muhammadan Law, there is no legal prohibition against a woman holding a *mutwalliship*, when a trust by its nature involves no spiritual duties such as a woman could not properly discharge in person or by deputy, and it is always a question of fact whether the duties attached to a particular office are so spiritual that they cannot be discharged by a female.

On behalf of the appellants reliance is placed upon the ruling in *Mirzamalli v. Hidyathi* (6), where it was held that the performance of the services of *imam*—

(3) 4 M H O R 23.

(4) 38 M 50; 23 Ind. Cas. 72; A I R 1915 Mac 561; 26 M L J 315; (1914), M W N 286; 1 L W 276.

(5) 34 O 118; 341 A 46, 4 L B R 66; 5 O L J 134; 11 O W N 297 (P O).

(6) 3 Bom. L R 772.

*Page of 41 M.—[Ed.]

moujani and *khitabat* at a mosque could only be done by the male members of a family, and that it was not open to the female members to have them done by a proxy when there were already male members of the family in existence. The duties of the four offices are explained on p. 776*, and one of those duties, viz., the *imamat*, consisted of preaching by being a priest and the duties of *moujani* consisted in calling to prayer, while those of *khitabat* consisted of reading the Koran at the mosque. These duties were regarded as incapable of performance by females, and the decision ultimately turned on the wording of the *sanad* which granted the *imam*. The word *Bafarjandan* used in the *sanad* was interpreted as descendants in the male line only. It was also remarked that females were not competent to perform the duties which were of a spiritual nature. But in this case the duties of a *mujavar* are said to consist of sweeping and cleansing the place, reading the *fatiha*, offering prayers and incense, and looking after the general management of the shrine, and on the evidence the lower Appellate Court has held that these duties can be performed by females; and in the case of this very *mujavarship*, instances were cited to show that females did succeed and that the duties of the *mujavar* were performed by ladies. Defendant No. 1, who was herself a female, used to manage the present Pir Mahi Taj, and defendant No. 5 admitted that if any of them died without a male issue, his widow, daughters and sisters were entitled to get a share in the land of the Pir. It is not that this evidence is intended to prove a custom, but merely to show that the duties of a *mujavar* in this case are capable of being performed by a female. If that is so, then according to the ruling of the Privy Council in *Shahoo Banoo v. Aga Mohamad Jaffar Binduneem* (5), female succession is not barred. On these grounds I confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

S.

Appeal dismissed.

*Page of 3 Bom. L. R.—[Ed.]

MADRAS HIGH COURT

O. S. Appeal No. 79 of 1936

November 15, 1933

LEACH, C. J. AND MADHAVAN NAIR, J.
O. S. NATARAJA PILLAI AND ANOT.—
APPELLANTS

versus

O. S. SUBBAROYA CHETTYAR—
RESPONDENT

Hindu Law—Succession—Hindu domiciled out of British India—Succession, whether governed by Hindu Law or Succession Act (XXXIX of 1925)—Judgment—Foreign judgment—Judgment in rem—Foreign judgment declaring person as validly adopted son of another—Whether binding on Courts in British India in matters of succession to immovable property in British India.

The law of succession is to be determined according to the personal law of the individual whose succession is in question. [p. 681, col. 1.]

The Courts in India have always applied the personal law of a Hindu who has migrated from one part of India to another. The same principle applies to a case of a Hindu domiciled abroad. Hence in a case of a Hindu domiciled out of British India, Hindu Law applies in matters of succession and not the Succession Act. 73 Ind. Cas. 202 (1), applied, 57 Ind. Cas. 545 (2) and 114 Ind. Cas. 17 (4), referred to. [p. 680, col. 2.]

A declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment *in rem*, and governs succession to movable property. The same principle applies in a matter of succession to immovable property where the law requires the personal law to be followed. Hence, although the judgment of the foreign Court declaring a person to be a validly adopted son of another person, cannot be regarded as a judgment *in rem* within meaning of s. 41, Evi. Act, it is binding on the Courts in British India in matters relating to immovable property situated in British India 177 Ind. Cas. 836 (5), relied on, *Ramakrishnayya v. Mahalakshamma Garu* (6), applied.

O. S. A. against the judgment and decree of Wadsworth, J. in O. S. No. 596 of 1923, dated December 1, 1936.

Mr. P. R. Ramakrishna Ayyar, for the Appellants.

Messrs. K. Rajah Ayyar and V. Ramaswamy Ayyar, for the Respondent.

Leach, C. J.—In this appeal the Court is called upon to decide the question whether a foreign judgment declaring the respondent to be the adopted son of a Hindu widow is binding on the Court in a suit relating to immovable property. On April 26, 1891, one Calve Sadasiva Chetti, a French citizen, died in Pondicherry leaving a widow, but no issue. The deceased was a man of considerable wealth and had immovable properties in Pondicherry and in the Madras Presidency. By a will and a codicil dated July 25, 1889,

and May 20, 1891, respectively, the deceased directed that the bulk of the estate should be devoted to charitable purposes and he appointed five executors and trustees. The will and the codicil were proved both in Pondicherry and in this Court by four of the trustees, but one of them, Calve Krishnaswami Chetti, refused to join in, and in 1892 instituted proceedings in Pondicherry for the removal of the trustees who had proved the will. As the result of this action, the trustees were removed in 1906 and fresh trustees were appointed. The final decision was given by the Court of Cession in Paris. There was also litigation in Pondicherry with regard to the validity of the will and this led in 1917 to a declaration by the French Courts that the will was invalid and that Vasavambal Ammal, the widow, took the Pondicherry assets as on an intestacy. On December 12, 1906, Vasavambal Ammal executed in Madras a deed by which she purported to adopt respondent No. 2. It is said by the appellants that this adoption was invalid as the widow had no authority to adopt. In fact they say that the will should be construed as embodying prohibition against adoption. They also say that the widow was induced to sign the adoption deed under pressure from the trustees who were removed by the decree passed in Pondicherry. The deed of adoption was registered in Pondicherry and the French Courts have held the respondent to be the adopted son of Calve Sadasiva Chetti and also of Vasavambal Ammal. I will return to the decisions of the French Courts later, but as there has been considerable litigation with regard to the estate in this Court, it will be convenient first to refer to the suits in Madras.

On February 19, 1908, the respondent who was then about four years of age instituted, through Vasavambal Ammal as his next friend, Suit No. 49 of 1908 of this Court for a declaration that he was the lawfully adopted son of Calve Sadasiva Chetti and that the will was in consequence invalid. On this basis he asked that he be given possession of the Madras properties. On November 24, 1908, this suit was withdrawn with liberty to bring a fresh suit on the same cause of action. In 1910, the persons who were appointed trustees as the result of the suit filed in Pondicherry by Calve Krishnaswami Chetti in 1892, filed Suit No. 312 of 1910 of this Court for a declaration that the respondent's adoption by Vasa-

vambal Ammal was invalid and for possession of the properties situated in Madras. The defendants in this suit were three of the four trustees who had been removed, Krishnaveni Ammal (the respondent's natural mother), Vasavambal Ammal and the respondent. The fourth trustee had died in the meantime. This suit was tried by Sir John Wallis who was then a Puisne Judge of this Court. Sir John Wallis held that the adoption of the respondent by Vasavambal Ammal was invalid as it was contrary to the provisions of the will and also because the nearest *sapinda* had not been consulted. Accordingly, he directed that the properties in the Madras Presidency should be handed over to the plaintiffs; an appeal (O. S. A. No. 72 of 1913) was filed against this judgment and was heard by Abdur Rahim and Phillips, JJ. Abdur Rahim, J., held that the Pondicherry Court had no power to remove the trustees appointed by the Madras Court in respect of immovable properties situated in Madras, and in order to remove the old trustees, a suit under s. 92, Civil P. O. would be necessary. Phillips, J. held that this was not a suit for the removal of trustees. The old trustees had been removed and the plaintiffs had been appointed in their places. This was a suit based upon a foreign judgment which recognized the title of the plaintiffs to administer the trust and to recover the trust properties. He agreed that the adoption was invalid for the reasons stated by Sir John Wallis and also on the ground that the factum of adoption had not been proved. In view of this disagreement, a Letters Patent Appeal No. 229 of 1916, followed and was heard by Ayling, Seshagiri Ayyar and Bakewell, JJ. who dismissed the suit on the ground that there was a defect in the appointment of the plaintiffs as trustees and that they therefore had no *locus standi*. No opinion was expressed on the question of the validity of the adoption.

In 1920 Calve Subbaraya Chetti, son of Calve Krishnaswami Chetti and two others with the sanction of the Advocate-General instituted in this Court Suit No. 226 of that year for the removal of the three surviving trustees who had proved the will in Madras, for the appointment of new trustees and for the settlement of a scheme. The respondent, Krishnaveni Ammal and Vasavambal Ammal were also made defendants. This suit also resulted in a compromise. The compromise was sanctioned by Kumaraswami Sastri, J. who passed

a decree in the terms agreed upon. The respondent gave up his claim to be the adopted son of Calve Sadasiva Chetti. To Krishnaveni Ammal was allotted one item of immovable property in Madras, subject to her paying a sum of Rs. 50,000 to the respondent, and to the widow was allotted the property which is the subject-matter of the suit, out of which this appeal arises. The other properties of Calve Sadasiva Chetti in Madras were to be regarded as constituting valid bequests to charities and a scheme for their management was settled. The respondent was still a minor, but the Court considered that it was in his interest that there should be a decree in the terms agreed upon.

Vasavambal Ammal died on January 25, 1922. Calve Subbaraya Chetti then claimed to be entitled to the property which was allotted to Vasavambal Ammal under the compromise decree passed in Suit No. 226 of 1920 on the ground that he was the reversioner to the estate of Calve Sadasiva Chetti, and purported to transfer it to the Madras trustees for the benefit of the charities mentioned in the will of Calve Sadasiva Chetti who was his great uncle. Sankara Chetti, one of the trustees, who had been removed by the order of the French Court, set up a claim to the property as the nearest reversioner of the widow and purported to transfer it to the appellants who claimed to be illegitimate sons of Calve Sadasiva Chetti. In 1924 the Madras trustees filed Suit No. 53 of 1924 to recover possession of the property and also of a rest house which had been managed by Vasavambal Ammal. In addition to the appellants, Sankara Chetti, Chockanathan Chetti (who was also one of the original trustees) the then tenant of the property, the respondent, and the person in possession of the rest house were made defendants. In spite of the compromise decree passed in Suit No. 26 of 1920, the respondent advanced the claim to be the adopted son of Calve Sadasiva Chetti as well as the adopted son of the widow. This suit was dismissed on August 24, 1928, by Kumaraswami Sastri, J. on the ground that Sankara Chetti and not Calve Subbaraya Chetti was the nearest reversioner of Calve Sadasiva Chetti. Suit No. 696 of 1924 was tried with this suit. Suit No. 696 of 1924 had been filed by the respondent to recover the rest house from the caretaker. The respondent claimed the right to possession of the rest house as the adopted son of the widow, but without pre-

judice to his claim that he was also the adopted son of Calve Sadasiva Chetti. This suit was decreed by Kumaraswami Sastri, J. on September 5, 1928, on the ground that the respondent had been validly adopted to Vasavambal Ammal according to French law by which she was governed. The learned Judge left upon the question of the respondent's adoption to the testator. In Suit No. 591 of 1928 of this Court Sankara Chetti sought to recover from Krishnaveni Ammal possession of the property which had been allotted to her under the decree in Suit No. 226 of 1920. Sankara Chetti claimed to be entitled to the property as the nearest reversioner of Calve Sadasiva Chetti. He also claimed the right to manage the rest house. The suit came before Krishnan Pandarai, J. who dismissed it on the ground that the respondent was the validly adopted son of Vasavambal Ammal. The Court also held that Sankara Chetti could not challenge the adoption to Calve Sadasiva Chetti as Sankara Chetti had been instrumental in bringing it about. In 1930 the respondent instituted in this Court Suit No. 257 of 1930 to set aside the compromise decree passed in Suit No. 226 of 1920. The defendants were the Madras trustees. The respondent again claimed that he had been validly adopted both to the husband and the wife and that he was entitled to their estates. This suit was also compromised. The decree passed in Suit No. 226 of 1920 was confirmed subject to the payment to the respondent of Rs. 1,000 plus a like sum for costs and the payment by the trustees of Rs. 35 per mensem for his maintenance.

I will now return to the litigation in Pondicherry. I have already mentioned that in 1906 the trustees who had proved the will were removed and this led to the appointment of new trustees under the provisions of the will. In 1917 it was held by the Court of Appeal at Pondicherry that the bequests to charities were invalid because the sanction of the administration had not been obtained before the will was executed, and it was further held that in the absence of any other heir the widow took the French estate subject to certain non-charitable legacies. In 1920 Calve Subbaraya Chetti filed a suit in Pondicherry for a declaration that he was the reversioner to the estate of Calve Sadasiva Chetti. The defendants in this suit were the widow and the respondent. The adoption was challenged but the Court of first

instance held that the respondent had been validly adopted both to the testator and to Vasavambal Ammal and ordered that all those who were in possession of the properties left by the testator should deliver them up to the respondent. The judgment, of course, did not apply to properties which were made the subject of non-charitable legacies. The judgment was upheld on appeal by the Court of Appeal in Pondicherry and also by the Court of Cession on second appeal. Therefore, so far as the French Law is concerned, the respondent is the heir both of Calve Sadasiva Chetti and of his widow and the French Courts have given him a declaration of his status.

The suit out of which this appeal arises was filed on November 5, 1928, to recover the property which was allotted to Vasavambal Ammal under the compromise decree in Suit No. 226 of 1920. The respondent claimed title to the property both as the adopted son of Calve Sadasiva Chetti and of Vasavambal Ammal. The suit was tried by Wadsworth, J. who held that it was no longer open to the respondent to set up his adoption to Calve Sadasiva Chetti, this claim having been abandoned in Suit No. 226 of 1920 and Suit No. 257 of 1930, but it was open to him to claim to be the adopted son of Vasavambal Ammal. The learned Judge held that the adoption by the widow had been proved, and as she was governed by French Law the adoption was valid. Accordingly he granted the respondent a decree for possession. In holding that the adoption of the respondent was valid, the learned Judge relied on the documentary evidence (the deed of adoption and a deed of gift executed by Vasavambal Ammal in which reference is made to the adoption) and on the judicial recognition of the respondent's status. The appellants have conceded in this Court that under French Law a Hindu widow can adopt a son to herself and that if she does, her adopted son succeeds to her estate, but they say that the documentary evidence does not prove that there was a giving and a taking and that the requisite ceremony was performed and therefore it is not sufficient to prove that there was a valid adoption. They contend that this Court cannot have regard to the declaration of status given to the respondent by the French Courts or to the decisions of Kumaraswami Sastri and Krishnan Pandalai, JJ. For reasons which I shall state, I consider that this Court must accept the declaration of the French Courts that the respondent is the adopted son of

Vasavambal Ammal and therefore it is not necessary to inquire further into the matter.

Before stating the reasons for holding that the Court must accept the declaration of status by the French Courts, I will deal with an argument advanced by the learned Advocate for the appellant that succession to the estate of Vasavambal Ammal is governed by the Succession Act which does not recognize adoption. It is said that in declaring in s. 4 that Part II of the Act shall not apply if the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jain and in s. 29 that Part V shall not apply to an intestacy or to the property of any such person, the legislature could have only in its contemplation Hindus, Muhammadans, Buddhists, Sikhs and Jains who are domiciled in British India because a country can only legislate for its own citizens, and therefore when a Hindu domiciled abroad dies leaving property in British India, the Act applies because the estate is not within the exception. The Courts of this country have always applied the personal law of a Hindu who has migrated from one part of India to another and in *Khatubai v. Mohammad Haji Abu* (1), the Privy Council applied the personal law of a Halai Memon domiciled outside British India in the matter of succession to immovable property within British India. The deceased was domiciled in Porebunder in Kathiawar which is a Native State. He had carried on business for many years in Bombay and died leaving immovable property there. In matters of inheritance and succession, the Halai Memons of Porebunder follow the Hindu and not the Muhammadan Law and in that respect differ from the Halai Memons of Bombay who have adopted the Muhammadan Law. The question was whether the deceased's son took the whole of his estate to the exclusion of his daughter as under Hindu Law. The Judicial Committee held that the succession was governed by the personal law of the deceased which was the law of the Halai Memons of Porebunder and not by the personal law of the Halai Memons of Bombay. In *Balwant Rao v. Baji Rao* (2), the Privy Council stated that it was established

(1) 47 B 146; 72 Ind. Cas. 202; A I R 1922 P O 414; 50 I A 108; 44 M L J 35; 25 Bom. L R 127; 17 L W 218; 37 O L J 131; 32 M L T 45; 27 O W N 774 (P O).

(2) 48 O 30; 57 Ind. Cas. 545; A I R 1921 P O 59; 47 I A 213; 16 N L R 187; 39 M L J 166; (1920) M W N 483; 22 Bom. L R 1070; 28 M L T 157; 18 A L J 1049; 12 L W 679; 25 O W N 243 (P O).

that the law of succession was in any given case to be determined according to the personal law of the individual whose succession was in question. This case, however, related to a Maharashtra Brahmin domiciled in the Bombay Presidency leaving immovable property in the Central Provinces and is therefore not so much in point as *Khatubai v. Mahomed Haji Abu* (1). The latter case is directly in point and decides the question.

The argument of the learned Advocate for the appellant would appear to be based on observations by Wallis, C. J. in *Kessara Venkattappayya v. Nayani Venkata Ranga Rao* (3), where he said that the limits of legislative authority are territorial and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. *Prima facie* therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects. In that case the Court held that the Registration Act did not apply to authorities to adopt, executed in Native States by domiciled subjects of those States and such documents being valid and admissible in British India a person adopted in pursuance of an authority executed in the Nizam's Dominions was entitled to inherit the separate properties of his adopted mother's father situated in British India. The case was carried to the Privy Council, *Kinara Venkattappayya v. Nayani Venkata Ranga Rao* (4). Their Lordships held that the document in question had been duly registered, and did not consider it necessary to discuss

"the important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the State of the Nizam, could rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's Dominions, as a binding decision on the question of his status precluding all dispute as to the fact and lawfulness of his adoption."

Consequently, the Privy Council left open the specific question whether the declaration of a foreign Court on the question of adoption is binding on Courts in British India, but its decision in *Khatubai v. Mahomed Haji Abu* (1) negatives the argument that the Succession Act must be deemed to apply to the estates of Hindus

(3) 43 M 288; 59 Ind. Cas. 978; A I R 1920 Mad. 763; 38 M L J 149.

(4) 52 M 175; 114 Ind. Cas. 17; A I R 1929 P O 24; 56 I A 21; 29 L W 118; (1929) M W N 47; 33 O W N 261; 49 O L J 148; 31 Bom. L R 299; (1929) A L J 41; 56 M L J 218; Ind. Rul. (1929) P O 57 (P O).

who are domiciled abroad. Coming now to the main question, it must be accepted that the judgments of the French Courts declaring that the respondent is the validly adopted son of Vasavambal Ammal cannot be regarded as judgments *in rem* within the meaning of s. 41, Evi. Act, but a declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment *in rem*, as was pointed out by the Bombay High Court in the recent case in *Menahem Mesha Menahem Messa v. Moses Bunin Menahem Messa* (5) and governs succession to movable property. Immovable property stands on a different basis and international law does not recognize any power in a Court to adjudicate upon the title or the right to the possession of immovable property situate outside the country of the Court. Chattels can be taken away but land cannot. But in recognizing only the personal law of Hindus, Muhammadans, Buddhists, Sikhs and Jains in matters of succession, British India has added an exception to the general principle that the *lex situs* must be applied in questions relating to immovable property and this is pointed out in "Mayne on Hindu Law and Usage" (Edn. 10, p. 96). The *lex situs* is the Succession Act and the Succession Act does not apply to a Hindu, Muhammadan, Buddhist, Sikh or Jain even when he is domiciled outside British India. So far as such persons are concerned, the governing factor is the personal law.

Inasmuch as the Courts of British India recognize the validity of a declaration of status by a foreign Court in a matter of succession to movable property in British India because the personal law applies, it seems to me that they must do the same in a matter of succession to immovable property where the law requires the personal law to be followed. No reason exists for making any distinction. Treating the personal law as part of the *lex situs*, the Courts of the country of domicile are best able to decide questions of status. In *Ramakrishnayya v. Mahalakshamma Garu* (6). Phillips and Reilly, JJ. held that British Indian Courts had no jurisdiction to entertain a suit for a declaration that an adoption which was made in French territory was not valid according to French Law,

(5) 40 Bom. L R 571; 177 Ind. Cas. 838; A I R 1938 Bom. 394; I L R (1938) Bom. 529; 11 R B 121.

(6) 30 L W 691.

and the fact that there was in British India immovable property belonging to the estate would not invest the Court with jurisdiction to entertain the suit. It appeared from the evidence in the case that the French Law as to adoption and as to a Hindu widow's rights in property was on all fours with the law as administered in British India. The Court considered that the contesting defendants being French subjects were entitled to have the question of status determined according to the law prevailing in the country in which they were domiciled and for a foreign Court to usurp jurisdiction in such a matter was highly undesirable. The Court added that it might be necessary (it did not say that it would be necessary) in litigation with regard to property situated in British India to decide such questions, but it refused to entertain a mere declaratory suit. The decision is not in conflict with the opinion I have expressed but rather lends support. For the reasons indicated I hold that this Court must accept the declaration of the French Courts that the respondent was lawfully adopted by Vasavambal Ammal and that as the property in suit belongs to her estate the respondent is entitled to possession of it. My learned brother shares this view and the appeal will therefore be dismissed with costs. We certify for two Counsel.

N.S.

*Appeal dismissed.***ALLAHABAD HIGH COURT**

Criminal Reference No. 474 of 1939

July 7, 1939

MULLA, J.

BANSIDHAR AND OTHERS—APPELLANTS*versus***EMPEROR—RESPONDENT.***Criminal Procedure Code (Act V of 1898), ss. 424, 367—Duty of Appellate Court.*

It would be well for District Magistrates who hear appeals in criminal cases to bear in mind that they are also subordinate to higher Courts and it is their duty to satisfy the higher Courts by their judgments that they have applied their minds to the case before them and in recording a finding of conviction upon the evidence produced before them, have arrived at a correct conclusion. In order to discharge this duty, it is necessary for them to see that their judgments fulfil the requirements laid down by the law. Merely saying that all the points arising in the case have been considered by the Court below and have been rightly decided, does not show that the Appellate Court has applied its mind to the points arising in the case and has arrived at its own independent judgment in respect of them as it is required by the law to do.

Or. Ref. made by the Sessions Judge of Jhansi, dated May 30, 1939.

The Assistant Govt. Advocate, for the Crown.

Order.—This is a reference by the learned Sessions Judge of Jhansi drawing the attention of this Court to a judgment recorded by the learned District Magistrate of Jalaun in an appeal made before him by seven persons who were convicted by a Magistrate of the Second Class of offences under ss. 147 and 355, I. P. C. The learned Sessions Judge has suggested without making a specific recommendation to that effect that the judgment of the learned District Magistrate should be set aside and that he should be directed to re-hear the appeal and to record a proper judgment. The judgment of the learned District Magistrate to which objection has been taken by the learned Sessions Judge runs as follows :

"This is an appeal against an order of a Special Magistrate of the Second Class, Orai, in a case under ss. 355 and 137, I. P. C. Seven persons were convicted and all of them appeal. I have given a patient hearing to the learned Counsel for the appellants. Not a single new thing has been said in this Court. Almost all the points advanced by the learned Counsel for the appellants have been discussed in the judgment of the Court below. In my opinion, the Court below has not erred in its findings. If anything, the learned Magistrate was lenient to the accused persons. I dismiss the appeal and further order that all the appellants be bound down under s. 106, Criminal P. C., for one year (after the release of the accused persons sentenced to imprisonment) and each accused person will have to furnish a surety for Rs. 100 to keep the peace."

The objection taken by the learned Sessions Judge is that this judgment does not fulfil the provisions of s. 424 read with s. 367, Criminal P. C. Having considered the judgment of the trying Magistrate as well as of the learned District Magistrate, I have not the least hesitation in agreeing with the view taken by the learned Sessions Judge. The judgment written by the learned District Magistrate obviously fails to fulfil the conditions of s. 424 read with s. 367, Criminal P. C. The latter section which is relevant for the purposes of the argument provides that a judgment of a Criminal Court "shall contain the point or points for determination, the decision thereon and the reasons for the decision." This provision is made applicable to the judgments of the Appellate Courts by s. 424, Criminal P. C. It would be well for District Magistrates who hear appeals in criminal cases to bear in mind that they are also subordinate to higher Courts and it is

their duty to satisfy the higher Courts by their judgments that they have applied their minds to the case before them and in recording a finding of conviction upon the evidence produced before them have arrived at a correct conclusion. In order to discharge this duty, it is necessary for them to see that their judgments fulfil the requirements laid down by the law. It is always easy for the Appellate Court to say that all the points arising in the case have been considered by the Court below and have been rightly decided. This does not, however, show that the Appellate Court has applied its mind to the points arising in the case and has arrived at its own independent judgment in respect of them as it is required by the law to do. In the present case I have carefully perused the judgment of the trying Magistrate which covers seven typed pages and I find that the prosecution story is by no means a simple and straightforward story and the evidence produced by the prosecution is by no means overwhelming or of such a character as to leave no room for doubt.

It is quite evident that several points arise for consideration relating to the inherent merit of the prosecution story and the credibility of the evidence by which it is sought to be supported. Some of these points have been considered by the trying Magistrate and it is not for me to say whether the findings arrived at by him are right or wrong. The fact remains that the case demanded some consideration on the part of the Appellate Court, but the judgment of the learned District Magistrate does not show that he gave the case the consideration which it deserved. Under the law it was clearly his duty to state the various points urged before him and to record his decisions thereon with his reasons for those decisions. He has entirely failed to discharge that duty and I am therefore of the opinion that his judgment must be set aside. I therefore accept this reference and direct that the case shall be sent back to the learned District Magistrate of Jalaun for re-hearing the appeal and for recording a proper judgment as required by the law.

B.

Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT

Reference No. 17 of 1937

May 22, 1939

DAVIS, J. C. AND LCB, J.

COMMISSIONER OF INCOME-TAX,
BOMBAY PRESIDENCY, SIND AND ADEN
—APPLICANT

versus

CENTRAL POPULAR ASSURANCE Co.,

LTD.—ASSESSEE—OPPONENT

Income Tax Act (XI of 1922), s. 66 (2)—Fee of Rs. 100, is part of reference by assessee and part of cost of reference by Commissioner and falls within terms of "costs" as used in sub-s. (6)—Assessee unsuccessful in reference—His contentions shown to be wrong—Taxed costs—Setting off against fees of Rs. 100 paid under sub-s. (2).

"Fee" in sub-s. (2) of s. 66, Income Tax Act, does not mean a deposit or security. It is the price paid by the assessee for the reference and it is not unreasonable to assume that the word is used in its ordinary meaning, that is to say, it is a fee for payment for work done in connection with the reference by the Commissioner. It is part of the costs of reference by him and likewise the cost or part of the costs of the reference by the Income-tax Commissioner. Therefore, as such, it falls within the term 'costs' as used in sub-s. 6 and it is in the discretion of the Court to pass such orders in relation to it as may, in its judicial discretion, seem proper. When the assessee is successful, when it is clear that he is right in his contention, there is no reason why he should not have paid back to him as part of the costs incurred, this Rs. 100 plus any taxed costs incurred by the proceedings in Court. But on the other hand, there is no reason, if he should fail and his contentions be shown to be wrong, why he should not lose this Rs. 100 and pay as well the taxed costs incurred by proceedings in Court on the general principle that costs should follow the event. The taxed costs will not be set-off against the fee of Rs. 100 paid under sub-s. (2) of s. 66, Income Tax Act, which the Commissioner will retain as a fee. [p. 684, col. 2.]

Ref. made by the Commissioner of Income-tax, Bombay Presidency, Sind and Aden.

Mr. Partabrai D. Punwani, Advocate-General, for the Applicant.

Mr. Suganlal Hassanand, for the Opponents.

Davis J.C.—We have before us the question of the costs and the method of calculating the costs to be awarded to the Commissioner of Income-tax in a reference made by him under s. 66 (2), Income Tax Act, in which the assessee was unsuccessful. There appeared to be two extreme views taken by the learned Advocate who appeared in this case on behalf of the unsuccessful assessee and the learned Advocate-General for the Income-tax Commissioner. Mr. Suganlal, for the unsuccessful assessee,

takes the view that Rs. 100 which is payable under s. 66 (2), Income Tax Act is, what he describes as a deposit or security for costs to be incurred in Court, and that if these taxed costs should be less than Rs. 100, as would be the case here, the unsuccessful assessee is entitled to refund of the balance. The learned Advocate-General takes the view that this Rs. 100 does not fall within the discretion of this Court under sub-s. 6 of s. 66, Income Tax Act, at all. He says that the Court cannot even when the assessee is successful direct that he should be re-paid this Rs. 100 which is the price of the reference; that the Legislature did not intend this Rs. 100 to be the subject of the order of the Court at all, and he relies principally upon the fact that the proviso to sub s. 2 of s. 66 expressly provides the circumstances under which this fee may be refunded and these circumstances relate to something which happens before the reference reaches the Court and not after. We think, however, that the better view lies between these two extremes. We do not think that in view of the fact the word 'fee' is used by the Legislature in sub-s. 2, it can mean, as Mr. Suganlal argues, a deposit or security; the word 'fee' in this case appears clearly to be the price paid by the assessee for the reference and it is not unreasonable to assume that the word is used in its ordinary meaning, that is to say, it is a fee for payment for work done in connection with the reference by the Commissioner.

One of the objects, of course, of fixing this fee at Rs. 100 may have been to discourage a frivolous reference and the Revenue Authorities have statutory powers to reduce this fee; but be that as it may, we think, that there is no reason why the word 'fee' in sub-s. 2 of s. 66, Income Tax Act, should not be given its own ordinary meaning. We see, however, nothing incompatible between the view that Rs. 100 is a fee and the view that this Rs. 100 is nevertheless part of the costs of the reference and therefore within the discretion of the Court under sub-s. 6. Part of the costs of reference by the assessee is undoubtedly payment of this fee of Rs. 100. It is part of the costs of reference by him and likewise the cost or part of the costs of the reference by the Income-tax Commissioner. Therefore we think, as such, it falls within the term 'costs' as used in sub-s. 6 and that it is in the discretion of the Court to pass such orders in relation

to it as may, in its judicial discretion, seem proper.

Our attention has been drawn to a Rangoon case in *Commissioner of Income-tax, Burma v. J. I. Milne* (1) the part of the judgment dealing with the question of this fee of Rs. 100 is at pp. 460 and 461*. But in this Rangoon case as in the Bombay case in *Commissioner of Income-tax, Bombay v. Gopal Vajinath* (2) the assessee was successful and we have no difficulty in holding that when the assessee is successful, when it is clear that he is right in his contention, there is no reason why he should not have paid back to him as part of the costs incurred this Rs. 100 plus any taxed costs incurred by the proceedings in Court. But on the other hand, we see no reason, if he should fail and his contentions be shown to be wrong, why he should not lose this Rs. 100 and pay as well the taxed costs incurred by proceedings in Court on the general principle that costs should follow the event. In the Bombay case the learned Chief Justice was dealing with a case where the assessee was successful and he said:

"The Advocate-General says that in some of the decisions of the other High Courts, the fee has not been treated as part of the costs, but the Court has made an order that it be refunded. In my view the Court has no jurisdiction to order the fee as such to be refunded; it can only deal with the matter in relation to costs. In my opinion, the fee is part of the assessee's costs of the reference, and consequently our order directing the Commissioner to pay the costs covers the return of the fee as being part of the out of pockets of the assessee. In cases in which the assessee is ordered to pay costs, the Court can, if it considers that credit should be given to the assessee for the fee, give the Commissioner his costs less Rs. 100."

So that the learned Chief Justice was not dealing with the case of the unsuccessful assessee but merely said what, with respect, we think necessarily follows from his finding, that the fee is part of the costs. It is a matter to be dealt with by the Court in its discretion under sub-s. (6), and there is nothing in any relevant section in that Act which deals with this fee of Rs. 100 separately as such and gives the Court power to order its refund as a fee. If it is not part of costs within the meaning of sub-s. (6), the Court has no power to deal with it at all. But we think clearly that the Court has power to deal with it because so far the assessee is

(1) 11 R 454; 148 Ind. Cas. 98; A I R 1934 Rang. 4; 6 R Rang. 197 (S B).

(2) 38 Bom. L R 929; 165 Ind. Cas. 518; A I R 1936 Bom. 385; 60 B 999; 9 R B 148.

* Page of 11 R.—[Ed.]

concerned, it is clear that he pays Rs. 100 as the price of the reference to be made by the Commissioner, it is part of the costs of the reference with which sub-s. (6) deals and if the assessee is successful ordinarily, he should be entitled to his costs which include this fee.

Our attention has been drawn to a case of this Court *Commissioner of Income-tax, Bombay Presidency and Aden v. K. H. Katrak* (3) and the remarks at p 437* which deal with the refund of the balance of this Rs. 100 after taxed costs had been deducted because according to the scales of fees in force in this Court it must happen in many cases that the taxed costs would be less than Rs. 100, so that the unsuccessful assessee would often be entitled to a refund if we hold that this Rs. 100 was, as it were, a deposit or security against which the taxed costs incurred by him had to be set-off, and balance being re-paid to him. But in this case the learned Judges did not consider this question at any length, nor indeed do we think they gave a decision which binds this Court. The learned Judge who gave the judgment went no further, we think, in that case than to express a pious hope. He said:

"The assessee has already deposited Rs. 100 with the Income-tax Commissioner to meet the costs of this reference as we order that the Income-tax Commissioner should have his costs as taxed by this Court provided such sum does not exceed Rs. 100. If the costs taxed are less, the assessee will no doubt get a refund from the Income-tax Commissioner of the balance."

But even if the learned Judges had there decided that the balance should be refunded, even so under sub-s. (6) it would appear they had discretion. But we think that in this case before us there is no reason that we should follow any other principle than that costs follow the event. The assessee in this case was unsuccessful. No circumstance has been shown which invites special sympathy on his behalf. It does not appear that the Commissioner of Income-tax did anything which was unnecessary or which would invite our disapproval or discrimination against him. It was said that in one case, for instance, the Commissioner of Income-tax refused to make a reference when called upon by this Court to do so. In such a case it would be within this Court's discretion to order the fee of Rs. 100, as part of the costs, to be returned to even an unsuccessful assessee. But in

this case there is no circumstance of this kind and we see no reason why, as the assessee has failed, he should be entitled to a credit of this Rs. 100 or the return of the balance merely because he had to pay it in advance as a fee to the Commissioner and as the price of the reference. It was enacted that a fee of Rs. 100 should be paid because presumably the Legislature thought this sum was a fair return for the work involved by the reference; and it being shown, as in this case, that the assessee was wrong and the Income-tax Commissioner was right on the questions raised in the case stated, we see no reason why this fee of Rs. 100 should be returned to the unsuccessful assessee, by way of cash or credit, in part or in whole. The order as to costs then will be that the unsuccessful assessee is to pay the taxed costs and these taxed costs will not be set-off against the fee of Rs. 100 paid under sub-s. (2) of s. 66, Income Tax Act, which the Commissioner will retain as a fee.

D.

Order accordingly.

PATNA HIGH COURT

Appeal from Appellate Decree No. 67
of 1938

September 15, 1939

ROWLAND AND CHATTERJI, JJ.
PRAHLAD CHANDRA SINGH—
PLAINTIFF—APPELLANT

versus

BHIM MAHATO AND OTHERS—
DEFENDANTS—RESPONDENTS

Abatement—Partial—Appeal—Partition suit decreed—Appeal by all defendants—Decree and grounds of appeal proceeding on grounds common to all—Death of one appellant—Others can continue appeal under O. XLI, r. 4, Civil Procedure Code (Act V. of 1908)—Evidence—Judgment in previous suit—Probative value of.

In a partition suit no effective decree can be made unless all the co-shareis are before the Court. It does not, however, follow that a suit for partition cannot be dismissed against an absent defendant. In an appeal from a decree which proceeds on grounds common to all the appellants if there is partial abatement owing to the death of some of them, the surviving appellants may continue the whole appeal. Where the decree appealed from is of such a nature that the hearing of the appeal after partial abatement may result in the passing of two inconsistent decrees, the whole appeal must fail. [p. 688, col. 1.]

Where a decree in a partition suit is challenged in appeal by all the defendants and the decree proceeds on grounds common to them all and so also are their grounds of appeal, on the death of one of the appellants, the survivors are entitled to the benefit of O. XLI, r. 4, Civil P. C., and can

(3) 31 S L R 432; 171 Ind. Cas. 375; A I R 1937 Sind 234; 10 R S 104.

* Page of 31 S L R—[Ed.]

continue the appeal without the legal representative of the deceased being substituted.

[Case-law referred to.]

The question as to the probative value of a finding in a previous suit depends on the nature of the finding and of the issues involved in the two different suits. [p. 689, col. 1]

A. from the decision of the District Judge, Manbhum, dated September 27, 1937.

Messrs. S. M. Mullick and S. C. Mazumdar, for the Appellant.

Messrs. B. C. De, N. N. Ray and Sambhu Brameshwar Prasad, for the Minor, for the Respondents.

Chatterji, J.—This is an appeal by the plaintiff who brought a suit for partition of a rent-free tenure consisting of village Mirdih in the District of Manbhum. The village has been recorded in the Record of Rights published in 1920 as comprised of twenty-four Khewats, namely, Khewats Nos. 2-1 to 2-24. The tenure formerly belonged to a family of three brothers Buchu, Dakshin and Gandhu. In course of time the shares of all these brothers passed into the hands of outsiders. On September 23, 1935, the plaintiff, who is the landlord of the village, purchased the 2-3rds interest of the first two brothers in execution of three decrees for arrears of cess obtained against the recorded tenure-holders. The defendants on the other hand originally obtained a *mokarrari* lease of Gandhu's 1-3rd share but subsequently purchased that share at an execution sale on August 30, 1880. The position therefore is that the plaintiff is now the holder of the 2-3rds share of Buchu and Dakshin and the defendants of the 1-3rd share of Gandhu. The suit was defended mainly on the grounds; (1) that there was a previous partition between the three brothers Buchu, Dakshin and Gandhu long ago; (2) that the plaintiff's purchase of the 2-3rds share of Buchu and Dakshin was not valid as the decrees for cess were "without jurisdiction and null and void"; and (3) that the defendants acquired partly by settlement and partly by purchase some lands from the branches of Buchu and Dakshin and have been in possession of those lands adversely for a long time.

The learned Subordinate Judge tried the suit, overruling all these defences, passed a preliminary decree for partition. On appeal by the defendants the learned District Judge has reversed the decree except with regard to the lands recorded in *ijmal* Khewat No. 2-24, area 21.99 acres. Hence this second appeal by the plaintiff.

The first point raised by Mr. S. M. Mullick

on behalf of the appellant is that the appeal before the District Judge was not competent. It appears that during the pendency of that appeal one of the appellants, Rakhal Mahto, who was defendant No. 5 died on July 18, 1937, and without his heirs being brought on the record, the appeal was decided on September 27, 1937, that is to say, within the period allowed for substitution. Mr. Mullick's contention is that after the death of Rakhal the appeal could not proceed in the absence of his heirs because in a partition suit all the co-sharers are necessary parties. He relies on the cases of *Churaman Mahto v. Bhatu Mahto* (1), *Mahammad Abjal v. Hafizannessa Khatun*, 91 Ind. Cas. 567 (2) and *Naimuddin Biswas v. Maniraddin Laskar* (3).

In the Patna case a suit for partition having been dismissed, the plaintiffs appealed and during the pendency of the appeal one of the respondents died and no substitution of his heirs having been made within the prescribed period, the appeal stood abated against him. The question then arose whether the appeal could proceed against the remaining respondents. It was held that it could not, because no decree for partition could be passed in the absence of any co-sharer.

In *Mahammad Abjal v. Hafizannessa Khatun* (2) it was laid down that an appeal in a partition suit is incompetent unless all persons interested are made parties to the appeal either as appellants or respondents. There a suit for partition having been decreed, some of the defendants preferred an appeal without impleading the plaintiffs as parties as the contest was limited to the question of shares as between the defendants *inter se*. The appeal was held to be incompetent for want of necessary parties. Though the plaintiffs' share might not have been disputed, the object of the appeal was to obtain a decree for partition after determining the shares of the defendants *inter se*. This case, therefore, is only an illustration of the principle that no effective decree for partition can be passed unless all the co-sharers are before the Court.

In *Naimuddin Biswas v. Maniraddin Laskar* (3) the suit was one under s. 106 of the Ben. Ten. Act for correction of the Record of Rights on the allegation that the rent was really Rs. 7 and not Rs. 10 as

(1) 16 P L T 308; 154 Ind. Cas. 856; 7 R P 491 (1); A I R 1935 Pat. 241.

(2) A I R 1926 Cal. 741; 91 Ind. Cas. 567.

(3) 32 O W N 299; 107 Ind. Cas. 728; 47 O L J 82; A I R 1923 Cal. 184.

entered in the record. The suit was dismissed by the trial Court and on appeal it was decreed. The landlord-defendants then appealed to the High Court. During the pendency of the appeal in the High Court one of the appellants died and his heirs not having been substituted, the appeal abated so far as he was concerned. The respondents then contended that the whole appeal must fail. This contention was accepted on the ground that if the appeal were allowed to proceed as regards the surviving appellants and ultimately it succeeded, the result would be that there would be two contradictory decrees, one which stood against the deceased appellant declaring that the rent was Rs. 7 and the other which would be passed in favour of the surviving appellants to the effect that the rent was Rs. 10. Malik, J., one of the Judges who decided the case, observed that the true test for determining whether the appeal is competent after partial abatement is whether, having regard to the nature of the suit and the decree made, the appeal can be heard in the absence of the heirs of the deceased appellant.

The position in the present case is different. The trial Court passed a decree for partition and that decree was challenged in appeal by all the defendants. The decree proceeded on grounds common to them all and so also were their grounds of appeal. They were therefore entitled to the benefit of O. XLI, r. 4 of the Civil P. O. which runs as follows:—

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be".

It is no doubt true that in a suit for partition no decree can be made in the absence of any co-sharer. But it does not follow that a suit for partition cannot be dismissed against an absent defendant. Here the purpose of the appeal was to obtain a reversal of the decree for partition and dismissal of the suit. This purpose could be gained by the surviving appellants continuing the appeal after Rakhai's death. Indeed the heirs of Rakhai could complain, had the result of the appeal been to their detriment, that the Court should not have heard the appeal without waiting for the prescribed time for substitution. The plaintiff, however, cannot make any grievance out of this. In this connection

reference may be made to the cases of *Chintaman Nilkant v. Gangabai* (4), *Ram Sewak v. Lambar Pande* (5), *Somasundaram Chettiar v. Vaithilinga Mudaliar* (6) and *Satulal Bhattacharjee v. Asiruddi Shaikh* (7).

The facts in the Bombay case were that a suit for partition having been decreed, two of the defendants filed a joint appeal and pending its hearing, one of them died without her representative being brought on the record. The surviving appellant proceeded with the appeal which was ultimately allowed and the suit was dismissed. On second appeal by the plaintiffs it was contended that the lower Appellate Court ought not to have heard the appeal as it had abated. This contention was overruled and it was held that as the two defendants had appealed on grounds common to them both, the Court had power to hear the appeal and deal with the whole suit.

The suit in *Ram Sewak v. Lambar Pande* (5) was also a suit for partition. The suit was decreed by the trial Court and on appeal by the defendants one of them died pending its hearing and her heir not being substituted within time, the appeal, so far as she was concerned, abated. The contention was raised that the whole appeal abated. This contention was given effect to; but on second appeal the High Court overruled it.

The case in *Somasundaram Chettiar v. Vaithilinga Mudaliar* (6) related to a suit by Hindu reversioners for recovery of possession of properties said to have been improperly alienated during the lifetime of the limited owner. The suit having been decreed, some of the defendants appealed. Two of the appellants died and their representatives were not brought on the record. It was contended that the appeal, having abated so far as those two were concerned, could not proceed as regards the surviving appellants. This contention was overruled and their Lordships said

"The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of O. XLI, r. 4 of the Civil P. O. are wide enough to cover this case and enable this Court to set aside the decree as regards the whole of the plaintiffs' claim and not merely in respect of the interest of these appellants whose appeals have not abated".

In *Satulal Bhattacharjee v. Asiruddi*

(4) 27 B 284; 5 Bom. L R 90.

(5) 25 A 27; A W N 1902, 171.

(6) 40 M 846; 41 Ind. Cas. 516; A I R 1918 Mad. 794; 6 L W 253.

(7) 61 O 879; 154 Ind. Cas. 147, 38 O W N 743, A I R 1934 Cal. 703; 7 R O 435; 59 O L J 362.

Shaikh (7) which related to a suit for ejectment, the question arose whether an appeal which was preferred by the defendants could proceed after partial abatement due to the death of some of them. Their Lordships, applying the provisions of O. XLI, r. 4 of the Civil P. C. held that the appeal could proceed at the instance of the surviving appellants. They however accepted as correct the statement of law made by Mallik, J. in *Naimuddin Biswas v. Maniraddin Laskar* (3) that the true test is whether the appeal can be heard in the absence of the appellant who is dead.

The principles deducible from all these decisions including those cited by Mr. Mullick may be thus stated:—

(1) In a partition suit no effective decree can be made unless all the co-sharers are before the Court.

(2) In an appeal from a decree which proceeds on grounds common to all the appellants if there is partial abatement owing to the death of some of them, the surviving appellants may continue the whole appeal.

(3) Where the decree appealed from is of such a nature that the hearing of the appeal after partial abatement may result in the passing of two inconsistent decrees, the whole appeal must fail.

In the present case there was no abatement of the appeal on the death of Rakhal, because before the time for abatement came, the appeal was heard and decided. The whole appeal was still pending and the question is whether the Court could hear it in the absence of Rakhal's heirs. The answer to this is to be found in the second of the above-stated principles which may very well be applied here, though it is not a case of any abatement. The contention that the appeal was incompetent must, therefore, be overruled.

Coming to the merits of the appeal, it is necessary to mention certain facts. Out of the twenty-four Khewats, Nos. 2-1, 2-13 and 2-22 appear to have been recorded separately in the names of the plaintiff's predecessors-in-interest and No. 2-24 is recorded *ijmal*. Almost all the remaining twenty covering a total area of 24.10 acres were recorded in the names of the representatives of the third branch. The plaintiff in execution of his decrees for arrears of cess purchased Khewats Nos. 2-1, 2-13, 2-22 and 2-3rds share in the *ijmal* Khewat No. 2-24. According to the defendants they acquired by settlement or purchase some of the lands from the branches of Buchu and

Dakshin. These lands, it is said, form part of 234.10 acres included in the remaining twenty Khewats. The plaintiff claims that he purchased the undivided 2-3rds share of Buchu and Dakshin in the entire village and is therefore entitled to partition of the lands comprised in all the twenty-four Khewats. The learned District Judge has dismissed his claim for partition except with regard to the lands of Khewat No. 2-24 on the finding that there was a previous partition.

Apparently this is a finding of fact, but Mr. Mullick wants to assail it on the ground that in coming to this finding the learned District Judge has committed error of law. He argues in the first place that the learned Judge has merely relied on the entries in the Records of Rights, but those are not conclusive proof of partition. The learned District Judge's judgment, however, shows that in dealing with the question of previous partition, he considered the various documents in detail and after having done so came to the following conclusion:

"Broadly speaking the documentary evidence shows that for the last 90 years or so there has been separate possession of lands, and each branch of the family dealt exclusively with the lands in their own possession."

He therefore held that at least as regards the lands recorded separately, there could be no re-partition. There is no error of law in this finding.

It is next contended that the learned District Judge did not take a correct view of the effect of a judgment in previous suit *inter partes*. That suit was brought in 1845 by the predecessors-in-interest of some of the present defendants for a declaration of their exclusive title to a tank on the ground that it was included in their share which was allotted to them by partition which took place long ago, this partition being the same as that alleged in the present suit. On a reference to the appellate judgment Ex. 7, it appears that the Appellate Court dismissed the suit mainly on the ground that the plaintiffs failed to discharge the burden of proving that they had title to the disputed tank. In the present suit the trial Court took the view that the decision in the said suit of 1845 operates as *res judicata*. The learned District Judge has dissented from that view but it is said that the reasons given by him are not supportable in law. This may be so, but it is clear that the previous decision cannot operate as *res judicata* for the simple reason that the previous suit

was decided by a Munsif's Court which had no jurisdiction to try the present suit.

Mr. Mullick then contends that although the previous decision may not operate as *res judicata*, it is a very strong piece of evidence. In support of this contention, he relies on the Privy Council decision in *Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy* (8) and refers to the following passage:

"Their Lordships do not consider that this will found an actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform".

This decision must be read with reference to the facts of that case. The question as to the probative value of a finding in a previous suit depends on the nature of the finding and of the issues involved in the two different suits. In the present case the judgment of the trial Court in the suit of 1895 has not been produced and we do not know what were the issues framed there. Looking to the Appellate Court's judgment Ex. 7 it appears that the real question for consideration in the present suit was not at all in issue in the earlier suit. As I have already pointed out, the Appellate Court dismissed the suit on the finding that the plaintiffs failed to discharge the burden of proving their title. The broad question as to whether there was a partition of the entire village does not appear to have been considered or decided. The previous decision, therefore, is hardly of any assistance in the present suit. This is the view which the learned District Judge has apparently taken and there is nothing wrong in it.

Mr. Mullick next attacks that part of the judgment of the District Judge where he says that even if it were held that there had been no partition, this suit cannot succeed in its present form. In dealing with this aspect of the case, it is said, the District Judge lost sight of the distinction between the landlord's interest and the tenancy right with respect to those lands of which the defendants took settlement from the two branches of Buchu and Dakshin. Mr. Mullick's argument is that in those lands the defendants have only tenancy right while the plaintiff has the superior interest, and the claim for partition being in res-

pect of the superior interest, there is no reason for refusing partition of those lands. Indeed the learned District Judge's observations in this connection may be open to some criticism; but the question does not arise in view of his finding that there was a previous partition. What he really means is that if the plaintiff has any superior right in respect of the lands which are in the possession of the defendants in tenancy right, the plaintiff may seek his remedy otherwise but not in a simple suit for partition.

A further question was raised as to what was the effect of the sales in execution of the decrees for cess. On the one hand it was contended that they had the effect of rent sales under the provisions of s. 208 of the Chota Nag. Ten. Act; on the other hand that they were sales in execution of money decrees. This question is of no consequence because the suit must fail on the ground that there was a previous partition.

The appeal must, therefore, be dismissed with costs.

Rowland, J.—I agree, and on the merits of the appeal have nothing to add.

But on the preliminary point that it was not competent to the District Judge to decide the appeal in the absence of the legal representatives of defendant No. 5, Rakhal, I may indicate my view, as the point is of some importance. Mr. Mullick for the appellants sought to bring the matter within the rule that a decree against a dead man is void; and relied on O. XXII, r. 3 and the decisions under that rule. He argued that in a partition suit as in a mortgage suit all the persons having an interest in the property are not only proper but necessary parties; and that in the absence of any one of such parties, no new decree could be passed in appeal changing the title or status of the absentee, as declared by the Court below. Where the absentee is a respondent, there is abundant and uniform authority for saying that the decree cannot be changed to his disadvantage without his having an opportunity of being heard; and in cases where an appeal has become defective through the death of a respondent, (he being a necessary party to the suit) it has always been held that such an appeal cannot proceed in the absence of his heirs. The appeal having abated against the deceased is no longer properly constituted and the whole appeal must fail. This was, for example, the position in

(8) 48 O 460; 64 Ind. Cas. 231; 14 L W 265; 30 M C T 279; AIR 1922 PC 211; 48 IA 49 (PC).

Kalidyal Bhattacharjee v. Nagendra Nath Pakrosi (9), a decision the correctness of which I have no wish to question. Following this decision, in *Naimuddin Biswas v. Maniruddin Laskar* (3); the same rule was applied to the case where the deceased had been an appellant. It was said that the appeal of the deceased having abated, the appeal in his absence was incompetent and could not proceed: it was said that the appeal of one appellant being dismissed that of the remainder could not be allowed for the result would be that there would be contradictory judgments on the same point.

But the position where the constitution of a suit or appeal has become defective through the death of a defendant or a respondent against whom relief being claimed, has in other decisions been distinguished from the case where the consequences of the death of an appellant are to be considered. In the latter case, it has been held the surviving appellants can invoke the aid of O. XLI, r. 4 of the Code, if the decree appealed from proceeds on a ground common to all the plaintiffs or to all the defendants. The condition was fulfilled here.

The decision in *Naimuddin Biswas v. Maniruddin Laskar* (3) was considered in a later case of the same High Court in *Satulal Bhattacharjee v. Asiruddin Shaikh* (7), where it was held that the appeal did not abate as a whole and that, the appeal succeeding, the appellate decree enured for the benefit of all the appellants including the deceased.

The judgment approves the decision in the Madras High Court in *Sundaram Chettiar v. Vaithilinga Mudaliar* (6), which followed earlier decisions in *Ram Sewak v. Lambar Pande* (5), and *Chintaman Nilkant v. Gangabai* (4). The same principle has been applied to an appeal in a mortgage redemption suit in *Maung Byaung v. Maung Shawe Baw* (10).

I am of opinion that we ought to follow those decisions, that O. XLI, r. 4 gives a discretionary power to an Appellate Court to save the rights of parties from being defeated by a purely technical objection, and that this was a case within both the letter and the intention of the rule.

In the case before us it is to be noted that the appeal to the District Judge can in no sense be held to have abated because it was disposed of before the expiry of the

time prescribed for making an application to substitute the heirs of the deceased. No objection as to defect of parties taken at the hearing before the District Judge; if it had been taken, there was time to remedy it. In the memorandum of appeal to this Court, no mention is made of the alleged defect in the constitution of the appeal before the lower Appellate Court and I think it relevant to refer to O. I, r. 13 and O. I, r. 13. Order I, r. 9 lays down the principle that

"No suit shall be defeated by reason of the joinder or non-joinder of parties, and the Court in every suit, deal with the matter in controversy so far as regards the rights and interests of parties actually before it".

The principle is subject to necessary exceptions; but it seems to be the declared policy of the legislature to limit rather than to enlarge these. And O. I, r. 13, says that

"All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity.... and any such objection so taken shall be deemed to have been waived".

s.

Appeal dismissed

ALLAHABAD HIGH COURT
Privy Council Appeal No. 17 of 1939
August 11, 1939
BENNET AND VERMA, JJ.
RAI SRI KRISHNA MOHAN JI—
APPELLANT

versus

PURSHOTAM DAS AND OTHERS—
RESPONDENTS

*Civil Procedure Code (Act V of 1908), s. 110—
applicant, if can be allowed to enhance valuation
plaint for purposes of s. 110.*

A person applying for leave to appeal to His Majesty in Council has no right to allege before His Majesty that the valuation for jurisdiction was too low or that he should be allowed to enhance the valuation for the purpose of s. 110, Civil P. O.

P. O. A. for leave to appeal to His Majesty in Council.

Mr. K. B. L. Agarwal, for the Appellant.
Messrs. P. L. Banerji and Govind Lal, for the Respondents.

Order.—This is an application for leave to appeal to His Majesty in Council. The District Court allowed the appeal and there did not affirm the decree of the District Court below. The application is under s. 110, Civil P. O. It is necessary for the applicant to show that it comes within the provisions of that section in regard to valuation. The applicant was the plaintiff and the valuation in his plaint for the purpose

(9) 24 O W N 44; 54 Ind. Cas. 822; 30 O L J 217; A I R 1920 Cal. 264.

(10) 2 R 486; 84 Ind. Cas. 170; 3 Bur. L J 171; A I R 1924 Rang. 376.

jurisdiction was Rs. 9,000 and for the purpose of court-fee Rs. 5,081-4-0, the latter being based on the revenue of three villages and fifteen times certain annual profits from *muafi*. The application now alleges that the real value of the subject-matter is above Rs. 10,000 in the Court of first instance and in the appeal to this Court. To indicate this valuation, the learned Counsel takes the figures for revenue in three villages in the plaint and multiplies them by 20 and also multiplies the net profits by 20 instead of by 15. The result attained is Rs. 12,431. No ground is shown for this method of calculation and we are not satisfied that there is any evidence in the affidavit of any value that this is the correct method of valuation. As a matter of fact, from the time of the plaint in 1936 till the present year 1939, there has been a decline in the value of *samidari* property in Gorakhpur district from which this appeal comes, and in other districts in the Province. We are also not satisfied that an applicant before this Court has got any right to come to this Court in the present manner and allege that the valuation for jurisdiction which he put on his plaint in the trial Court was too low and that he should now be allowed to enhance the valuation for the purpose of s. 110, Civil P. O. No ruling has been cited by the applicant. For these reasons we dismiss this application for leave to appeal, with costs.

S. Application dismissed.

CALCUTTA HIGH COURT

First Appeals Nos. 82 of 1938 and 50 and 141 of 1937

May 10, 1939

R. C. MITTAL AND RAU, JJ.
PATTU KUMARI BIBI w/o RAI
DHANPAT SINGH NAWLAKHA—
PLAINTIFF—APPELLANT

versus

NIRMAL KUMAR SINGH NAWLAKHA
—DEFENDANT—RESPONDENT

Evidence Act (I of 1872), ss. 65 (e), 74 (1) (iii), 35—Powers-of-attorney—True copy in register of powers-of-attorney—Admissibility in proof of original entry—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2, (1)—Parties executing solenama, after decree—Effect of—Such solenama, if can be dealt with by executing Court under s. 47—Pardanashin lady—Deed of adjustment after passing of decree—Held on facts, the transaction embodied therein was binding on lady.

Every entry in the register of powers-of-attorney is "a public document" within the meaning of s. 74 (1) (iii), Evi. Act, being "a document forming

the act or record of the act" of an executive public officer in the discharge of a statutory duty imposed upon him. It follows that a true copy of the entry [which by virtue of s. 76, Evi. Act, is a certified copy within the meaning of s. 63 (1)] is admissible as proof of the original entry by virtue of s. 65 (e), Evi. Act. The weight to be attached to the entry depends upon the accuracy of the abstract of the power. But the Court is entitled to presume the correctness of the abstract in accordance with the usual presumption that official acts are regularly performed and hence the original entry itself is good evidence of the contents of the power-of-attorney and is relevant under s. 35, Evi. Act [p. 699, col. 2.]

Where subsequent to the decree the parties enter into a *solenama*, it has the effect of extinguishing in part the plaintiff's claim under the original decree and to that extent it is an "adjustment" of the decree within the meaning of O. XXI, r. 2 (1), Civil P. O. But even otherwise and as such, it is a matter to be dealt with by the executing Court under s. 47. 180 Ind. Cas. 378 (2), relied on. [p. 700, col. 1.]

There was a dispute between a *pardanashin* lady and her adopted son. It was referred to arbitrators. Their award was made a decree of the Court. Subsequently in the executing Court a *solenama* was filed, embodying the terms of settlement between them. The *solenama* showed that the provisions thereof were the natural results of the circumstances and the relations between the parties. There was nothing to indicate fraud. It was in evidence that before the execution of the *solenama* there were direct negotiations between the lady herself and her son and that she caused the terms which were agreed between them to be reduced to writing in the form of a note or draft and that the *solenama* was prepared in accordance with it.

Held, that the transaction embodied in the *solenama* was the free and intelligent act of the lady and was binding on her. 89 Ind. Cas. 649 (1), applied.

F. As. from an original decree and orders of Sub-Judge, Murshidabad.

Messrs. A. N. Bose, P. N. Mitter and Bhuban Mohan Saha (Jr.), for Appellant (in No. 82) and Respondent (in Nos. 50 and 141.)

Dr. S. C. Basak, Messrs. Panchanan Ghose and Paresah Nath Mukherji, for Respondent (in No. 82) and Appellant (in Nos. 50 and 141.)

Judgment.—(Appeal No. 82 of 1938)—This appeal arises out of a suit brought by the plaintiff-appellant, Pattu Kumari Bibi, against her adopted son, Nirmal Kumar Singh Nawlakha, in the Court of the Subordinate Judge, Murshidabad, for a declaration that a certain adjustment made on compromise on February 24, 1931, in respect of a decree of January 21, 1924 in Suit No. 17 of 1924 between the same parties was fraudulent, illegal, *ultra vires*, inoperative and invalid and therefore not binding on the plaintiff-appellant.

Nine issues were framed in the suit, of which the first four were decided in her favour. The other five were decided against her, with the result that the suit was dismissed with costs. Hence this appeal. Before dealing with the points raised in the appeal, it will be necessary to set out in some detail the nature of the decree of January 21, 1924, and of the adjustment of February 24, 1934. The plaintiff-appellant is the widow of a rich merchant and *zamindar*, Rai Dhanpat Singh Nawlakha of Azimganj. On the death of her sons, after her husband's death, she took the defendant-respondent as an adopted son in 1918. Subsequently, disputes arose between the mother and the adopted son which in January 1924, they referred to arbitration. The arbitrators made an award and on January 21, 1924, in Suit No. 17 of that year, the Subordinate Judge of Murshidabad made a decree in terms of the award. Those terms, so far as they are relevant for the purposes of this case, were that the management of certain scheduled lands were to remain with the son, but out of the income thereof he was to pay the mother a sum of Rs. 13,000 a year in four instalments, namely Rs. 3,000 in *Ashar*, 3,000 in *Aswin*, 3,000 in *Pous* 4,000 in *Chaitra*. It was further provided that as regards certain cash moneys which were in deposit in his *kuti* or firm in the mother's name, he was to pay her interest which, as to a sum of Rs. 34,000, would be calculated at 6 per cent. per year and, as to the balance, was fixed at the round figure of Rs. 1,000 per month. Thus, under the head of interest she was to get in all a sum of Rs. 14,040 per year, or Rs. 1,170 per month.

Some of the dues under the above decree having fallen into arrears, the plaintiff-appellant started Execution Case No. 73 of 1933 for realization of a sum of Rs. 48,334 from the defendant-respondent. This was in May 1933. On February 24, 1934, a joint petition was filed in Suit No. 17 of 1924 on behalf of both the parties stating that they had arrived at a compromise on certain terms (set out in the petition) and asking that the decree in the suit (of January 21, 1924) be adjusted accordingly and that the petition be treated as part of the decree and the award. On March 5, 1934, the Subordinate Judge passed an order allowing the petition. The terms set out in the petition were briefly these: (a) The arrears of Rs. 48,334 mentioned in the execution case plus certain additional

arrears of Rs. 22,336 that had accrued since, making a total of Rs. 70,700 were dealt with thus: (i) Nirmal Kumar paid down in cash Rs. 10,000; (ii) He was to pay a further sum of Rs. 15,000 spread over three years from *Chaitra* 1340 B. S. to *Magh* 1343 B. S. both inclusive, in 4 quarterly instalments, *Chaitra* Rs. 2,500, *Ashar* 800, *Aswin* 800, *Magh* 900—Rs. 5,000; (iii) For the balance of Rs. 45,700 he was to transfer certain scheduled lands to his mother with full rights of alienation and she was simultaneously to lease them back to him permanently but without any power of alienation and on a nominal annual rent of Re. 1. A detailed procedure for the execution and exchange of the necessary transfer deeds were also laid down. As soon as the conveyance to the mother was ready for execution and registration, Nirmal Kumar was to give her seven days' notice of the date appointed by him for the execution and registration of the lease and both deeds would be registered together. If he failed to execute the conveyance as stipulated, the entire compromise was to be treated as null and void and the original decree was to be liable to be executed in full; if on the other hand the mother defaulted, the son was to be under no obligation to convey the property to her, and the rest of the compromise would stand. On this last point there is a slight error of translation in the document, Ex. I, printed at pp. 12-13 of Part II of the paper-book in Appeal No. 82 of 1935. In para. 3 of the document in lines 28, 29 relating to what is to happen in the event of the mother's default, the words "nor shall this adjustment or compromise being considered null and void stand" should be "nor shall this *solenama* be considered null and void."

The right of the mother to get Rs. 13,000 annually as provided in the original decree was maintained but in slightly accelerated instalments. It will be remembered that under the original decree this sum was payable in four instalments, namely Rs. 3,000 in each of the months of *Ashar*, *Aswin*, and *Pous* and Rs. 4,000 in *Chaitra*. Under the compromise the entire sum of Rs. 13,000 became payable in 12 monthly instalments of Rs. 1,000 each, except for the *Magh* and *Phalgun* instalments which were fixed at Rs. 1,500 each. It was further provided in the terms that if Nirmal Kumar made default in payment of four consecutive instalments, the mother would be entitled to appoint a Receiver of the immovable pro-

erties mentioned in the schedule to the original award. The mother relinquished her claim to the entire interest of Rs. 1,170 per month due under the original decree, with a proviso that the claim would revive from the date of the auction sale, if the immovable properties mentioned in the Schedule to the original award were sold for arrears of revenue or rent. On the same day on which the aforesaid joint petition was filed in the parent suit, namely February 24, 1934, Nirmal Kumar also filed a petition in the execution case mentioning the aforesaid compromise and praying for disposal of the case according to O. XXI, r. 2, Civil P. O. The Pleader for the other side, Gouri Prasad Roy, endorsed on this petition the words "No objection" and signed it; and on that very day the execution case was disposed of "no full satisfaction" according to the petition. The suit out of which this appeal has arisen was, as already mentioned, for a declaration that "the adjustment on compromise made on February 24, 1934, in Suit No. 17 of 1924" was fraudulent, illegal, *ultra vires*, etc. The language of the plaint on this point is slightly ambiguous. The use of the words "illegal" and *ultra vires* would appear to indicate that the declaration sought was of the invalidity of the Court's order on the petition of compromise rather than of the compromise itself. On the other hand, the use of the word "fraudulent" and the particular date mentioned (February 24, 1934) suggest that the prayer was directed, not against the Court's order (which as regards Suit No. 17 of 1924 was passed on March 5, 1934), but against the petition of compromise itself. We shall assume for the purposes of this appeal that the plaintiff meant to attack both, the petition of compromise as "fraudulent" and the Court's orders thereon as "illegal" and *ultra vires*.

The plaintiff's case is set out in paras. 3 and 4 of plaint (there are two paragraphs in the plaint each of which is No. 4; both are relevant). In para. 3 she states that she was not aware of the defendant's prayer for final disposal of Execution Case No. 73 of 1933 on the basis of the compromise and that she did not instruct any Pleader, nor authorize anybody to instruct any Pleader, to consent to that prayer. She further states that her *tadbirkarak* or agent, Soubhagya Chand, was dishonestly induced by the defendant to mislead her Pleader and thereby procure the endorsement of "No objection" on the defendant's petition for

final disposal. As regards Suit No. 17 of 1924, she states in the first para. 4 of the plaint that the adjustment petition was filed without her knowledge or consent. She is a *pardanashin* lady and the defendant, it is said, fraudulently caused an adjustment petition to be filed by her agent, Soubhagya Chand. In the second para. 4 of the plaint she goes on to say that by this unauthorized act of Soubhagya Chand she has been deprived of a large sum of money due to her as interest. In fact, she continues, Soubhagya Chand had no real power-of-attorney to act for her. "The defendant fraudulently got the said *am-muktearnama* also executed in favour of the said Soubhagya Chand." The terms of the power were not read over to her; she received no independent instructions about its execution, it is not binding upon her, and Soubhagya Chand had no right to enter into any adjustment or compromise on her behalf. The adjustment of the decree for compromise is also attacked as illegal and *ultra vires*, inasmuch as it has substituted a new decree in place of the original decree. She first came to know of the fraud on January 30, 1937. These allegations of the plaintiff are traversed in para. 9 of the written statement of the defendant. Briefly, the defence position is that the plaintiff was fully aware of the compromise and that the petition of compromise was filed in Court with her knowledge and on proper instructions given by her to her Pleaders and her *am-muktear* Soubhagya Chand. The defendant further points out that in a subsequent proceeding, namely Execution Case No. 230 of 1936, the fact of the adjustment made in Execution Case No. 73 of 1933 was admitted by the plaintiff. On these Pleadings three main issues have been framed, namely Nos. 6, 7 and 8, mentioned in the Subordinate Judge's judgment. These issues are in the following terms:

"Issue No. 6: Was the petition of adjustment in Suit No. 17 of 1924 O. C. filed without the knowledge of the plaintiff and fraudulently? Issue No. 7: Was it signed and filed by the plaintiff's Pleader without any authority? Was the Pleader induced to sign and file it by fraud or misrepresentation? Issue No. 8: Was the adjustment improperly recorded? Is the order of recording the adjustment *ultra vires* and invalid?"

We shall deal first with Issues Nos. 6 and 7. They turn largely on questions of fact. On the side of the plaintiff there have been examined the plaintiff herself, P. W. No. 2, Lokendra Nath Roy (her latest Pleader in the suit), P. W. No. 3, Kharag Sing Kuthari

(a son-in-law of the plaintiff), and P. W. No. 4 Dharam Chand Boyed (brother of the plaintiff). For the defence there have been examined besides the defendant himself, D. W. No. 1 Pramatha Nath Roy (defendant's secretary), D. W. No. 2 Keshri Singh Boyed (defendant's cashier), D. W. No. 3 Pratap Singh Boyed (nephew of the plaintiff), D. W. No. 4 Gouri Prasad Roy (at one time a Pleader for the plaintiff) and D. W. No. 5 Jitendra Nath Banerjee (another Pleader for the plaintiff). The defendant's account of the circumstances that led up to the compromise in Execution Case No. 73 of 1933 is briefly this: when the execution proceedings had gone on for eight or nine months (they had been started in May 1933) Dhannu Lal, who was one of the arbitrators in the original award of 1924 sent word to him asking why he was quarrelling. Defendant replied that owing to the condition of his business it was not possible for him to pay the amounts mentioned in the award and that it would be much better if the matter could be compromised. This appears to have been communicated in due course to plaintiff, and on January 22, 1934, defendant received a letter, Ex. E (8), from Soubhagya Chand, who besides being the plaintiff's agent was also one of her sons-in-law. The whole of this letter is very important and its terms may be set out here in full:

"This letter is written by Soubhagya Chand Sett from Calcutta who sends greetings to Babu Saheb Nirmal Kumar Singhji Nowlakha of Azimganj. Received your kind letter. The day before yesterday Johar Mullji came and paid the sum of Rs. 2,000 (rupees two thousand). Now kindly come here immediately and see your mother and settle the matter. The 27th is the date fixed for the suit in respect of which I have already written to you. And now under any circumstances further adjournment cannot be taken. Please come here before the 25th with money, otherwise I shall start from here on the night of the 25th for the purpose of conducting the case and thereafter you cannot blame me. Accept blessings from the respected mother-in-law and also the blessings of your sister and accept obeisance of the children. Inform of your welfare and convey my blessings to the children.

Sd./- Soubhagya Chand Sett."

The defendant states that on receipt of this letter he went to Calcutta and there met Soubhagya Chand at his mother's place. The terms were discussed with his mother for three or four days and she got a draft of the terms prepared. This was in Calcutta. The draft was then brought by Soubhagya Chand to Berhampur where the execution proceedings were pending. Then Soubhagya Chand and Dharam Chand

brought a *solenama* or petition of compromise to the defendant at Azimganj for his signature. Defendant compared the *solenama* with the draft brought from Calcutta; they were in the same terms. Defendant then signed the *solenama* and paid Soubhagya Chand Rs. 10,000. Soubhagya Chand also signed the *solenama* which was then filed in Court. At the time when the terms were discussed with the plaintiff in Calcutta, there were present, on some days, Dhannu Lal and on some days, Keshri Singh; Jalim Singh also used to be present sometimes and once or twice Soubhagya Chand also. At the time when the terms were finally settled, there were present, besides the plaintiff and the defendant, Keshri Singh and Jalim Singh. Of the persons mentioned above, Dhannu Lal and Jalim Singh are dead and Soubhagya Chand has for obvious reasons not been examined by either side. Keshri Singh, who is the defendant's cashier, has been examined on behalf of the defence. He is D. W. No. 2. He states that he brought the defendant to Calcutta for a settlement of his differences with the plaintiff. Defendant, witness and Dhannu Lal saw the plaintiff together in Calcutta and upon defendant's request backed by Dhannu Lal, the plaintiff agreed to give up her claim of Rs. 14,040 as interest for ever and wanted Rs. 25,000 to be paid in cash. She further desired to have a conveyance of certain properties for the balance, agreeing to settle them again with the defendant on an annual rent of Re. 1. Defendant said he was unable to pay Rs. 25,000 immediately in cash and offered to pay Rs. 10,000 down and the balance of Rs. 15,000 in instalments. The plaintiff agreed to this. It was also agreed between the parties that the annual payment of Rs. 13,000 to the plaintiff should be made in monthly instalments. The plaintiff also wanted that in the event of the defendant's *zamindari* being sold away, the sum of Rs. 14,040 remitted by her would have to be paid. This in brief is D. W. No. 2's evidence.

It will be seen that it substantially bears out the defendant's own account, the terms described by the witness being substantially those that have been embodied in the *solenama*. One slight discrepancy needs notice, as it has been commented upon by the learned Advocate appearing for the plaintiff. Keshri Singh goes on to state in his cross-examination that during the discussions between the defendant and the plaintiff in Calcutta nothing was mentioned

as to what would happen if the conveyance was not executed. In the *solenama* filed in Court, however, there is provision for this contingency; if the conveyance was not executed by the defendant as stipulated in the deed, the entire compromise was to stand annulled. From this, it has been sought to be argued that whatever may have been discussed between the parties, the actual terms of the *solenama*, which was subsequently filed in Court, were not discussed and the plaintiff, therefore, cannot be said to have understood all that was in the *solenama*. We think that the foundation is much too slight for any such inference. Witness Keshri Singh in his evidence is speaking of negotiations which took place nearly four years before and it is quite possible that he may have forgotten a detail here or there of what was discussed during many days. The fact that there were prolonged negotiations for three or four days with the plaintiff herself is proved by this witness and he also states most of the terms agreed upon. The fact that Soubhagya Chand brought with him from Calcutta a written record of the terms arranged is proved not only by the defendant himself but also by witness Pramoth Nath Roy, D. W. No. 1 and Gouri Prasad Roy, D. W. No. 4. They both state that Soubhagya Chand brought with him a note of the terms, that the plaintiff's Advocate Babu Kali Krishna Banerji drafted the *solenama* with reference to that note and that defendant's Pleader Shyama Pada Roy prepared a fair copy of the draft for filing in Court. There is no ground whatever for disbelieving these witnesses and they confirm defendant's statement that the *solenama* put into Court merely embodied the terms already contained in the draft or note brought by Soubhagya Chand. The defendant has further stated that the draft was actually shown to him by his mother before he left Calcutta on the conclusion of the discussion between him and her. The plaintiff of course denies all knowledge of the negotiations which, according to the defence, preceded the filing of the *solenama*. She says in her evidence that she first learnt of the *solenama* in the preceding *Magh* (January/February 1937) from her Pleader Loken Babu, who is P. W. No. 2. She says that she enquired about the execution case from him in the latter part of January, 1937, and that when he told her of the *solenama* she was surprised and said she knew nothing about it or its terms. Ultimately, therefore, we have only plaintiff's

own denial to set against the evidence of the defendant and the other defence witnesses that we have mentioned. We have no hesitation in preferring the latter to the former, for the following reasons:

The fact that the defendant visited Calcutta in order to have matters settled is rendered probable by Soubhagya Chand's letter of January 22, 1934, Ex. E (8), written to the defendant from Calcutta in which Soubhagya Chand says, amongst other things, "Now kindly come here and see your mother and settle the matter." We have already quoted the whole of this letter; there is nothing in it which suggests that the writer was colluding with the defendant against the plaintiff. Indeed, the warning to the defendant that unless he came before the 25th, the writer would have to prosecute the suit and "thereafter you cannot blame me" points against any such collusion. We must, in this connection, mention another important piece of evidence. On November 12, 1937, in the course of her examination on commission, plaintiff was asked on what terms Soubhagya Chand and Nirmal Kumar were and she replied: "Now they are on good terms. They have been on good terms since a short time—say one year." As they could not possibly collude against the plaintiff before they were on good terms with each other it follows from this statement that the letter of January 22, 1934, must have been written long before there could be any collusion. Some comment has been made by the learned Advocate for the plaintiff-appellant as regards the payment of Rs. 2,000 mentioned in the letter and the suggestion has been thrown out that the money was probably a bribe to Soubhagya Chand. There is no basis at all for this suggestion. When the plaintiff was specifically questioned whether she had received Rs. 2,000 from Nirmal Kumar in *Pous* or *Magh* 1340 B. S. (January 1931) through Johar Mullji she could only say "I do not remember." It is incredible that she did not keep accounts of the large sums of money which she was receiving from time to time from Nirmal Kumar and was not in a position to answer the question more definitely than by saying that she did not remember. We are not satisfied that she did not receive the aforesaid sum of Rs. 2,000 or that the defendant-respondent, Nirmal Kumar, intended the sum as a bribe to Soubhagya Chand. It is significant that the payments of Rs. 2,500

and Rs. 1,000 set out in Ex. F and Ex. F (1) whose receipt the plaintiff had to admit, were also made through Johar Mullji. In all the circumstances of the case we see no reason for refusing to accept the letter of January 22, 1934, at its face value. It is clear from its terms that it contained an urgent invitation to the defendant to go and settle matters with his mother and it therefore supports his version that he actually went to Calcutta and negotiated with her. There is further support for this version in Ex. O. This is a certified copy of the petition filed in the Subordinate Judge's Court on January 27, 1934, signed on behalf of the plaintiff by her Advocate, Kali Krishna Banerji and on behalf of the defendant by his Pleader Shyama Pada Roy. The petition was filed in connection with Execution Case No. 73 of 1933 and the objection preferred therein. In this joint petition the parties stated that negotiations for settlement by compromise were going on between them and had advanced a long way. They accordingly prayed that the case be adjourned for two weeks for a compromise. Ex. 5 (b) which has been printed in Part II of the connected Appeal No. 50 of 1937 shows that upon this joint petition the Court adjourned the case to February 10, 1934. It is therefore clear that negotiations were in progress at about this time as stated in the defendant's version.

Babu Gouri Prasad Roy, who was at one time a Pleader for the plaintiff, has given evidence in this case for the defence. He is D. W. No. 4. He states that in the beginning of the year 1934 he was the plaintiff's Pleader in an income tax case. He filed a petition on her behalf that as she had no income in 1339 B. S. (1932-33) she could not be assessed to tax. In support of that petition he filed on her behalf a certified copy of the *solenama* of which she now denies all knowledge. The witness further states that the *vakalatnama* which he filed in the Income tax Office bore the plaintiff's signature in Hindi and was delivered to him by Dharam Ohand, who is her brother. As the result of the petition in the income-tax case, the plaintiff was not assessed to income-tax. Ex. O. shows that on March 9, 1934, Upendra Nath Banerji, who is Pleader Gouri Prasad Roy's clerk, applied for a certified copy of the *solenama*. It thus bears out the Pleader's statement that a certified copy of the document was filed in the income-tax case. We see no reason for disbelieving the Pleader in question. The circumstances in which, and the

precise purpose for which, the *solenama* was filed in that case might have been elucidated by production of the relevant documents from the Income-tax Office. As these documents are confidential and the defendant could not obtain copies himself, he offered to pay the plaintiff all necessary costs if she would take out the copies. The offer was not accepted, with the result that we have to rely on the Pleader's evidence for the purpose of ascertaining what took place in the course of the income-tax proceedings. As we have already said, we see no reason for disbelieving him. An attempt was made on behalf of the appellant, on the strength of the letter Ex. E (5) which is a letter written on May 27, 1934, by the plaintiff to the defendant, to suggest that she left him to conduct the income-tax proceedings for her, but judging from the date of the letter (May 27, 1934) we doubt very much whether this particular letter had any reference to the assessment for 1932-33 in respect of which the Pleader Gouri Prasad Roy appeared for the plaintiff. As already remarked, the plaintiff had it in her power to obtain certified copies of the relevant papers from the Income-tax Office to prove exactly what took place; not having produced those papers, even after the defendant had offered to pay for copies, she cannot ask us to disbelieve the Pleader. There is thus evidence to show that she was not only aware of the *solenama* but actually used it for the purpose of obtaining a remission of income-tax.

It will be remembered that one of the terms of the *solenama* was that the defendant was to execute a conveyance of certain lands to the plaintiff, who was simultaneously to lease them back to the defendant. By way of prescribing the procedure for the exchange of these documents, the *solenama* provided that the defendant should serve a notice on the plaintiff as soon as the conveyance was ready, mentioning a date for the stipulated exchange. It seems to us that these particular provisions by their very nature point against any fraud. Had there been any intention to defraud the plaintiff, those who were perpetrating the fraud would not have provided for a procedure which was bound to bring the fraud to the notice of the plaintiff almost at once. We say "almost at once," because the *solenama* was executed on February 24, 1934, and the stipulated notice had to be served upon the plaintiff before the end of the following *Chaitra*, i. e. before the middle of April 1934. That a notice of this

kind was actually served on the plaintiff admits of no doubt. Ex. D is a certified copy of the notice bearing the signature of the defendant's Pleader, Shyama Pada Roy. The notice was dated March 29, 1934, and a copy of it was filed in the Subordinate Judge's Court on the same day. It was addressed to the plaintiff at her Lake Road residence in Calcutta. It mentioned April 10, 1934, as the date appointed for the simultaneous registration of the conveyance and the lease and it warned the plaintiff that if she defaulted in the execution and registration of the lease, the defendant would not be bound to execute and register the conveyance. The plaintiff has admitted having signed the postal acknowledgment receipt for the registered letter by which the notice was sent to her. She has further admitted that she had the letter with her for two or three days, but she makes the amazing statement that she had no curiosity at all to know where the letter came from or what it contained. She says she handed over the letter to Soubhagya Chand and said to him "some letter has come, take it with you." We do not believe this statement. She must have informed herself of the contents of the notice. The postal acknowledgment receipt bears the date March 31, 1934. Thus, this part of the evidence in the case shows that the *solenama* or compromise was a *bona fide* transaction and was actually acted upon in respect of one of its important terms, namely the service of a notice appointing a date for the exchange of the stipulated document.

We now come to certain payments which also indicate that the *solenama* was acted upon by the parties. Exs. F and F (1) are two receipts granted by the plaintiff. They both bear her signature. The first of them is dated April 15, 1934, and is for a sum of Rs. 2,500 received from Nirmal Kumar "in respect of the *kist* of the month of *Chaitra*." The second is dated April 23, 1934, and is for a sum of Rs. 1,000 received from Nirmal Kumar "in respect of the *kist* of the month of *Baisakh*." The significance of these payments is that they can only be related to the *solenama*. Under the original award of January, 1924, the *Chaitra kist* was Rs. 4,000. It was only under the *solenama* that there was a *Chaitra kist* of Rs. 2,500. The learned Advocate for the plaintiff has sought to get over this difficulty by suggesting that possibly the payment referred to in Ex. F was towards the *Chaitra kist* of Rs. 4,000 mentioned in the original award.

That is to say, that it was a part payment of that *kist*; but this is not the natural meaning of the words in the receipt. Moreover, if the sum was intended as a part payment, there would have remained Rs. 1,500 still to be paid in respect of the *Chaitra kist*; but we find that only eight days later, another sum of Rs. 1,000 whose receipt is acknowledged in Ex. F (1), was credited, not against any balance of the *Chaitra kist* but against the *Baisakh kist*. It is therefore clear that Ex. F cannot be explained away as relating to a part payment of the *Chaitra kist* of the original arbitration award. It can only be related to the *Chaitra kist* of Rs. 2,500 mentioned in the *solenama*. Similarly, under the original award, there was no specific *Baisakh kist* of Rs. 1,000. We only find such a specific *kist* in para. 6 of the *solenama*, which relates to the sum of Rs. 13,000 annually payable to the plaintiff and prescribes the monthly instalments in which it is to be paid, the *Baisakh* instalment being fixed at Rs. 1,000. Here again, an ingenious attempt has been made on behalf of the plaintiff-appellant to connect the payment with para. 6, not of the *solenama*, but of the original award, under which a sum of Rs. 1,000 was payable to her as monthly interest on a portion of the cash deposit standing in her name. There is, however, the same difficulty as before: if we hold that these two payments of Rs. 2,500 and Rs. 1,000 were made under the original award, they should both have been towards the *Chaitra kist* of Rs. 4,000 mentioned in para. 5 of the award. It is nobody's case that she received any further payments in the eight days' interval between these two. There is a further difficulty in that the total monthly instalment on account of interest under para. 6 of the original award was not Rs. 1,000 but Rs. 1,170 (see, for example, para. 7 of the plaintiff's execution petition, Ex. A, in Execution Case No. 230 of 1936). In our opinion, the payment can only be explained on the footing that they were made under the *solenama*; they thus furnish additional evidence that the *solenama* was being acted upon by both parties at this time.

Another important piece of evidence which goes to show that the plaintiff-appellant was aware of the *solenama* is the petition that was filed on her behalf in Execution Case No. 230 of 1936. This petition, Ex. A, was filed in the Subordinate Judge's Court on September 19, 1936, and purported to be for the

execution of the decree of January 21, 1934. Paragraph 11 of the petition sets out the mode in which the assistance of the Court was sought:

"The judgment-debtor having failed to execute the sale deed and do other acts in accordance with the terms of settlement arrived at in the former execution case, the said settlement has stood cancelled and there has been cause for execution of decree."

It is clear, therefore, that if this petition was filed with the knowledge of the plaintiff, it completely disproves the case which she now seeks to make out that she was not aware of the *solenama* until some time in January 1937. That the petition was filed with her knowledge has been established by the evidence produced. Dharam Chand, brother of the plaintiff and a witness on her side (P. W. No. 4), has admitted that it was according to her instructions that he asked her Advocate Kali Krishna Banerji to file the execution case. The contents of the petition were verified by Dharam Chand himself, who, by an affidavit, filed in Court on the same date, (September 19, 1936), stated that he is a brother of the plaintiff lady and, having knowledge of and being fully conversant with the facts, was a fit person to verify the execution petition. The petition bears the signature of the plaintiff's admitted Advocate, Kali Krishna Banerji, who accepted the *vakalatnama* from Dharam Chand, Ex. K (1). These facts prove that both the plaintiff and her brother, Dharam Chand, were fully aware of the *solenama*. The execution petition of September 19, 1936, proceeded on the basis that the sale deed stipulated in the *solenama* not having been executed, the original decree of January 1924 became liable to be executed in full. In answer to this, on December 18, 1936, the defendant's Pleader served a notice upon the plaintiff's Pleader drawing his attention to certain documents. Amongst these documents were the notice sent to the plaintiff by registered post on March 29, 1934, and her acknowledgment of the notice dated March 31, 1934. As the result, on February 3, 1937, the petitioner withdrew the Execution Case (No. 230 of 1930) alleging that the entries in the "prayer" column thereof had not been according to her instructions and were due to her Pleader's inadvertence. The circumstances in which the execution petition was filed have already been detailed and we have no doubt whatever that there was inadvertence at all.

Against this mass of evidence in favour

of the defendant-respondent's version there is only one circumstance of any importance that needs consideration. It has been contended that the terms of the *solenama* are so one-sided and unfavourable to the plaintiff-appellant that she cannot possibly have consented to them. Now, it is perfectly true that by the *solenama* she relinquished a good deal that was due to her under the original award: not only did she give up her claim to a good portion of the arrears but she also gave up her claim to the recurring monthly interest of Rs. 1,170 due to her under para 6 of the award. But we have to consider the circumstances under which the relinquishment took place. Admittedly, payments under the original award were greatly in arrear. Clearly, therefore, the defendant was finding it difficult to make these payments. His business was deteriorating. The parties were related as mother and son. Even after the relinquishment, she would still be entitled to get Rs. 13,000 per year, which is sufficient for a widow to live in comfort. In these circumstances it does not seem to us at all unnatural that upon the son's importunity she agreed to give up her claim to the recurring interest and also to a portion of the past arrears. The rather peculiar transaction by which, in return for the wiping out of the past arrears, the defendant was to execute a conveyance in favour of the plaintiff in respect of the family dwelling house and certain adjoining lands which she was to lease back to him simultaneously, has also been explained by the defendant in his evidence. It was really a device to prevent prospective creditors seizing the properties: had he remained their owner, creditors could have had them attached and sold in execution, but if he became a mere lessee with no powers of alienation and with no power to his creditors to put them to sale in execution, they might be saved. The double transfer provided for in the *solenama* had, therefore, the merit not only of giving the plaintiff something, however nominal, for her relinquishment of certain arrear payments, but also of serving at the same time to protect the dwelling house and lands in question from being sold in execution of the prospective debts of a dwindling business, to the ultimate detriment of the defendant's children. We must also remember that the *solenama* specifically provided for the appointment of a Receiver in the event of the defendant defaulting in the payment of the new instalments: this was clearly a term to the advantage of the plain-

tiff and a term which did not occur in the original award.

Considering the *solenama* as a whole, we find nothing in its provisions which cannot be explained as the natural result of the circumstances of the time and the relationship between the parties; there is nothing in them to indicate fraud. We find on the evidence that the execution of the document was preceded by direct negotiations between the plaintiff herself and the defendant, that the plaintiff caused the terms which were agreed between them to be reduced to writing in the form of a note or draft, and that the *solenama* was prepared with reference to and in accordance with the terms of this note or draft. It follows that in our view the transaction embodied in the *solenama* was "the free and intelligent act" of the plaintiff, so as to satisfy the criterion laid down by the Privy Council in *Farid-un-nisa v. Mukhtar Ahmad* (1). It is, therefore, binding upon her although doubtless at the instance of certain interested parties, she is now seeking to repudiate it. We have no hesitation in finding in favour of the defendant-respondent on Issues Nos. 6 and 7. Before turning to Issue No. 8, we ought to say a few words about the power-of-attorney, dated April 26, 1933, purporting to have been executed by the plaintiff in favour of Soubhagya Chand. In view of our findings on Issues Nos. 6 and 7 and particularly of the finding that the *solenama* embodied the result of direct negotiations between the plaintiff herself and the defendant, it is strictly speaking immaterial whether power-of-attorney by which Soubhagya Chand signed the *solenama* on her behalf was good or bad. Nevertheless, since the issue has been raised, we think it necessary to record our decision on the point. The learned Subordinate Judge has, after considering the evidence very fully, come to the conclusion that the plaintiff executed the power-of-attorney in favour of Soubhagya Chand with full knowledge and understanding of the terms and that there was no deception upon her in that connection. This finding, so far as it negatives fraud, has not been challenged before us during the hearing of the appeal. Indeed, as we have already pointed out, according to the plaintiff herself, "the good terms" bet-

ween Soubhagya Chand and the defendant began only about a year before 1937, so that the power-of-attorney of April 1933, could not have been the result of any collusion between them. It is not necessary to repeat the grounds upon which the Subordinate Judge has arrived at his finding on this part of the case; we think it is sufficient to state that we accept that finding.

It was, however, contended before us on behalf of the plaintiff-appellant that the Subordinate Judge was wrong in admitting, as evidence of the contents of the power-of-attorney in question, Ex. G which purports to be a true copy of an entry in the register of powers-of-attorney kept in the Registration Office. We consider that the copy was properly admitted. The register of powers-of-attorney is maintained by the Registering Officer under certain rules made by the Inspector-General of Registration under s. 69, Registration Act, 1908. Every entry in that register is therefore "a public document" within the meaning of s. 74 (1) (iii), Evi. Act. being "a document forming the act or record of the act" of an executive public officer in the discharge of a statutory duty imposed upon him. It follows that a true copy of the entry (which by virtue of s. 76, Evi. Act, is a certified copy within the meaning of s. 63 (1)) is admissible as proof of the original entry by virtue of s. 65 (e), Evi. Act. How far the original entry itself is good evidence of the contents of the power-of-attorney is a slightly different question. It is undoubtedly relevant under s. 35, Evi. Act. The weight to be attached to the entry depends upon the accuracy of the abstract of the power which appears to be the sixth column of the entry. According to this abstract the power was a general power-of-attorney authorizing the agent, *inter alia*

"to adjust, compromise and submit any account, debts, claims, demands and disputes touching any matters which now subsist or may arise between the principal and Nirmal Kumar Singh Nawalakha;"

also

"to abandon or compromise any suit, action or proceedings if the attorney thinks, necessary; to appoint advocates, attorneys, vakils, solicitors pleaders, *muktears* revenue agents" and so forth. This abstract is as already mentioned made by the Sub-Registrar in the discharge of his official duty and we think that the Court is entitled to presume its correctness in accordance with the usual presumption that official acts are

(1) 52 I A 342; 89 Ind. Cas 649; AIR 1925 P O 204; 47 A 703; 28 O O 338; 2 O W N 662; 49 M L J 758; 43 O L J 531; 23 A L J 1000; (1925) M W N 318; 12 O L J 656; 30 O W N 337; 28 Bom. L R 193 (P O).

regularly performed. We have therefore no doubt that Ex. G was properly admitted and properly given full weight. The original power, it may be remarked, was called for by the defendant from the plaintiff, but was not produced, presumably because it was not with her: even so, secondary evidence is admissible under s. 65 (e), Evi. Act. It follows that even if we had not found (as in fact we have) that the terms of the *solenama* were discussed and agreed with the plaintiff direct, the execution of the *solenama* by Soubhagya Chand on the strength of his power-of-attorney would have been sufficient to make its terms binding upon his principal. We have already had occasion to point out that there is no basis for the suggestion that Soubhagya Chand had been bribed by the defendant;

We now turn to Issue No 8: "Was the adjustment improperly recorded? Is the order of recording the adjustment *ultra vires* and invalid?" To decide this question we must revert for a moment to the terms of the *solenama*. On the date on which the *solenama* was filed in Court (February 24, 1934) the plaintiff-appellant had a claim under the original decree of January, 1934, to the following sums immediate or prospective: (a) Past arrears up to *Chaitra* 1340 B. S., Rs. 70,700; (b) Future payments: (i) Rs. 13,000 per year in four instalments out of the income of certain landed properties, (ii) Rs. 1,170 per month as interest on certain deposits. By virtue of the *solenama*, (a) was discharged by on immediate payment of Rs. 10,000, a prospective payment of another Rs. 15,000 in certain instalments during the next three years and subject to certain conditions the conveyance of certain lands to the plaintiff; (b) (i) was left intact except that the instalments were made monthly and provision was made for the appointment of a Receiver in the event of continuous default; (b) (ii) was remitted until the happening of a specified but uncertain event, *viz.*, an auction sale for arrears of revenue or rent. It is clear therefore that the *solenama* had the effect of extinguishing in part the plaintiff's claim under the original decree and to that extent it was in our opinion an "adjustment" of the decree within the meaning of O. XXI, r. 2 (1). But even otherwise the matter appears to us to be covered by the decision of their Lordships of the Judicial Committee of the Privy Council in the recent case in *Oudh Commercial Bank, Ltd.*

v. Thakurain Bind Basni Kuer (2). In that case their Lordships pointed out (p. 510*, *loc cit*) that the Civil P. O.

"contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge, or satisfaction of the decree, the provisions of s. 47 involve that questions relating to such terms may fall to be determined by the executing Court"

They further observed (p. 511* *loc cit*), that if an agreement is

"intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under s. 47."

The result is that even if the *solenama* in the present case is held not to have been an "adjustment" within O. XXI, r. 2 (1), nevertheless, being an agreement "intended to govern the liability of the debtor under the decree and to have effect upon the time and manner of its enforcement," it was a matter to be dealt with under s. 47. Therefore, the learned Subordinate Judge was justified in placing it on the record of the original decree and in disposing of Execution Case No. 73 of 1933 on the basis of its provisions. We accordingly decide this issue against the plaintiff-appellant. In the result this appeal is dismissed with costs.

Appeal No. 50 of 1937 (F. M. A.) and Appeal No. 141 of 1937 (F. M. A.)—These appeals which are connected with Appeal No. 82 of 1938 are not pressed. They are accordingly dismissed with costs.

D. *Appeals dismissed.*

(2) 43 O W N 501; 180 Ind. Cas. 378; A I R 1939 P O 80; I L R (1939) Kar 136; 14 Luck. 192; 1939 O L R 187; 11 R P O 176; 1939 O W N 313; 5 B R 476; 1939 R D 208; (1939) 1 M L J 652; 69 O L R 317; 41 Bom. L R 708; 50 L W 39; (1939) A L J 481 (1939) M W N 692; 66 I A 84 (P O).

*Pages of 43 O W N—[Ed].

ALLAHABAD HIGH COURT

Criminal Appeal No. 619 of 1939

September 11, 1939

MULLA, J.

AKBAR HUSAIN KHAN—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 476-B, 195 (3)—Special Judge making complaint under s. 476 for offence committed in case under U. P. Encumbered Estates Act—Appeal from such order—Forum.

Where a person commits perjury in the Court of a Special Judge in a case under the U. P. Encumbered Estates Act and the Judge makes a complaint against him under s. 476, Criminal P. O., the Special

Judge acts only as a Civil Court [irrespective of the fact that the Court is further invested with special powers under the Encumbered Estates Act. The Special Judge is primarily Civil Judge and if he takes any action under s. 476, Criminal P. O., in an ordinary civil case, whatever its valuation, his order would be appealable to the District Judge and not to the High Court.

Or. A. from the order of the Special Judge, Mirzapur, dated July 8, 1939.

Mr. M. A. Aziz, for the Appellant.

Judgment.—This is an appeal under s. 476-B, Criminal P. O. It appears that the appellant, Akbar Husain, gave evidence in the Court of the Special Judge, First Grade, Mirzapur, in a case under the Encumbered Estates Act. The learned Special Judge came to the conclusion that the appellant had committed perjury and has accordingly made a complaint against him under s. 476, Criminal P. O. It is obvious to my mind that in taking action under s. 476, Criminal P. O., the learned Special Judge has acted only as a Civil Court irrespective of the fact that the Court is further invested with special powers under the Encumbered Estates Act. The learned Special Judge is primarily Civil Judge of Mirzapur and if he takes any action under s. 476, Criminal P. O., in an ordinary civil case, whatever its valuation, his order would be appealable to the District Judge and not to this Court. Section 476-B clearly provides that a person against whom a complaint has been made

"may appeal to the Court to which such former Court is subordinate within the meaning of s. 195, sub-s. (3)."

Section 195, sub-s. (3) provides that

"where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate."

From these provisions of law it is clear in my judgment, that any order passed by the Civil Judge of Mirzapur under s. 476, Criminal P. O., making a complaint for an offence against any person would be appealable to the District Judge and not to this Court. The question therefore is whether the fact that the order appealed from in the present case has been made in connection with a case under the Encumbered Estates Act takes it out of the purview of the above provisions of law. In my view the answer is in the negative. The learned Special Judge in making a complaint under s. 476, Criminal P. O., has not passed an order under the Encumbered Estates Act which would be appealable to this Court under s. 45 of that Act. It is merely an order

under s. 476, Criminal P. O., by a Civil Court and the question of the forum of appeal from that order has to be decided in the light of the provisions of s. 476-B read with s. 195, Criminal P. O. In accordance with those provisions the appeal would lie, as stated above, in the Court of the District Judge and not in this Court. I therefore hold that this appeal does not lie in this Court and accordingly order that it should be returned for presentation to the proper Court.

B.

Order accordingly.

LAHORE HIGH COURT

Civil Revision No. 117 of 1939

May 4, 1939

DALIP SINGH, J.

JARNAIL SINGH AND ANOTHER—

DEFENDANTS—PETITIONERS

versus

BAHADUR SINGH, PLAINTIFF AND OTHERS,

DEFENDANTS—RESPONDENTS

Hindu Law—Suit by karta on pro-note—Plea of repayment urged by executors, not proved—Form of decree.

In a suit on a pro-note by the karta of a joint Hindu family when the alleged partition or separation between him and other members and the plea of repayment urged by the executors of the pro-note are not proved, all that is necessary is to declare that a decree is given to the plaintiff as karta of the joint family. It is wrong to add that as the other members had pleaded that the executors of the pro-note, had repaid the money, therefore they were not entitled to any share in the amount due on the pro-note because there is no share in the amount arising or anything else.

C. R. for the revision of the decree of the Senior Sub-Judge, Amritsar, dated November 8, 1938.

Mr. Hans Raj Mehta, for the Petitioners.

Mr. Shamair Chand, for the Respondents.

Order.—The plaintiff in this case alleging that he alone was joint with his father and his nephews had been separated by the plaintiff's father from the joint family, brought his suit against the defendants on a pro-note. The nephews who were made parties to the suit denied the alleged separation. The obligees under the pro-note pleaded payment and raised other pleas which do not concern us now. The trial Court held that the alleged partition was not proved and to an oral request that the plaintiff was anyhow entitled to a decree as karta of the joint Hindu family if his alleged separation was not proved, the trial

Court held that it would be dangerous to grant this decree which was no part of the plaintiff's original case. It therefore dismissed the plaintiff's suit. On appeal, the learned Appellate Court held that the alleged partition or separation was not proved but as the plaintiff was the *karta* of the joint Hindu family which in the absence of proof of separation must be presumed to exist, it granted the plaintiff a decree holding that the plea of re-payment urged by the executants of the pro-note was not proved. It added, however, a sentence that as defendants Nos. 3 and 4, namely the nephews of the plaintiff, had pleaded that the defendants, the executants of the pro-note, had re-paid the money, therefore they were not entitled to any share in the amount due on the pro-note. This sentence is of course incorrect on the findings of the lower Appellate Court. There is no share in the amount arising or anything else. All that is necessary is to declare that a decree is given to the plaintiff as a *karta* of the joint Hindu family. The decree therefore is varied to this extent only, otherwise the petition for revision is dismissed. No order as to costs.

D.

Decree varied.

SIND JUDICIAL COMMISSIONER'S COURT

Miscellaneous Appeal No. 13 of 1937

May 16, 1939

DAVIS, J. C. AND TYABJI, J.

TIKAMDAS HOTUMAL AND ANOTHER

—APPELLANTS

versus

KISHNOMAL JESSOMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expt. V, O. II, r. 2—Partition suit—Failure to ask for mesne profits from date of suit until delivery of possession—Another suit for recovery of mesne profits, if barred.

Order, II, r. 2, must be read with Expt. V to s. 11, Civil P. O., and the relief claimed under Expt. V to s. 11 is a relief arising from the same cause of action; and the fact that under O. II, r. 4, mesne profits may be claimed in the suit for recovery of immovable property emphasizes the fact that the suit for recovery of immovable property and the suit for mesne profits may arise from two separate causes of action. But the fact that a plaintiff may under O. II, r. 4, join in one suit two causes of action, does not mean that he must necessarily do so, or fall under the bar imposed by O. II, r. 2 and s. 11, Expt. V. Plaintiff may, of course, anticipate in the suit for partition that certain property will fall to his share; he may anticipate that after the final decree, he will not be given delivery of possession and he may in his suit for partition ask for mesne profits from the

date of suit until delivery of possession. But if he does not do so, another suit for recovery of mesne profits is not barred.

(Case-law reviewed.)

Misc. A. against the order of the First Class Sub-Judge, Sukkur, dated January 5, 1937.

Mr. Fatehchand Asudamal, for the Appellants.

Mr. Dipchand Chandumal, for the Respondents.

Davis, J. C.—This is an appeal from the judgment of the First Class Subordinate Judge, Sukkur, in which he allowed an appeal from a judgment of the Joint Subordinate Judge at Sukkur, who dismissed the plaintiff's suit for mesne profits, on the ground that he should have asked for mesne profits in the partition suit to which he was a party. The learned trial Judge relied principally on the two cases, one reported in *Atmaram Bhaskar v. Parashram Ballal*, (1) and the other in *Gordhan Lalji v. Bishambar Nath* (2) to the effect that in a suit for partition mesne profits could and should be asked for in that same suit; and that if they are not asked for, a second suit will not lie to get them. But both the Bombay case and the Allahabad case have since been overruled by Full Benches of the respective High Courts. In *Gangadhar Gopalrao v. Shripad Annarao* (3) a Full Bench of the Bombay High Court held that:

"Where in a suit for partition and for possession of lands together with mesne profits, past and future, the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the first suit or the date of the decree till delivery of possession is not barred under s. 11, Expt. 5, Civil P. O. of 1908."

In that judgment the learned Judges, while considering at length the previous Bombay case in *Atmaram Bhaskar v. Parashram Ballal* (1) held themselves bound in the interpretation of s. 11, Expt. V, Civil P. O., by the preponderance of judicial authority in the interpretation of Expt. III to s. 13, Civil P. O. of 1882, which is in the same terms as Expt. V to s. 11 of the present Civil P. O. Therefore the relief referred to in Expt. III to s. 13, as in Expt. V to s. 11, is the relief arising out of a cause of action accrued at the date of institution of the suit, and such relief

(1) 44 B 954; 58 Ind. Cas. 419; A I R 1920 Bom 39; 22 Bom. L R 982.

(2) 49 A 597; 109 Ind. Cas. 736; A I R 1927 All 716; 25 A L J 409.

(3) 40 Bom. L R 324; 174 Ind. Cas. 773; A I R 1935 Bom. 231; I L R (1935) Bom. 655; 10 R B 491 (F B).

would not, for instance, cover future mesne profits in respect of which the cause of action accrued subsequently to the suit. This is the opinion of the Calcutta High Court in *Mon Mohan Sirkar v. Secretary of State* (4) of the Madras High Court in *Ponnammal v. Ramamirida Aiyar* (5) and *Doraiswami Ayyar v. Subramania Ayyar* (6). In *Ram Karan Singh v. Nakhhed Ahir* (7) the learned Judges differed from a ruling of a Division Bench of their Court in *Gordhan Lalji v. Bishambar Nath* (2) on which, in this case, the learned trial Judge relied; and they point out that the rule under O. XX, r. 12, Civil P. O., whereby a Court may pass a decree directing an inquiry into future mesne profits is only directory and not mandatory.

It is true, there is a judgment of the Patna High Court which is to the effect that in a suit for partition, the question of mesne profits should also be raised and decided. That case is *Nand Kishore Prasad Singh v. Parmeshwar Prasad Singh* (8) but the decisions of other High Courts are not in that judgment discussed at any length. In the case before us the plaintiff was not in fact a plaintiff in the partition suit at all but a defendant and did not ask either for mesne profits from the date of suit until the final decree or from the final decree till delivery of possession and the present suit is limited to mesne profits for three years prior to its institution and subsequent to the final decree in the partition suit and this present suit is with regard to the rent of two shops occupied by some of the co-parceners after these had been awarded in the final decree to the plaintiff in the present suit, the present respondent. We do not see how it can be fairly said that he is debarred from bringing this suit. At the date of the institution of the suit, the two shops were not his, nor did he know whether they would be allotted to him, nor did he know that if allotted to him, the defendants would not give vacant possession soon after the date of the final decree. Moreover, the plaintiff in the present suit was not even a

(4) 17 O 968.

(5) 38 M 829; 27 Ind. Cas. 679; A I R 1915 Mad. 912; 28 M L J 127; 7 M L T 125; (1915) M W N 130 (F B).

(6) 41 M 188; 42 Ind. Cas. 929; A I R 1918 Mad. 484; 33 M L J 699; 22 M L T 484; (1917) M W N 847; 6 L W 784 (F B).

(7) 53 A 951; 133 Ind. Cas. 298; A I R 1931 All. 429; (1931) A L J 673; Ind. Rul. (1931) All. 618 (F B).

(8) A I R 1935 Pat. 60; 153 Ind. Cas. 233; 7 R P 319.

plaintiff in the partition suit, though we do not think that this would affect the case or make any difference to the application of the general principle on which the preponderance of judicial authority had decided this question.

The only argument of substance advanced by the learned Advocate for the appellants is that under O. II, r. 2, the plaintiff should have asked in the partition suit for mesne profits and as he did not ask for mesne profits he must be deemed to have relinquished his claim in respect of them; but O. II, r. 2 must be read with Expl. V to s. 11, Civil P. O., and the relief arising under Expl. V to s. 11 is a relief claimed from the same cause of action; and the fact that under O. II, r. 4, mesne profits may be claimed in the suit for recovery of immovable property merely seems to emphasize the fact that the suit for recovery of immovable property and the suit for mesne profits may arise from two separate causes of action. But the fact that a plaintiff may under O. II, r. 4, join in one suit two causes of action, does not, we think, mean that he must necessarily do so, or fall under the bar imposed by O. II, r. 2 and s. 11, Expl. V. Plaintiff may, of course, anticipate in the suit for partition that certain property will fall to his share; he may anticipate that after the final decree he will not be given delivery of possession and he may in his suit for partition ask for mesne profits from the date of suit until delivery of possession. But if he does not do so, we do not think another suit for recovery of mesne profits is barred. We are not here even concerned with a case where mesne profits were claimed in the suit but the decree was silent about them, nor are we even concerned with the case of a plaintiff in a partition suit, though in a partition suit, the defendants are as plaintiffs.

We think, therefore, that the plaintiff is clearly entitled to bring this suit for mesne profits of the two shops allotted to him in partition, though no mesne profits are claimed by him when he was party to the partition suit. We think, therefore, that the judgment of the lower Appellate Court was right and this appeal must be dismissed with costs. Order accordingly.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 1692 of 1937

August 21, 1939

HENDERSON, J.

DEBENDRA CHANDRA DE AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

JAMINI KUMAR DEY—DEFENDANT No. 1,
AND OTHERS—RESPONDENTS*Bengal Tenancy Act (VIII of 1885), ss. 26-F, 48-H—Pre-emption proceeding against minor, if void—Registration of under-lease without payment of landlord's fees, effect of*

The effect of a decree passed against a minor in a suit in which he is not properly represented is a nullity so far as he is concerned. But to say that the decree is absolutely void and a mere waste piece of paper is to go a good deal further than this. A minor is certainly not bound to treat it as a nullity if he does not desire to do so, and third persons cannot be heard to say that it is void. 72 Ind. Cas. 475 (1) and 18 Ind. Cas. 859 (2), referred to.

There is no real analogy between a decree of a Civil Court and an order passed in the proceedings under s. 26-F, Ben. Ten. Act. The order for pre-emption in no way corresponds to a decree and the section really does nothing more than provide a convenient machinery for giving effect to the claim to pre-empt.

Where the minor purchaser forms a *raiyat* describes himself in the *kobala* as a major and the pre-emption proceedings are taken against him by the landlord under s. 26-F, an order obtained thereon is not void.

Under the terms of s. 48-H payment of the landlord's fee is a condition precedent to registration of an under-lease and the defect cannot be cured by a subsequent payment.

A. from the appellate decree of the Sub-Judge, Second Court, Chittagong, dated July 9, 1937.

Mr. Chandra Sekhar Sen, for the Appellants.

Mr. Nripendra Chandra Das, for the Respondents.

Judgment.—This appeal is by the plaintiffs. They instituted the suit in order to recover possession of certain land. Their tenant, one Nishi, the predecessor of defendants Nos. 3 to 6, had a *raiyati* holding. He sold it to one Chittaranjan De. The plaintiffs thereupon applied for pre-emption under the provisions of s. 26-F, Ben. Ten. Act. The application was allowed and they took delivery of possession through the Court. They were unable, however, to obtain actual possession through the obstruction of defendant No. 1. They accordingly instituted the present suit. Defendant No. 1 contends that he has an under-*raiyati* which was created previous to the pre-emption. The Munsif gave the plaintiffs a decree, but this decree was

reversed by the Subordinate Judge in appeal. Two points arise for decision (1) whether the proceedings by which the plaintiffs exercised their right of pre-emption under s. 26-F, Ben. Ten. Act, were void, (2) whether defendant No. 1 was entitled to resist the plaintiffs' claim for *khas* possession on the strength of his under-*raiyati* interest. The defence contention that the pre-emption proceedings were void was based upon the fact that the purchaser Chittaranjan was a minor. He is not a party to the present proceedings. It is therefore impossible for the respondents to succeed on this point unless they can show that the proceedings were void. The argument which found favour with the learned Subordinate Judge was to the effect that proceedings under s. 26-F, Ben. Ten. Act, are analogous to a suit and that an order made by the Court is similar to a decree. From this point of view it was argued that the order of the Court was void just as much as a decree against a minor who is not represented is void. It is to be noted that, if the contention of the defendants succeeds, the minor will certainly have imposed upon him the burden of paying rent and he will be left with property which quite possibly he may not want. Again, supposing there was a sudden slump in land values, it will be open to the plaintiffs to withdraw the money which they paid into Court along with their application for pre-emption. Certainly, it would be rather startling, if the position of the minor could be affected in this way.

The effect of a decree passed against a minor in a suit in which he is not properly represented has been discussed in several cases. In particular, I may refer to the cases in *Umapati Samanta v. Sheikh Masitulla* (1) and *Purna Chandra v. Bejoy Chand* (2) to which my attention was particularly drawn during the hearing of the appeal. There can be no doubt that in such a case a minor is not affected by any decree that may be passed against him and that it is a nullity so far as he is concerned. But to say that the decree was absolutely void and a mere waste piece of paper is to go a good deal further than this. A minor is certainly not bound to treat it as a nullity if he does not desire to do so, and third persons cannot be heard to say that it is void. Then in the second place there is no real analogy between a decree of a Civil Court and an order passed in these proceedings.

(1) 37 O L J 496; 72 Ind. Cas. 475; A. I. R. 1923 Cal. 692.

(2) 17 O W N 549; 18 Ind. Cas. 859; 18 O L J 18.

ings under s. 26-F, Ben. Ten. Act. The order for pre-emption in no way corresponds to a decree and the section really does nothing more than provide a convenient machinery for giving effect to the claim to pre-empt. Under s. 26-C, Ben. Ten. Act, a purchaser is bound to give notice to the registering officer and the notice is then served upon the landlord. The landlord has the right to apply to the Court for the transfer of the holding to him within a certain time of the receipt of the notice. The Court gives notice to the purchaser merely to enable him to claim reimbursement for any payment which he may have made subsequent to his purchase. The landlord is not responsible in any way for the service of any notice. Thus, it will appear (1) that the right to pre-emption does not depend upon any decision by the Court. It flows automatically from the transfer itself; and (2) no duty is cast upon the landlord to give any notice to the purchaser. In the present case the purchaser described himself in the *kubala* as a major and the Court could only serve the notice in accordance with its terms. I must accordingly respectfully dissent from the view taken by the learned Subordinate Judge that these proceedings were void.

There remains the second question whether defendant No. 1 is entitled to resist the plaintiffs' claim for *khas* possession on account of his under-*rayati* lease. As the learned Judge pointed out that lease infringes the terms of s. 48-H, Ben. Ten. Act. On behalf of the respondents, Mr. Das referred to the decisions explaining the meaning of the old section (s. 50) which has now been repealed. Those decisions cannot afford any assistance in the present case. Here there was nothing illegal in the terms of the lease itself. The mistake made was that the landlord's fee was not deposited. The lease therefore ought not to have been registered. Two other points were, however, raised in support of the respondents' claim to retain possession. The lease has actually been registered. Mr. Das expressed his willingness to pay the landlord's fee into Court. The registration was actually affected owing to a misdescription of the lessor's status in the document. As it was made in contravention of the provisions of the law, it has no effect. Under the terms of the section payment of the landlord's fee is a condition precedent to registration and the defect cannot be cured by a subsequent payment. The second point relates to the fact that the plaintiffs have now succeeded

to the interest of the respondents' original lessor. It was therefore contended that they cannot be allowed to repudiate the lease without refunding the premium which was paid at the time. Mr. Sen on behalf of the plaintiffs did not contest this. The decree of the lower Appellate Court is accordingly set aside. If within a month from the arrival of the record in the lower Court the plaintiffs pay Rs. 200 into Court, the decree of the Munsif will be restored. Defendant No. 1 will be at liberty to withdraw the money. If such payment is not made, the plaintiffs will get a declaration of their title and a further declaration that they are entitled to receive rent from defendant No. 1. Defendant No. 1 will pay the costs of the plaintiffs in all Courts.

D.

Order accordingly.

RANGOON HIGH COURT

First Appeal No. 16 of 1939

May 29, 1939

ROBERTS, C. J. AND DUNKLEY, J.

AKOOJEE JADWET AND Co.—APPELLANTS
versus

A. V. AND SON—RESPONDENTS

Contract—Concluded contract—Burden of proof—Only certain terms settled, while others left open—Whether concluded contract—Option for renewal of contract on terms to be mutually agreed upon—Whether implies that terms of prior contract should be incorporated in new one.

In an action on an alleged contract, the burden of proof is of course, upon the plaintiffs to show that a firm contract has been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence must be looked at as a whole to see whether the parties to them have concluded a binding contract or not. There is no concluded contract, where only certain terms of the contract were settled and the other terms were left open. *Winn v. Bull* (1) and *Ridgway v. Wharton* (2), relied on. [p. 706, cols. 1 & 2.]

Moreover, the fact that a party to the contract has given the other party to it, an option for renewal of the contract on terms which would be mutually agreed upon, does not imply that the terms of the prior contract, or any of them should be incorporated in the new one. The party does not bind itself in any way to renew the contract upon the old terms.

F. A. against the decree of the District Court, Amherst, dated January 30, 1939.

Mr. Clark, for the Appellants.

Messrs. Hay and K. C. Sanyal, for the Respondents.

Roberts, C. J.—The appellants in this case, who were defendants in the Court below, are the agents and distributors of the Indo-Burma Petroleum Co. for

the sale of petrol in the district of Moulmein; and the respondents are general merchants carrying on business in petrol and commodities incidental to the motor trade. In 1930, the respondents were appointed sole distributors of the Indo-Burma Petroleum Co.'s petrol in Moulmein by the appellants, and on June 15, 1934, the contract was renewed as from May 1, 1934, for a period of three years, which expired on April 30, 1937. The terms of the contract contained provisions for the payment for petrol supplied, or what is known as "overriding commission," and rent for the petrol godown, and various other stipulations. Paragraphs 6 and 7 of the contract are as follows:

"6. You will remain the sole distributor of I.B. P. petrol in Moulmein and district for a period of three years from May 1, 1934, subject to our holding the I.B. P. Sub-Agency, with the option of renewal of this distributorship for a further period of two years on terms which shall be mutually agreed upon."

7. Should any dispute arise between us, the subject-matter of such dispute shall be referred to the I.B. P. Co., Ltd., Rangoon, whose decision shall be final."

On April 5, 1937, shortly before the expiry of this contract, the appellants wrote a letter to the respondents, in which they state:

"We shall be glad to know as to what arrangement you intend to make for renewal of it (the contract) for another two years for which you have been given option conditionally on certain terms to be mutually agreed upon."

We therefore beg to propose fresh terms by imposing our overriding commission at Rs. 25-15-0 per wagon load of 830 tins of petrol.

An early reply will be much appreciated."

Owing to the absence of the respondents' manager in India, an extension of time up to May 31, 1937, was mutually agreed upon between the parties and on that date the contract came to an end. The plaintiff's action was brought upon an alleged contract of June 1, 1937, whereby they were to be appointed for a further two years on the same terms and conditions as were contained in the old contract and it is said that it was further agreed that a formal agreement to that effect should be executed between the parties as early as possible. The plaintiffs say that without any reasonable cause or excuse, the defendants refused to execute the written agreement and they brought an action for specific performance, or alternatively for damages. The burden of proof was, of course, upon the plaintiffs that a firm contract had been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence

must be looked at as a whole to see whether the parties to them have concluded a binding contract or not. As was said by Jessel, M. R. in *Winn v. Bull* (1), at p. 30:

"If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say, 'we will have the terms put into form' then all the terms being put into writing and agreed to there is a contract."

If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor, and shall be such as are approved of by him, then there is no contract, because all the terms have not been settled."

And again it was remarked in *Ridgway v. Wharton* (2) that the act of sending a paper to a solicitor to have a matter reduced into form affords generally cogent reasons that the parties do not intend to bind themselves till it is reduced to form. And it is quite clear to my mind that the phrase "option for renewal of this distributorship on terms which shall be mutually agreed upon" does not in any way imply that the terms of the prior contract, or any of them, should be incorporated in the new one. The appellants could not, having made such an agreement, have entered into a new contract with third parties for the distributorship, but must first approach the respondents. But they did not bind themselves in any way to renew the distributorship to the respondents upon the old terms. It is quite plain that the respondents were eager to secure a renewal of the contract upon the old terms; and their case is that the moment Valliappa Chettyar, their manager, returned from India, he proceeded at once to Moulmein and there interviewed the appellants, and after some discussion, the contract was renewed for two years. In support of this it is urged that one waggon of petrol was received by the respondents on June 8, and another waggon of petrol on the 12th. I cannot myself find this conclusive of any more than that there was a mutual desire to achieve some continuity and that whilst negotiations were in progress petrol was supplied on an implied promise to be bound by reasonable terms: and it is clear that it was to everyone's interest that Moulmein should not be without supplies of petrol, and the gap during which negotiations took place was bridged by the offer and acceptance of these two consignments.

The appellants' case is that the respondents' manager, Valliappa Chettyar, arrived

(1) (1878) 7 Ch. D 29; at p. 30; 47 L. J. Ch. 139; 26 W. R. 230.

(2) (1856) 6 H. L. O. 238; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. A. 804; 105 R. R. 88; 29 L. T. (S. S.) 390.

on June 4, at their office saying that he had been indisposed during the early days of the month: there was a question about the reduction of the overriding commission, and matters were left open till June 8, and, as they were in abeyance on the 8th, the petrol to which I have referred was applied, and, on June 10, the terms of the contract which the appellants proposed to grant were handed to the respondents. These terms contained provisos that there should be no further option for extension at the end of the new term to be granted and that the godown and licence for storing petroleum should be taken and kept in the name of the appellants. The appellants say that Valliappa Chettyar explained that he was insufficiently familiar with English to accept the terms of this offer without further investigation and that he would come back in the evening—if it was all right—to sign the contract. He did not do so but returned on the 15th with a refusal to accept the terms of it. On June 17, the appellants' legal adviser wrote to the respondents stating that up to then they had not come to any terms and that they had by their conduct ceased to be representatives of the appellants and must forthwith furnish accounts of empty tins, tins and cans and make over the godown and licence for the same to the appellants within three days. The respondents did not see fit to answer that letter direct. They were representing their case to the Indo-Burma Petroleum Co. and when they received this letter, they forwarded it to that firm. Their letter to the Indo-Burma Petroleum Co. is also dated June 17. It says that Mr. Jadwet, for the appellants, agreed to renew the agreement for a further term of two years on the same terms as previously, but sets out the documents which they were asked to sign on June 10, and which constitute what the appellants describe as their offer. The respondents, in that letter, asked the Indo-Burma Petroleum Co. to be so good as to try and effect a compromise. The respondents are able to send the Indo-Burma Petroleum Co. copies of Ex. B, which was the offer of June 10, and of Ex. M, which was a memorandum in writing of the terms of the contract which they say they entered into on June 1: Ex. M is dated June 10.

To my mind, insufficient reasons have been given for the respondents being in possession of Ex. B at all, unless it is true that Valliappa Chettyar took it away with

him on June 10. His own story is that he never took it away, but saw it in the appellants' office and declined to agree to its terms. He also says that Ex. M was left with the appellants. In order to explain his ability to forward copies to the Indo-Burma Petroleum Co., he says that they were copied in the appellants' office by his own clerk, Xavier. Xavier is not a witness whose story can be accepted without caution as he has twice been in prison for criminal breach of trust. And the account which the respondents give of the interview on June 10, is, to my mind, inconsistent with their story of a firm contract having been arrived at on June 1. It is quite plain from the evidence given on both sides that it was contemplated that a final agreement should be signed at an interview between the parties. If the respondents' story is true, there would be no need for a meeting between them on June 10 at all. No final agreement was ever signed; and I am obliged to hold that the negotiations which were being continued up to and beyond the interview of June 10, were broken off by the refusal of the respondents to accept the new terms under which they were offered the distributorship. When the plaintiff came to give evidence in the box and was cross-examined with regard to Ex. M, he described it as a draft and said that "Jadwet was at liberty to add anything to it except in the matter of the godown lease and the petrol license." On his own showing therefore, it appears to me, that even at that stage the respondents cannot suggest that a firm contract had been arrived at. The version of Mr. Highet, whose evidence was taken on commission, is to the following effect. About June 24, after some discussion, Valliappa Chettyar agreed to renew the agreement on the terms set out by the appellants in the draft dated June 10. The witness told Valliappa Chettyar that the final decision as to renewal rested with Mr. Ebrahim, the manager of the appellants. At that time he says, in evidence, "the dispute had not been left to my company to decide."

The case for the respondents is supported not only by Mr. Xavier but also by Mr. Venkatesan, who was at one time their manager and alleges that he was present on June 1, when an oral agreement was come to. But I am satisfied, upon the evidence given on behalf of the respondents and from the letter in which fresh terms are mentioned and a reference is made to the fact that the option was to be exer-

cised on terms to be mutually agreed upon, that all that happened at the oral interview, whether it took place on June 1 or 4, was that some further meeting would be necessary at which the final terms should be agreed upon. Mr. Hay says that the respondents are justified in raising objection to Ex. B, because it proposed something which had never been arranged before. This depends, to my mind, on the fallacy of going back to the old contract and assuming that, though it had been discharged by efflux of time, some, many, or most, of its terms must necessarily be the terms to be arrived at when a renewal of the distributorship was being arranged. So it is quite clear from the evidence that the negotiations broke down and I cannot accept the view that there was a firm contract on June 1, since it appears to me that the appellants' conduct has been consistent throughout and they explain their position fully in their letter of June 17, to the respondents. They were never anxious to grant a renewal upon precisely the old terms, but the respondents were always anxious to persuade them to do so: having failed, they then turned round and endeavoured to get the best terms they could and to force the appellants to re-open negotiations after their offer of June 10 had been refused.

Something has been said about arbitration in this connection. In my view, the arbitration clause in Ex. A only refers to the submission of disputes between the parties to the contract whilst it lasted. It expired at midnight on May 31. There is no submission to arbitration as to the terms of a new contract to be arranged, although in fact it was the appellants who in these proceedings suggested arbitration; and the respondents, in their written objections, said:

"Plaintiffs beg to submit that the Indo-Burma Petroleum Co., Ltd., being a company, cannot act as arbitrators. Even if it be held that its directors or shareholders should act as arbitrators, it would never be feasible for such directors or shareholders to act as arbitrators."

They themselves brought this suit and in it they rely on the alleged contract of June 1. The learned trial Judge has found upon a consideration of the evidence, that an agreement was reached on June 1, to renew the contract for a further term of two years. But he observes that the plaintiff in his own evidence said that Ex. M was meant to be very brief but that the defendant was at liberty to add to it. It is quite inconsistent with the respondents' case

that there should be in existence, nine days after the alleged contract, a document embodying its terms which one of the parties was permitted to alter. For the reasons I have given, I am satisfied that we ought to hold that this was a case which never proceeded further than negotiations. The respondents' grievance has arisen from the fact that they have assumed that the so-called option for renewal given in the earlier contract conferred upon them a right to extend the operation of that contract upon the same terms for the further period: nothing could be further from the truth. This appeal must therefore be allowed, and the suit of the plaintiffs-respondents dismissed with costs in both Courts.

Dunkley, J.—I am in entire agreement with my Lord the Chief Justice and I have very little to add to his reasons for this decision. In my opinion, it is of importance to notice that the option given to the respondents by the letter of June 15, 1934 (Ex. A), was not an option to renew the agreement but an option of renewal of the distributorship. If para. (6) of this letter conferred any right at all on the respondents, it meant at most, as my Lord has said, that at the expiry of the agreed term of three years, before giving the business of distributor to any other person, the appellants must offer it to the respondents and give the respondents an opportunity of coming to terms with them. The appellants carried out their obligation by their letter of April 5, 1937 (Ex. C), in which they made a proposal to the respondents. This proposal was not accepted by the respondents' manager, who entered into negotiations with the appellants, with the result that the appellants modified their proposal as set out in the respondents' manager's letter of April 25 (Ex. D).

Time was asked for on behalf of the respondents to consider this modified proposal and time was granted until May 31 (Ex. E). The proposal was not accepted within the time given. It therefore lapsed. Also, at the same time, the agreement contained in the letter of June 15, 1934, ceased to have any force or effect by efflux of time, and every term of that agreement ceased to be binding on either party. Hence it is idle for the respondents to lay stress as they have done, on para. (7) of this letter and to say that, in view of the letter of June 25, from the Indo-Burma Petroleum Co. to the appellants, the appellants were bound to accept the offer made by the respondents on June 26, to continu-

the business of the distributorship on the terms proposed by the appellants on June 10, and contained in the document J. B. The respondents had been given ample time to accept these terms, and the correspondence shows that they had definitely rejected them, at any rate on June 17, if not earlier. Consequently, it was not open to the respondents to accept them on June 26. Moreover, this case, which has been strenuously urged before us, is not the case which is set up in the plaint, which is based on a binding agreement between the parties concluded on June 1. I agree with my Lord that the supplies of petrol made on June 8 and 12, cannot be held to have been made in pursuance of any such agreement, or that they raise any inference as to the existence of any new agreement, and that the true inference is that they were made by the appellants in their own interests for the preservation of the business while negotiations were going on.

To my mind, it is a matter of indifference whether, as the respondents state, negotiations were begun on June 1, or whether, as the appellants state, they were begun on June 4. Negotiations were opened at the beginning of June, and they were entirely fresh negotiations for an entirely new agreement. It may be, as is now urged on behalf of the respondents, that the appellants did not think of the terms which subsequently became the bone of contention between the parties until after these negotiations had opened; but of what importance is that? The appellants were not bound by anything that had been done previously, and it was open to them to suggest new terms. It is plain that at the first interview only the rate of commission was settled and the other terms of the agreement were left open; that is, no concluded contract was made. This is clear from the respondents' letters of June 17 and June 27, to the Indo-Burma Petroleum Co. (Exs. 3 and 6), and their Pleader's letter to the appellant's Pleader of July 2, (Ex. 8) and the evidence of the respondent's managing partner. Referring to the note of the terms acceptable to him (Ex. M), which he alleges that he left with the appellants on June 10, he said in cross-examination: "Jadwet was at liberty to add anything to it, except in the matter of the godown lease and the petrol licence." This disposes of his claim based on a concluded contract

of June 1, and therefore his suit was bound to fail.

D.

Appeal allowed.

ALLAHABAD HIGH COURT
Criminal Revision No. 590 of 1939
September 25, 1939

MOHAMMAD ISMAIL, J.

HANS HOTZ AND ANOTHER—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY

Electricity Rules (1937), rr. 48 (1), 123—Wires originally fixed on surface subsequently buried in walls—There is alteration in system and breach of r. 48 (1)—Person actually carrying out installation, if guilty under r. 123.

It is not in every case that the prosecution is called upon to prove that a re-wiring has altered the capacity or character of old installation. It is only when there is replacement of lamps, fans, fuses, switches and other component parts of the installation that the alteration in capacity and character have to be examined. This exception, however, will not apply to electrical installation work including additions, alterations, repairs and adjustments of existing installations. Where the wires originally fixed on the surface are subsequently buried in the walls, there is certainly an alteration in the system and not a case of replacement and a breach of r. 48 (1) is committed. Replacement means changing of old wires for new ones.

The person who actually carries out the installation is not guilty of any offence under r. 123, Electricity Rules: it is only the person under whose immediate supervision the work is carried out who is liable to punishment.

Or. R. from the order of the Sessions Judge, Agra, dated July 10, 1939.

Messrs. S. N. Sen, B. S. Darbari and Bishan Sarup Darbari, for the Applicant.

The Deputy Govt. Advocate and Mr. Gopal Behari, for the Crown.

Order.—This is an application in revision directed against an order of the learned Sessions Judge of Agra affirming an order of a Magistrate of the First Class of that district. On November 14, 1938, the Electrical Inspector to Govt. U. P. made a complaint in the Court of the District Magistrate against the applicants Hans Hotz and Kishan Prasad on the ground that the applicants had committed a breach of r. 48 (1), Electricity Rules of 1937. According to the complaint accused No. 1, Mr. Hotz, was of Hotz's family and was seen instructing accused No. 2, Kishan Prasad, in respect of re-wiring of electric installation which Kishan Prasad was seen carrying out in Laurie Hotel. The District Magistrate initiated proceedings against the applicants and made over the case to a

Magistrate subordinate to himself who upon a consideration of the evidence found the offence proved and convicted and sentenced the applicants to a fine of Re. 1 each. The applicants denied the charge and pleaded not guilty. Several questions of law and facts were urged on their behalf in the Courts below but were repelled. In revision, I must accept the finding of the Court below as final. The learned Magistrate in a well-reasoned judgment came to the conclusion that it was certain that Mr. Hotz actually supervised Kishan Mistri when he did the re-wiring in some portion of Laurie Hotel. Upon this finding I have to consider whether the applicants were rightly convicted. The first question urged by learned Counsel for the applicants is that in the present case there is no evidence that the re-wiring had the effect of altering the capacity or the character of the electrical installation. According to the learned Counsel it is not permissible to convict an accused person for breach of r. 48 (1) unless it is affirmatively established that the new installation has had the aforesaid effect. In my opinion, it is not in every case that the prosecution is called upon to prove that a re-wiring has altered the capacity or character of old installation. It is only when there is replacement of lamps, fans, fuses, switches and other component parts of the installation that the alteration in capacity and character have to be examined. This exception, however, will not apply to electrical installation work including additions, alterations, repairs and adjustments of existing installations. It appears from the evidence which has not been controverted that the old system of wiring has been changed. The wires originally were fixed on the surface and now they are buried in the walls. This is certainly an alteration in the system and not a case of replacement. By replacement I would understand that the old wires were changed for new ones. In my opinion the Courts below have come to a correct conclusion that the applicants have committed a breach of r. 48 (1). The next question to be determined is whether the applicants are guilty under r. 123 for breach of r. 48. The above rule provides that

"where any electrical installation work specified in r. 48 has been carried out otherwise than . . . the consumer or owner, the contractor, (if any) through whom the work was carried out and the person under whose immediate supervision it was carried out shall each be punishable . . ."

The question is whether the applicant committed the breach of the above rule. Mr. Hans Hotz is merely a beneficiary while the trustees of Hotz's trust are different individuals who are not before me. Under these circumstances it would be difficult to describe Mr. Hans Hotz as a owner or consumer. The learned Magistrate has found that the re-wiring was done under the instructions of Mr. Hotz. The evidence produced on behalf of the prosecution proves that Mr. Hotz gave instructions to Kishan Prasad who carried out the re-wiring. In view of this finding it must be held that the installation was carried out under the immediate supervision of Mr. Hotz and therefore he will be guilty under r. 123 Electricity Rules. With regard to Kishan Mistri it has been held that he is an employee of the hotel and he carried out the re-wiring under the instruction and supervision of Mr. Hotz. The action attributed to Kishan Prasad, namely the re-wiring does not appear to me to be punishable under s. 123. The person who actually carried out the installation is not guilty of an offence under r. 123, Electricity Rules; it is only the person under whose immediate supervision the work is carried out that is liable to punishment. On the finding arrived at by the learned Magistrate and according to my reading of the rules I consider Kishan Prasad to be entitled to an acquittal. The learned Magistrate very properly has taken a very lenient view of the offence. Mr. Hotz is not a licensed contractor but is a qualified engineer and is in every way capable of supervising installation work, but under the rule unless a person is licensed he is not entitled to carry on installation work either as supervisor or as a contractor. Mr. Hotz has been sentenced to a fine of only Re. 1. It seems to me unnecessary to inflict any fine under the circumstances of the case. In my opinion the case can be adequately dealt with under s. 3, United Province First Offenders Probation Act. It appears that Mr. Hotz was trained as an engineer in England. It is not suggested that the wiring carried on under his supervision was in any way defective. Having regard to the nature of the offence and the character and antecedents of the offender while upholding the conviction, I set aside the sentence imposed upon Mr. Hans Hotz and release him on admonition. I hope that he will in future comply with the rules framed for the guidance of persons who are engaged in the supply of electrical energy and in the

allied trades. I set aside the conviction and sentence passed upon Kishan Prasad and direct that the fines, if paid, be refunded.

s. Order accordingly.

LAHORE HIGH COURT

Civil Revision No. 28 of 1939

May 11, 1939

SKEMP, J.

Lala HANS RAJ GUPTA—PLAINTIFF—

PETITIONER

versus

Seth RAM LAL BALDEO PARSHAD—

DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 20 (c)—Amount on pro-note to be paid at Delhi—Defendant residing in U. P.—Suit, if can be brought at Delhi contrary to s. 7 of U. P. Agriculturists' Relief Act (XXVII of 1934)—Such suit, if illegal within s. 23, Contract Act (IX of 1872).

A pro-note had a clause that payment should be made in Delhi. The plaintiff sued for the amount due on the pro-note at Delhi. The defendant resided in U. P. The Judge returned the plaint because s. 7, U. P. Agriculturists' Relief Act (U. P. Act XXVII of 1934), said that every suit for recovering an unsecured loan in which the defendant was an agriculturist should be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant resided:

Held, that according to s. 107 (1) of the Govt. of India Act, if any provision of a Provincial Law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact, or to any provision of an existing Indian Law, then the Federal Law or the existing Indian Law, shall prevail and the Provincial Law shall, to the extent of the repugnancy, be void. In Delhi the Courts are governed by s. 20 (c), Civil P. O., and the local law of the U. P. was void to the extent of the repugnancy. 121 Ind. Cas. 403 (1), relied on.

Held, also that the bringing of such a suit in Delhi contrary to the provisions of the U. P. Act was not illegal within the meaning of s. 23, Contract Act.

O. R. for revision of the order of the Additional Judge, Small Cause Court, Delhi, dated December 14, 1938.

Mr. Bishan Narain, for the Petitioner.

Order.—This is a petition for revision of an order of the Additional Judge, Small Cause Court, Delhi, returning the plaint. The plaintiff, who belongs to Delhi, is engaged in the business, *inter alia*, of letting out agricultural implements and machinery on hire. The plaint sets forth that he let out to the defendant Seth Ram Lal Baldeo Parshad of Lakhimpur District Kheri (United Provinces), a Persian wheel and a sugar-press on hire. The defendant did not pay the hire and on November 18, 1936, executed a pro-note for the amount due together with interest. The pro-note

had a clause that payment should be made in Delhi. The plaintiff sued for Rs. 73-1-9 due on the basis of the agreement and the pro-note. The Additional Judge returned the plaint because s. 7, U. P. Agriculturists' Relief Act (U. P. Act XXVII of 1934), lays down that every suit for recovering an unsecured loan in which the defendant is an agriculturist shall be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant resides. The learned Additional Judge also held that the provision about the payment of the pro-note in Delhi was unlawful as, contrary to the same section. The plaintiff has come here in revision through Mr. Bishan Narain. The defendant, although served by notice on the open door, is not present or represented, and the hearing of this revision is *ex parte*.

Mr. Bishan Narain's point is that the United Provinces Legislature has no jurisdiction and its Act has no force beyond the limits of these Provinces. But for the Act the Delhi Court would have jurisdiction under s. 20 (c), Civil P. O., and Mr. Bishan Narain urges that under s. 80-A, Govt. of India Act, 1919, which was in force when the U. P. Act in question was passed, or under s. 107 (1), Govt. of India Act, 1935, now in force, the local Legislature of a province has power to legislate only within the limits of that province. Section 80-A of the Act of 1919 simply empowers the local Legislature of any province to make laws for the territories constituting that province. Section 107 (1) of the present Act lays down that if any provision of a Provincial Law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact, or to any provision of an existing Indian Law, then the Federal Law or the existing Indian Law, shall prevail and the Provincial Law shall, to the extent of the repugnancy, be void. In Delhi the Courts are governed by s. 20 (c) Civil P. O., and the local law of the United Provinces is void to the extent of the repugnancy *Chhatoo Lal Misser & Co. v. Narain Das Baijnath Prasad* (1), is a ruling of the Calcutta High Court of the year 1928 which laid down in reference to the U. P. Court of Wards Act

"the local Legislature has no jurisdiction to legislate save for its own provinces and the Act does not purport to extend beyond those provinces.... In my opinion, this Act, like the Acts of many other local Legislatures, dealing with the local Courts of Wards, can have no effect beyond the jurisdiction of its own Legislature."

(1) 56 O 704; 121 Ind. Cas 403; A I R 1930 Cal. 53; Ind. Rul. (1930) Cal. 115.

As to s. 23, Contract Act, the only illegal object is to bring a suit in Delhi contrary to the provisions of U. P. Act. This is not illegal and the point therefore fails. I therefore accept this revision and direct that the Court of Small Causes, Delhi, accept this plaint and proceed therewith in accordance with law. The costs of this revision are to be borne by the respondent.

D. Revision accepted.

MADRAS HIGH COURT.

Civil Revision Petition No. 180 of 1938

January 6, 1939

BURN, J.

SYNMODELUX, LTD., TINNIVELLY—
PLAINTIFF—PETITIONER

versus

K. VANNAMUTHU PILLAI—DEFENDANT

—RESPONDENT

Companies Act (VII of 1913), s. 30—In order to give rise to liability to pay up value of shares, express allotment of shares to subscriber is necessary.

Although in the case of a person who subscribes to the memorandum of association, no separate application for shares is necessary, yet an express allotment of shares to subscriber is necessary, in order to give rise to a liability to pay up the value of the shares. The liability to pay up the value of the shares does not arise where there has been no valid allotment of shares to the subscriber.

O. R. P. to revise the decree of the Sub-Judge, Tinnevely, dated December 1, 1937.

Messrs. V. T. Rangaswamy Ayyangar and K. Venkateswaran, for the Petitioner.

Messrs. R. S. Srinivasacharya and K. V. Rajagopalan, for the Respondent.

Order.—In my opinion the dismissal of the suit by the learned Subordinate Judge was correct. The defendant subscribed for 20 shares in the memorandum of association and therefore by s. 30, sub-s. (1), Companies Act, he must be deemed to have agreed to become a member of the company and on registration of the company, his name must be entered as a member in the register of members. The fatal defect, in my opinion, in the plaintiff's case is that the 20 shares for which the defendant subscribed were not validly allotted to him. It is no doubt true, as Mr. Rangaswami Ayyangar for the petitioner contends, that in the case of a person who subscribes to the memorandum of association, no separate application for shares is necessary, but I find nowhere any authority for the view that no express allotment of shares is necessary, in order to give rise to a liability to

pay up the value of the shares. The learned Advocate for the petitioner refers me to Resolution No. 9 passed on December 21, 1936. That runs as follows:

"This meeting allots hereby the 517 shares subscribed for by the signatories and the names of the signatories may be entered in the register of members."

Mr. Rangaswami Ayyangar also refers to the prospectus which was published later in which there is a statement on p. 1 that 517 shares to the value of Rs. 12,925 have already been subscribed for by the signatories to the memorandum and allotted, and on pp. 6 and 7 of the prospectus, the number of shares taken by each of the signatories to the memorandum is set out. These, however, are not sufficient to show that on December 21, 1936, there was any "allotment" of shares to the defendant. It is provided in s. 28, sub-s. (2), Companies Act, that each share in a company having a share capital shall be distinguished by its appropriate number and by s. 31, sub-s. (1), every company is required to keep a register of members in which the following particulars are to be entered:

"(1) The names and addresses and the occupations, if any, of the members, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each by its number, and of the amount paid or agreed to be considered as paid on the shares of each member."

Now, it appears from the notice sent to the defendant by the plaintiff on March 8, 1937, informing him that his shares had been forfeited, that the shares of which he was registered as owner were shares numbered from 121 to 140. But the learned Counsel for the petitioner is not able to show me any resolution in the Minutes Book of the Board of Directors allotting shares numbered 121 to 140 to the defendant. I have looked through the book and there is no record of any such resolution. It is not necessary, in my opinion, to go so far as the learned Subordinate Judge has gone and to say that the defendant's liability to pay for the shares cannot arise till liquidation proceedings are started. But, it is, in my opinion, clear that his liability has not yet arisen, because the shares have not been validly allotted to him, and consequently no valid notice of allotment has been given to him. It is not necessary to consider the allegation that the defendant's shares have been forfeited. I do not understand the plaintiff as having contended that the defendant's liability to pay the value of the shares arises on forfeiture. The dismissal of the suit was, in my opinion,

correct and therefore this petition is dismissed with costs.

N.B.

Petition dismissed.

LAHORE HIGH COURT

Second Appeal No. 136 of 1939

May 4, 1939.

BAIDE, J.

RAM RATTAN—JUDGMENT-DEBTOR—

APPELLANT

versus

MUNICIPAL COMMITTEE, AMRITSAR—

DECREE-HOLDER—RESPONDENT

Contract Act (IX of 1872), ss. 19, 20—Suit for possession by Municipality decreed with costs—Judgment-debtor's offer not to file appeal and also to deliver possession, if Municipality gave up costs, accepted—Judgment-debtor found not to have right of appeal—Agreement held either void under s. 20 or voidable under s. 19.

Municipal Committee instituted a suit for possession of certain property which was alleged to have been encroached upon by one R. The suit was decreed with costs. The judgment-debtor R thereafter applied to the Municipal Committee to the effect that if the Committee gave up the costs, he would not file any appeal from the decree and also deliver possession of the property. The Committee accepted this offer. The Committee on re-examination of the matter found that as a matter of fact R had no right to appeal at the time when he made the offer:

Held, that even if the judgment-debtor made the offer honestly believing that he had a right of appeal, it would amount to saying that both the parties were under a mistake of fact essential to the agreement when they were alleged to have entered into the agreement in question; because the Committee would never have agreed to give up their costs if they knew that R's right of appeal had already become time-barred. If, on the other hand, R had made a dishonest misrepresentation, the agreement would be voidable at the instance of the Committee on that account. In either aspect of the case, the agreement would be voidable or void under s. 19 or s. 20, Contract Act.

S.A. from an order of the Senior Sub-judge, Amritsar, dated November 10, 1938.

Mr. Yashpal Gandhi, for the Appellant.

Mr. Shamair Chand, for the Respondent.

Judgment.—The facts giving rise to this second appeal may be briefly stated as follows:—The Municipal Committee of Amritsar instituted a suit for possession of certain property which was alleged to have been encroached upon by one Ram Rattan. The suit was decreed with costs, which amounted to Rs. 230. The judgment-debtor Ram Rattan thereafter applied to the Municipal Committee to the effect that if the Committee gave up the costs, he would not file any appeal from the decree

and also deliver possession of the property. The Committee accepted this offer but it appears that possession was not delivered voluntarily and the Committee had to take out execution in order to obtain possession of the property. Subsequently it was also discovered that the Committee had no right to accept the offer of Ram Rattan inasmuch as it involved remission of a sum exceeding Rs. 100 by the Municipal Committee and therefore required sanction of the Commissioner. The Committee then re-examined the matter and found that as a matter of fact Ram Rattan had no right to appeal at the time when he made the offer to the Municipal Committee. They, therefore, cancelled their previous resolution on the ground that it had been passed under a misrepresentation of facts and also because the judgment-debtor had not carried out his part of the Contract, namely delivery of possession. The Committee then proceeded to take out execution as regards costs when Ram Rattan pleaded the agreement to give up costs as a bar to the execution proceedings. The Courts below, however, held that the Committee was entitled to take out execution. From this decision this second appeal has been preferred. One of the issues in the case was:

"Whether the judgment-debtor delivered possession of the property to the decree-holder in accordance with the compromise, if not, what is its effect?"

The learned Senior Subordinate Judge has found that the appellant Ram Rattan had failed to deliver possession of the property to the decree-holder in accordance with the terms of the compromise and on this finding of fact alone it seems to me that the Committee would have a right to execute the decree in respect of the costs. The learned Counsel for the appellant has argued that as a matter of fact Ram Rattan had always been willing to deliver possession and that he made several applications to the Committee but no such application has been proved on the record. It seems to me unlikely that if any such application had been made the Municipal Committee would have taken the trouble to take out execution. The appeal is thus concluded by a finding of fact.

There is, moreover, another aspect of the matter. The Courts below have held that Ram Rattan's right to appeal had become barred at the time when he made his application to the Municipal Committee offering to give up possession and not to file an appeal if the Committee gave up costs. The fact that the right of appeal

had become barred on the date of the application is not disputed before me. The only point that the learned Counsel for the appellant urged was that there is nothing to show that Ram Rattan made any misrepresentation in this respect and that possibly, he being a layman was not acquainted with the law and honestly believed that he still had the right to appeal. But even if this position is accepted, it would amount to saying that both the parties were under a mistake of fact essential to the agreement when they are alleged to have entered into the agreement in question; because it seems clear enough that the Committee would never have agreed to give up their costs if they knew that Ram Rattan's right of appeal had already become time-barred. If on the other hand, Ram Rattan had made a dishonest misrepresentation, the agreement would be voidable at the instance of the Committee on that account. In either aspect of the case, the agreement would be voidable or void under s. 19 or s. 20, Contract Act. On the above finding it is unnecessary to discuss any other point. I dismiss the appeal with costs.

D: *Appeal dismissed.*

CALCUTTA HIGH COURT

Appeal No. 122 of 1935

August 11, 1938

R. C. MITTER AND SEN, JJ.

ABDUL LATIF AND OTHERS—DEFENDANTS—
APPELLANTS

versus

Nawab Khajeh HABIBULLA AND
OTHERS—RESPONDENTS

Landlord and tenant—Ejectment—Held on facts that the plaintiffs were entitled to declaration of title and confirmation of possession through tenants who could not be ejected—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Applicability of Art. 142—Terms "discontinued" and "dispossessed"—Held, on facts that no question of discontinuance of possession arose and that the suit was governed by Art. 144—Evidence Act (I of 1872), s. 42—Decree granting additional rent owing to increase of land by re-formation whether evidence against persons not parties to suit, regarding time when re-formed land became fit for possession—Alluvion and diluvion—Re-formation—Rent assessed—Evidentiary value—Survey—Survey line over big river—Presumption—Survey of small area—Star observations, necessity of—Landlord and tenant—Non-occupancy ryot holding under person bona fide claiming title—Rightful owner establishing title, whether can eject ryot—Words and phrases—"Jote," meaning of.

Article 142, Lim. Act, applies if the plaintiff has sued on the footing that while in possession he was dispossessed by the defendant, or if the fact he

established that while in possession he was dispossessed by the defendant. The word "discontinued" in Art. 142 connotes three elements, two physical and one mental. There must be (1) actual withdrawal, (2) with an intention to abandon, and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It presupposes physical contact, a collision, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effaced by the latter. [p. 722, col. 2.]

Where a person is not in physical possession either himself or through some one else holding under him at any time after the re-formation of the land and he does not exercise any acts of possession but through a fiction of law he is in possession of the lands, till the lands are actually fit for possession and he is not turned out either physically or by adverse acts of another, no question of discontinuance arises and a suit by such person for establishing his title to and for recovery of possession of such re-formed land would come within Art. 144, and not Art. 142 and the opposite party must prove adverse possession for 12 years or over before suit.

[Case-law referred to.]

The right obtained by adverse possession for more than 12 years would be co-extensive with the assertion of the claimant. [p. 723, cols. 1.]

Government claimed certain lands which were re-formed in 1916 and since then were in possession of the Govt.'s tenants. In 1923 Govt. acknowledged the title of the plaintiffs to these lands on condition that the tenants, would remain on land till 1930. A document for consideration in plaintiffs' favour was executed but it was not stamped as conveyance. It conveyed to the plaintiffs whatever rights the Govt. had in the land. In 1925 the Plaintiffs instituted a suit against the tenants for establishing their title to and for recovery of possession of the re-formed lands:

Held, that the acknowledgment by Govt. could not deprive tenants of their rights acquired under limitation, the tenants could not, therefore, be turned out. But the tenants could not get a declaration that the plaintiffs' title was not subsisting on the date of the suit. The plaintiffs were entitled to a declaration of title to the lands through the tenants who were regarded as their tenants on the date of the suit. *Hemendra Nath Mukherjee v. Kumar Nath Roy* (2), referred to.

The recitals and findings in judgment passed in a suit for additional rent on the ground that land in the holding has increased by accretion, are no evidence against persons who are not parties to that suit. But the fact that such decrees were passed by which additional rent was imposed is evidence as regards the time from which such re-formed land became fit for possession. [p. 718, col. 2.]

The fact that rent was assessed on re-formed land would be very strong, almost conclusive evidence, to support the case that the land had become fit for possession when it was so assessed.

It is a fundamental principle that a survey line cannot be taken over a big river without taking offsets with theodolite from points on the river bank. That in such cases such method is used is to be presumed. [p. 717, col. 2.]

When the place to be surveyed is comparatively small in area, star observations are not necessary.

If a non-occupancy *ryot bona fide* holds under a person who *bona fide* claims to be entitled to the land, he cannot be ejected by the rightful owner who had established his rights against the person *bona fide* claiming title. *Bindalal Pakrashi v. Kale Pramanik* (1), and 31 Ind. Cas. 789 (9), relied on. [p 725, col. 1.]

The word 'jote' by itself is an ambiguous word, which may mean a tenure or a holding.

A. from the original decree of the Sub-Judge, Third Court, Comilla, dated December 1, 1934.

Messrs. Gunada Charan Sen, Upendra Kumar Roy and Ajit Kumar Dutta, for the Appellants.

Messrs. Ramaprosad Mukherjee, Abdul Quasem and Nani Gopal Das, for the Respondents.

Judgment.—This appeal is on behalf of defendants Nos. 2 and 7 to 10 in a suit for establishment of title and recovery of possession. The plaintiffs are 32 in number. Plaintiffs Nos. 1 to 31 claim title on the basis of a *patni taluk* granted to their predecessor-in-interest, Bibi Manjura Banoo by the 13 annas proprietors of Touzi No. 22 of the Tippera Collectorate in the year 1880. The *patni kabuliati* is Ex. 28, an extract from which is printed at II-181. It included village Sovarampore, *alias* Jitram-pore. Plaintiff No. 32 is the proprietor of the remaining 3 annas share of the said estate. The plaintiffs' case is that the lands in suit which are described in three schedules, A, B and C, annexed to the plaint are re-formations *in situ* of their village Sovarampore, on the other side, namely the eastern side, of the river Meghna, which at the time of the *thac* and revenue survey, formed the eastern boundary of their village, but which since then has shifted its course far to the west. According to them the lands in suit began to rise above water from 10 or 12 years before the suit which was filed on September 15, 1925, and the lands of Schs. A, B and C became fit for possession at different times. In the plaint they do not state precisely when the lands of Sch. A became so fit, but in respect of the lands of Schs. B and C the statement is that they "formed and became fit for cultivation 7 or 8 years before the suit." The contesting defendants claim the lands in suit as re-formations *in situ* of or accretions to the Govt. Khas Mehal Estate Char Maricha Kandi, Touzi No. 2717 of the Tippera Collectorate. Nos. 7-10 claim under a *taluka* settlement from the Govt.

that is, they set up the claim to hold them as permanent tenure-holders under the Govt. under Ex. 21 (II-158). Defendant No. 2 claims that Schs. A and C and a good part of the lands of Sch. B falls within his occupancy holding held under defendants Nos. 7 to 10. The other defendants do not appear. The contesting defendants set up an alternative case (para. 38 of the written statement of defendants Nos. 7 to 10), that if the lands in suit or any portion thereof do not form a part of Govt. Estate Char Maricha Kandi, they were in the bed of the navigable river Meghna at the time of the *thac* and revenue survey and they are accordingly the Crown lands of the Govt. In that case they say the plaintiffs are to be defeated on the plea of *jus tertii*.

In the written statement there is no assertion that no part of Sovarampore was included in Bibi Manjura Banoo's *patni*, but the statement is that plaintiffs Nos. 1-31 did not purchase the *patni*, at least they got no title to the said village by their purchase. They say that the lands of Sch. A had formed and had become fit for possession before 1900 and were being possessed by their predecessors since then through their tenants, and that the lands of Schs. B and C had formed and had become fit for possession long before 1910 and were being similarly possessed since they became so fit. They accordingly say that the plaintiffs' suit is barred by time; at any rate their title, if any, has been extinguished by their adverse possession. There is a special defence of defendant No. 2 contained in para. 15 of his written statement. It is that as he has been *bona fide* holding the lands in *ryoti* right he cannot in any case be ejected. This defence is founded on the principle laid down in *Bindalal Pakrashi v. Kale Pramanik* (1).

For the purpose of determining whether the lands in suit form part of *Mouza* Sovarampore, a Civil Court Commissioner was appointed to relay the relevant maps. He relayed them and reported that all the lands in suit fell within the plaintiffs' village Sovarampore. His map is map No. 1 in part II of the map volumes. In his map he has shown the position of the river Meghna as it was at the time of the *thac* and revenue survey. It is just to the east of the lands in suit. The Subordinate Judge accepted the Commissioner's finding and found that the plaintiffs have title to all the lands. He further found that 326 *bighas* (1) 20,0 708 (F B).

15 cottas forming the western part of Sch. B had re-formed after 1916. He gave the plaintiffs *khas* possession of this area. He further held that the lands of Schs. A and C and the remaining portion of Sch. B had become fit for cultivation within 12 years of the suit and the whole of A and C and a good portion of B was included in the *ryot jote* of defendant No. 2, possibly of defendants Nos. 2 and 3, on the footing that defendant No. 3 was a co-sharer of defendant No. 2. In respect of these portions his decree is that defendants Nos. 7 to 10 are not entitled to retain them but that defendant No. 2 cannot be turned out. He accordingly gave the plaintiffs possession of those lands through defendant No. 2. With regard to the remaining portion of Sch. B, i.e. the southern portion to the south of Dag No. 192 which he held was not within the *jote* of defendant No. 2, he also gave the plaintiffs a decree for *khas* possession.

Defendants Nos. 2 and 7 to 10 have preferred this appeal. The plaintiffs have filed a memorandum of cross-objections in which they attack that portion of the decree passed by the Subordinate Judge by which they have been given possession through defendant No. 2. They also raise questions about costs. The points urged in the appeal are : (i) that the *putni* of 1880 only covered so much of the lands of Sovarampore as was then above water, (ii) that plaintiffs Nos. 1 to 31 did not purchase Sovarampore as the Court auction held in 1898, (iii) that the disputed lands are not re-formations *in situ* of Sovarampore, (iv) that the lands in suit had formed and had become fit for possession beyond 12 years of the suit and were being possessed by the defendants since they became so fit, (v) that Art. 142, Lim. Act, is applicable and the plaintiffs' suit is barred by time. If, however, Art. 144 be held to be the Article applicable, the defendants have acquired title by adverse possession, (vi) that in any case the plaintiffs cannot evict defendants Nos. 7 to 10 but can only get fair rent from them in a properly constituted suit. The points raised on the cross-objections are: (i) that defendant No. 2 is not a *ryot* but a tenure-holder and the plaintiffs are entitled to turn him out also, (ii) that the plaintiffs ought to get full costs of the Court below against defendants Nos. 7-10, and (iii) at any rate the costs of hiring the theodolite ought to be paid to the plaintiffs.

We will first deal with the points raised in the appeal. The first two points affect only plaintiffs Nos. 1 to 31 but not No. 32.

We do not see any substance in them. An extract from the *patni kabuliati* which is the counter part of the *patni potta* (Ex. 23 not printed) has been printed at p. 121, Part II. From it, it appears that the whole village Sovarampore was included in the *patni* granted to Bibi Manjura Banoo. The grantors did not retain, or reserve their right to retain, in *khas* any portion of the said *mouza* above or under water. In execution of a decree obtained by one Srish Chandra Das for his share of the *patni mulikana* against Bibi Manjura Banoo his *patni* interest was sold and purchased by Nawab Asanulla Bahadur, the predecessor-in-interest of plaintiffs Nos. 1 to 31. The sale certificate (Ex. 8, II. 133) shows clearly that the *patni taluk* which the judgment debtor held under the 13 annas proprietors was sold. In mentioning the villages included in the *patni taluk* village Sovarampore was omitted but that does not in any way advance the defendants' contention. The *patni taluk* was sold and purchased by the said Nawab and he got whatever was included in the *patni taluk* by the *patni* grant of 1880. We accordingly overrule both these points on the afore-said reasons and on the other reasons given by the Subordinate Judge which it is not necessary to repeat and with which we fully concur.

The third point relates to the relaying work of the Commissioner. It is admitted before us by both the parties that the plaintiffs' claim must succeed or fail according as the lands in suit are covered or not by the revenue survey map of Sovarampore (exhibited but not printed) prepared in the year 1861-62. There was some argument on behalf of the defendants in the lower Court that the state of things shown at the time of revenue survey cannot be presumed to be what was at the time of the permanent settlement, that is to say, that Sovarampore as depicted in the revenue survey map cannot be taken to be included in Estate No. 22 at the time of the permanent settlement. But that argument is not repeated before us by the appellants' Advocate, who does not challenge the conclusions of the Subordinate Judge on this part of the case. This map was relaid on the locality by the Commissioner who found that the whole of the disputed lands fell within the boundaries of Sovarampore as depicted in the revenue survey map. The Commissioner in his report says that he used a theodolite in making the survey. The appellants' Advocate asks us to reject

the Commissioner's work as faulty on the following three grounds: (i) that the plotting was unreliable as the Commissioner in his report admits that the theodolite supplied to him was defective, (ii) that as he could not with the instrument take any star observation, his work is unreliable, (iii) that at any rate the revenue survey line was plotted correctly up to the western bank of the present river, i. e. up to the letter "n" but no offsets were taken and the theodolite was not used for the purpose of fixing a station on the other bank of the river. This argument comes to this: that station "c" was not correctly placed by the Commissioner. Hence from the station "c" onwards the work is unreliable and accordingly the eastern boundary of Sovarampore as shown in the revenue survey map has not been correctly relaid on the locale. We cannot give effect to any of these contentions.

It appears from his report as also from the evidence of the Commissioner that owing to a defect in the instrument (a defect in the vernier screw on the vertical disc of the instrument) the vertical readings, i. e. the readings on the vertical disc of the theodolite could not be taken. The result was that the theodolite could not be used for observing the pole star. But the vernier for the reading on the horizontal disc of the theodolite was all right, with the result that the angular measurements on the horizontal plane could be and were taken by that theodolite. This was quite sufficient for the survey in hand after the Commissioner had checked his work with the small bends of the small chaks at the south western part of Sovarampore which had not undergone any change with time. The place to be surveyed was comparatively small in area, and in the survey of such an area, star observations are not necessary. At p. 225 of Thuilier and Smith's Manual of Surveying (Edition 3) it is pointed out that astronomical observations are not absolutely necessary. We do not, therefore, see any substance in the first two contentions.

With regard to the third, the position stands thus. To Mohim Ohandra Das, the plaintiffs' inspector of survey, who attended the field work of the Commissioner, the defendants put some questions in cross-examination for obtaining information as to how the Commissioner did his work in the field. One of such questions was whether in going over from the western to the eastern bank of the Meghna river

the Commissioner took offsets with the theodolite from points on the western bank. He gave an affirmative answer. When the Commissioner was later on examined, the defendants dropped the matter. It is a fundamental principle that a survey line cannot be taken over a big river without taking offsets and we do not see why the Commissioner should have omitted to proceed accordingly. No suggestion is made to the Commissioner and there are no materials on which we can say that the point "c" had been wrongly located and the revenue survey boundary of Sovarampore from that point had been incorrectly relaid. In 1916 the Settlement Officers relaid the eastern revenue survey boundary of the said village (called the demarcation line in the Commissioner index to the map-index No. 6). The eastern boundary of that village is only material to the suit and it is pertinent to observe that the Commissioner's relay of the eastern boundary line of the revenue survey map has followed very closely that demarcation line. We accordingly hold that there are no grounds for rejecting the Commissioner's work and the lands in suit fall within Sovarampore as has been found by the Court below. There is no force in the suggestion made by the appellants' Advocate that a part of the lands in suit may be covered by a village Baishazari. No such plan was taken in the written statement. There are, no doubt, indications in old papers that there was another village Baishazari near Sovarampore. Whether it was immediately to the east of Sovarampore, the evidence is not certain. If it was, then it was in the bed of the river Meghna at the time of the revenue survey, for the revenue survey maps of Sovarampore and Ohar Maricha Kandi show that only the river was in between. The revenue survey river as has been shown in the case map is beyond and to the east of the suit lands. In fact one of the documents on which Mr. Sen relied for supporting his argument on this point would indicate that Baishazari was a part of Ohar Jaikalipore (Exs. 24, II. 99) which is shown in the case map far to the east of the disputed land.

The question of fact raised in the fourth point is a very important one in the case and on this point there is a mass of conflicting oral evidence on which, we consider, it would not be safe to proceed. There are, however, important documentary evidences from which reasonable inferences can be made. This part of the case, as

also the questions of law which are indicated in the remaining points, have been argued with fullness and with remarkable ability both by the acting senior Govt. Pleader and by Mr. Sen, the leading Advocate for the appellants and we acknowledge the great help rendered to us by them. Before we enter into details, it is necessary for us to notice the respective cases of the parties relating to the three different Schs. A, B and C. For convenience of reference we would divide Sch. B into two parts, call the western portion of it with an area of 326 *bighas* 15 *cottas*, for which the Subordinate Judge has given the plaintiffs *khas* possession, as B (1) and the rest of Sch. B, i. e. the eastern part, as B (2). Likewise we would call the south-western part of Sch. C covered by settlement Dags Nos. 1 to 15 as C (2) and the rest of it as C (1). In the plaint the plaintiffs state that Sch. A re-formed on the east of river ten or twelve years before suit. They do not state when it became fit for possession. There is a negative statement that in 1900 it was not so fit and that rent on the sale was falsely assessed in 1900 when the Govt. granted an *ijara* for 30 years of Char Maricha Kandi to the defendants' predecessors, Rahim Bux, Jaha Bux and Apseruddi. Regarding Schs. B and C their case in the plaint is that they re-formed on the east of the river and became fit for possession 7 or 8 years before suit. The case of the contesting defendants is that the Sch. A lands were re-formed in about 1897, and became fit for possession before 1900. In 1900 the Govt. assessed it with rent and settled it with other lands as lands of Char Maricha Kandi in *taluki* right with their aforesaid predecessors. With regard to Schs. B and C, their case is that they re-formed and became fit for possession and were being possessed by their predecessors from about 1903.

Regarding Sch. A land and what we have called B (1) and C (1) there is not much difficulty. It is admitted in the plaint that in 1900 Govt. took the assets of Sch. A land into consideration in arriving at the *ijara* rent which was to be paid to it by Jaha Bux, Rahim Bux and Apseruddi under the *kabuliat* Ex. 21 (II-158) and that Rs. 51-1-3 represented the amount of rent payable to the Govt. for it (plaint para. 10). This fact is also borne out by documentary evidence, one of the documents being a document on which the plaintiffs rely in support of another part of their case (Ex. 1-A, II-198). The fact that

rent was assessed on it in 1900 would be very strong, almost conclusive evidence to support the case that the land had become fit for possession and was being possessed by Jaha Bux and others from 1900. To counteract that inference the plaintiffs state in paras. 4 and 5 of their plaint that in 1900 the said lands were under shallow water and at that time the predecessors of defendants Nos. 1 to 14 in collusion with their tenants in expectation of future gain and for showing their possession of the same as part and parcel of Char Maricha Kandi caused the same to be measured and included within the said Govt. *Khas* Mehal Estate. In one of the recitals in Ex. 1-A which the Govt. executed in favour of the plaintiffs on September 27, 1923, a similar statement is made. This explanation of the plaintiffs appears to us to be unsubstantial and the recitals in Ex. 1-A not to be in accord with facts. It is the case of both parties that before the demarcation proceedings of 1916, neither the plaintiffs nor the defendants' predecessors knew for certain, and in 1900 none of them had reason to believe, that Sch. A was a part of Sovarampore. It is a narrow and long strip of land only about 60 *bighas* in area being the extreme eastern portion of the lands in suit, bordering on the Govt. estate. We do not see why in this state of facts Jaha Bux and his co-sharers would in 1900 by their own act take upon themselves the burden of paying to Govt. every year an additional sum of Rs. 51 odd as rent with no immediate prospect or any prospect, if the plaintiffs' case about the time of re-formation of the land be true, within a reasonable time of getting any profit out of it. The plaintiffs' statement in the plaint that these lands re-formed only between 1913 to 1915 is palpably an untrue one, seeing that in the notice which they served on the Govt. under s. 80, Civil P. O. in 1918, which was in respect of the whole of Sch. A and at least of a good part of Schs. B and C they stated that the re-formation was in 1909 and lands were fit for possession before January 1910 (Ex. A, II-188). In para. 2 of Ex. 39 (II-184) a letter from the Director of Land Records to the Collector of Tippera dated February 23, 1916, there is a statement that these lands had formed and were in the possession of the Govt., obviously through their *ijara-dars*, the defendants' predecessors, since 1897 when the survey on the basis of which Ex. 21 (II-158) was executed commenced,

The lands mentioned in that paragraph refer obviously to Sch. A lands. We have no hesitation in holding that the lands of Sch. A had re-formed on the east of the river Meghna about the year 1897 and had become fit for possession and were being possessed by the defendants' predecessors at least from 1800.

The evidence is equally clear that B (1) had come above water after 1914. In the year 1913 Jaha Bux and others brought two suits against their tenants for increase of rent for increase in area of their holdings by reason of lands being added thereto by accretion. An Amin, Gouri Kamal Bhattacharyya, was appointed for local investigation. He prepared a map [Ex. Z (1) Map No. 10] and submitted a report in 1914 [Ex. Z-1 (1) II-54]. He has been examined as a witness and has proved his report and map. In his map he showed three strips of land within the rectangle A B C D as the accreted lands in those two suits. In the map and also in his report he showed that the river Meghna was to the immediate west of the line A. B. This line A B has been relaid on the case map and its elongation is practically the eastern boundary of what we have called B (1). The proceedings in those suits have an important bearing on the question of the time of the re-formation of B (2) which we will discuss hereafter. In 1916 the District Settlement and Survey under Ch. X, Ben. Ten. Act, which had commenced in 1913 was made final. The District Settlement map has also been relaid on the case map and the settlement Dags. over B (2) but not B (1). The learned subordinate Judge has found that B (1) re-formed after 1916 and I see no ground for disturbing that finding. The whole of Sch. O land had come above water at the time of the said District Settlement and Survey but in the Record of Rights which was finally published in 1916 Dags Nos. 10 to 18, i. e., O (1) is recorded as Sandy Char. Ex. Z (D) II. 80 at 81-82. We hold that B (1) and O (1) had not become fit for possession before 1916.

We will now take up the question as to when B (2) and O (2) became fit for possession. That they became so fit in 1916 and were being possessed by the contesting defendants from that year admits of no doubt. In the finally published Record of Rights, in which a statutory presumption of correctness attaches under s. 103 (B), Ben. Ten. Act, these are shown as *naal* lands, cultivated lands, in the possession of the tenants of the defendants' predecessors,

Rahim Bux and others. The Settlement Khatians are printed in Part II from pp. 71 to 90. The one-sided evidence is that the survey of the fields began in the early part of 1913, the Kistwar and the Khanapuri were finished in April-May 1913 (*Bysack* 1320 B. S.) and the Bujharat in November 1913 (*Agrahayan* 1320) D. W. No. 1, p. 174, l. 23 to 25 and p. 176, l. 25. The attestation takes place after the Bujharat. In the report of the Assistant Superintendent of Survey [Ex. 39 (A) II 182] it is stated that at the Khanapuri and attestation "present possession was followed." From this it is evident that what are stated in the different entries in the finally published Record of Rights (II, 71 to 90) were based on what the Settlement Officers found on the spot at the Khanapuri in April-May 1913. It would accordingly be a sound inference of fact to hold that B (2) and O (2) had become fit for possession and were being possessed by the tenants of Rahim Bux and his co-sharers at least from April-May 1913 (*Bysack* 1320) and the case of the plaintiffs that they were formed and had become fit for possession seven or eight years before suit is a false one.

The documentary evidence and the probabilities of the case would further indicate that they had re-formed and had become fit for possession at least at the end of the year 1909. The notice of suit (II, 18c) that was served on the Govt. in 1918 describes the lands in two Schedules. The western boundary of Sch. (1) is the river Meghna as it was in 1918. The evidence is that the river is gradually receding to the west. The lands which had been found to exist at the District Settlement, if not some more lands which had accreted to the west since 1916, were accordingly the subject of the notice. Paragraphs 6 and 11 of the said notice contain unequivocal admissions of the plaintiffs that the lands of Schs. 1 and 2 of that notice had become fit for possession in 1909. A portion of para. 6 has not been correctly translated. We have looked into the original and both the learned Advocates are agreed that the passage at para. 6, l. 3 of p. 192 ought to run thus: "As a matter of fact the said lands having re-formed in the eastern part of disputed land No. . . ."

During the District Survey and Settlement proceedings which we have stated commenced in the early part of 1913 the plaintiffs' agents came on the disputed lands and attempted to foment trouble. They succeeded for a time in setting up the

tenants of the Govt. *ijaradars* Jaha Bux and others against the latter. This led to criminal proceedings under s. 107, Criminal P. C. The Kanango's report and the Police report are exhibits in the case [Ex. X and Ex. X (2) only extracts have been printed at II. 179 and II. 180 but the whole was typed for us]. From the said reports it is quite evident that the plaintiffs' agents were moving and inciting the actual occupiers against the Govt. *ijaradars* in the interest of their principals. Their object was to win over the occupants to the side of their principals and with their help and concurrence to have them recorded in the settlement proceedings as tenants of their principals. They, however, ultimately failed, for the occupants made up with the said *ijaradars* and the finally published Record of Rights recorded the occupants as tenants of those *ijaradars*. These proceedings lead to the inference that the lands had for some time past been cultivated and possessed by those occupants and the plaintiffs' agents attempted, though unsuccessfully, to consolidate their principals' position in the settlement proceedings by having the actual occupants recorded as their tenants. We have already noticed that in the year 1913 the *ijaradars* instituted two suits against their tenants for increase of rent on the ground that the area of their holdings had increased by reason of accretions, and in those suits Gouri Kamal Bhattacharyya was appointed Amin for local investigation. Map No. 10 is his map. The accreted portions are there shown as three long coloured strips. In his report, Ex. Z 1 (1)—(II, 54) he gives details about the condition of the different portions of the said three strips which have been marked by separate alphabets and states that the whole had become fit for possession in 1910. The judgment passed in those suits is Ex. Z B. 4—II. 59 and decrees are also exhibits in the case. One of them has been printed. It is Ex. Z C (30)—II. (62). They show that a very substantial additional rent was imposed with effect from 1910. In one case rent was increased from Rs. 14 to Rs. 59, an enhancement of Rs. 45. These suits being not *inter partes*, the recitals and findings in the judgment are not evidence against the plaintiffs but the fact that such decrees were passed by which additional rent was imposed from 1910 is evidence. The report of Gouri Kamal is also evidence, he having been examined as a witness. It is, therefore, proved that

the lands of the two holdings shown in Gouri Kamal's map which fall within B (2) became fit for possession in 1910 and were from that time being possessed by the *ijaradar's* tenants. There is evidence that the formation of the whole of B (2) was at about the same time and the condition of the whole of the said portion of the Char at a particular period of time was practically the same. Having regard to this evidence and the other evidence which we have already noticed, we think it would be a sound inference to hold that the said land, B (2), had become fit for possession towards the end of 1899 or the beginning of 1910 and was being possessed from that time by the Govt. *ijaradars* through their tenants. The same remarks apply to O (2) for similar reasons.

Mr. Sen wants to go further. He contends that B (2) and O (2) had become fit for possession and were in the possession of the *ijaradars'* tenants at least from 1906 or so. To support this contention he has relied upon some counterfoil receipts produced by his clients (II. 165, etc.), some rent decrees (II. 51) and some registered *kabuliats* (II. 115, etc.). No attempt was made by his clients to relay the *kabuliat* lands in the locality and there is no reliable evidence to connect the said *kabuliats*, counterfoil receipts and decrees with the suit lands B (2) or O (2). They may as well relate to the Sch. A lands or lands further east which are undoubtedly the lands of Char Maricha Kandi. Reviewing the evidence as a whole we have come to the following conclusions: (1) The lands of Sch. A had re-formed in 1899 and had become fit for possession from at least 1900. They were in the possession from that year of the predecessors-in-interest of the contesting defendants Nos. 7 to 10 through their tenants, (2) the lands (B) (1) had re-formed after 1914 and had not become fit for possession before 1916, (3) the lands of O (1) had re-formed before 1913 but had not become fit for possession before 1916, (4) the lands of B (2) and O (2) had re-formed and had become fit for possession towards the end of the year 1909 or the beginning of the year 1910 and were from that time being possessed by the contesting defendants Nos. 7 to 10's predecessors through their tenants.

On these findings the contesting defendants Nos. 7 to 10 cannot resist the plaintiffs' claim for possession to B (1) and O (1), as the suit was filed in September 1925. No portion of B (1) falls within the tenancy of

defendant No. 2. The plaintiffs are accordingly entitled to *khas* possession thereof. We accordingly confirm the Subordinate Judge's decree giving the plaintiffs *khas* possession to 326 *bighas* 15 *cottas* of land as defined in his decree. The finding that O (1) is included in defendant No. 2's tenancy has not been challenged before us, but the finding about the nature of his tenancy has been challenged in the memorandum of cross-objections. We will accordingly deal with the nature of the relief to which the plaintiffs are entitled in respect of the same O (1) when we would be dealing with those cross-objections. The facts bearing on the last two points urged before us in the appeal have now to be stated. During the course of the district Settlement proceedings which began in the year 1913 the lands of Schs. A and O and what we have called B (2) were recorded in the draft record as in the possession of the *ijaradars* of the Govt. *khas mohal* estate, Ohar Maricha Kandi. The plaintiffs thereupon took up the position that a good portion of the said lands was their land and prayed for demarcation of the lands of their estate. On their application a demarcation case was started. The Assistant Settlement Officer caused the revenue survey map of Sovarampore to be relaid. As a result of the relay, he found that the lands of Schs. A and O and B (2) to be within the plaintiffs' estate. He accordingly made an order in favour of the plaintiffs on February 22, 1916 (Ex. 39 (A)—II. 182) and caused the demarcation line between the plaintiffs' Estate No. 22 and Govt. estate Maricha Kandi to be depicted on his map. This line has been relaid by the Commissioner in the present case map and it forms the eastern boundary of Sch. A.

Thereafter, there was correspondence between the Director of Land Records and the Collector of Tipperah, the latter representing Govt. interest. A letter of the former dated February 23, 1916, which was in reply to the Collector's letters, is Ex. 39 (printed at p. 184 of Part II). It appears from para. 2 of that letter that the Collector challenged the accuracy of the demarcation line and also set up the claim of the Govt. based on adverse possession. Up to this Govt. denied the plaintiffs' title and this position was maintained by the Govt. for some years. After the plaintiffs had served on the Govt. notice of a suit (Ex. A—II. 188) in 1918, a different attitude, however, was taken by the Govt. In a

letter from the Secretary, Board of Revenue, addressed to the Commissioner of the Ohittagong Division dated March 1, 1920, (Ex. 17 (a), II. 195) we find a reference to a previous letter of the Board of Revenue dated June 2, 1919, and the terms of that letter are set out. There the Govt. agreed to acknowledge the title of the plaintiffs to the lands which had been found in the demarcation proceedings of 1916 to belong to Estate No. 22 and to release the same to them with a condition that its *ijaradars* were to remain in possession till March 1930. It was then desired by the Board of Revenue that the Govt. *ijaradars* should also join in the compromise. It further appears that thereafter the said *ijaradars* made a representation to the Board of Revenue to the effect that the plaintiffs should accept them as permanent tenure-holders. This representation was rejected by the Board as would appear from paras. 4 and 5 of Ex. 17 (a) (not printed). The *ijaradars* ultimately refused to join and on September 27, 1923, the Govt. executed a document in favour of the plaintiffs (Ex. 1-A—II. 195). This document was, however, stamped not as a conveyance. One of the recitals runs as follows:

"And whereas thereafter (e. g. after the notice of suit, Ex. A) the Hon'ble Board of Revenue on behalf of the first party (the Secretary of State for India in Council) sanctioned the release of entire aforesaid land re-formed *in situ* of Mausā Sovarampore marked as aforesaid A, B and O respectively on the said plan amicably in favour of the second and third parties (the plaintiffs) on condition that the aforesaid lease on March 3, 1903 (the *ijara* lease in favour of Rahim Bux and others defendants Nos 7 to 10's predecessors-in-interest) shall be considered as comprising the said lands marked A and as good and valid in respect thereof according to its legal effect and purport and so accepted by the second and third parties."

This document proceeded on the footing that the Govt. had proceeded on a mistake, which it acknowledged, in including "A" within the *ijara* lease given to Rahim Bux and others executed on March 3, 1903, and by its terms the sum of Rs. 51-1-3 was assessed as the proportionate *ijara* rent in respect thereof. This the plaintiffs agreed to take from the *ijaradars* till March 31, 1930. The document was supported by consideration, because the plaintiffs gave up their claim to mesne profits against the Govt. Though the document was not stamped as a conveyance by its operative part, it conveyed to the plaintiffs whatever rights the Govt. then had in the lands marked A, B and O in the plan attached thereto. This would pass to the plaintiffs such title as the Govt. then had on the principle formulated

in *Hemendra Nath Mukherjee v. Kumar Nath Roy* (2). If the Govt. had then acquired title by adverse possession, the plaintiffs would, by this transfer, acquire the same, but then they would be bound by the terms of lease given to Rahim Bux and others in 1903, if the Govt. was bound by the said lease. We will consider the legal effect of this document Ex. I-A hereafter. The appellants' contentions are of a two-fold nature. They say that, firstly Art. 142, Lim. Act, applies and the plaintiffs' suit must be dismissed with regard to the lands of Sch. A and what we have called B (2) and C (2), on our finding that the defendants had remained in possession thereof for more than 12 years before the suit. The second contention is, that in any event, the plaintiffs are not entitled to *khas* possession as against defendants Nos. 7 to 10, who must be considered as their tenants. They further say that what are exactly their rights *qua*-tenants need not be determined in this suit but must be left over for determination if the plaintiffs later on sue in ejectment on the footing that their rights as tenants have determined.

The first question therefore is whether Art. 142 or Art. 144 applies. It is well settled that Art. 142 applies if the plaintiff has sued on the footing that while in possession he was dispossessed by the defendant, or if the fact be established that while in possession he was dispossessed by the defendant. In the plaint there is no admission which would bring the case within the first category. The plaintiffs were not in physical possession, either themselves or through persons holding under them at any time after their lands had re-formed on the other side of the river. They never exercised acts of possession and they were not turned out, neither physically expelled nor by reason of adverse acts on the part of the defendants, their acts of possession were interfered with and effaced. Through a fiction of law they, the plaintiffs, were in possession till the lands became fit for possession. It may be taken that they were by reason of this fiction in possession right up to the time when the lands became fit for possession but the question is whether they were "dispossessed" or whether they "discontinued" their possession within the meaning of Art. 142 after the lands had re-formed and had become fit for possession e. g. had become cultivable. There cannot be any question of discontinuance of possession on their part. That term connotes

(3) 12 O W N 478.

three elements, two physical and one mental. There must be (1) actual withdrawal, (2) with an intention to abandon, and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It pre-supposes physical contact, a collision, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effaced by the latter. On these concepts it would be difficult to say that the rightful owner, who is only presumed to be in possession, till a *Char* becomes fit for enjoyment is dispossessed simply because he does not take possession as soon as it becomes so fit, but another person occupies it and begins to till. Such a case would, in our judgment, come within Art. 144 and not Art. 142 and the defendant must prove adverse possession for 12 years or over before suit. This is our reading of the judgment of Lord Sumner in *Basanta Kumar Roy v. Secretary of State* (3). Art. 144 was applied there not on the ground of seasonal floodings.

The view we are taking finds support in the observation of N. R. Chatterjea and Panton, JJ. in *Rakhal Chandra v. Durga Das Samanta* (4), at p. 733. In *Bhupendra Narayan v. Rajeswar Prasad* (5), the Judicial Committee of the Privy Council held that Art. 144 and not Art. 142 was the Article applicable to the case when the defendant took physical possession of minerals by opening and working a mine, a case where the rightful owner was in possession but only on a construction of law right up to the time when the mine was opened and worked. The case in *Sures Chandra v. Shiti Kanta* (6), cited by the appellants' Advocate, does not touch this point. There was a difference of opinion between Woodroffe, J. and Cuming, J. whose judgments are reported in *Sures Chandra v. Shiti Kanta* (6). Wood-

(3) 44 I A 104; 40 Ind. Cas. 337; A I R 1917 P O 18; 44 O 858; 1 P L W 593; 32 M L J 505; 21 O W N 642; 15 A L J 398; 25 O L J 487; 19 Bom. L R 480, (1917) M W N 482; 6 L W 117; 22 M L T 310 (P O).

(4) 26 O W N 724 at p. 733; 67 Ind. Cas. 673; A I R 1922 Cal 557.

(5) 81 A I 28; 132 Ind. Cas. 610; A I R 1931 P O 162; 15 O 10; 35 O W N 870; (1931) A L J 586; 34 L W 1; Ind. Lul. (1931) P O 14; 54 O L J 137; 33 Bom. I R 1273; 61 M L J 632 (P O).

(6) 51 O 669; 78 Ind. Cas. 679; A I R 1924 Cal 855 28 O W N 637.

roffe, J. made it clear in the earlier part of his judgment that both parties conceded before the Division Bench that Art. 142 applied. Before the Letters Patent Bench it does not appear that any question was raised as to whether Art. 142 or Art. 144 was the proper Article to apply. The case proceeded throughout in the High Court on the footing that Art. 142 applied. The main question was on whom the burden of proof lay, and if it lay on the plaintiff could he discharge the burden of proving possession within 12 years from the suit by a recourse to the principle grounded on the anxiety of the Courts to come in aid of right and to disfavour wrong which imputes possession to the owner as long as the subject is incapable of enjoyment. Woodroffe, J. answered this in the affirmative after holding that the onus lay on the plaintiff and his view was affirmed by the Letters Patent Bench. That case accordingly does not support the learned Advocate for the appellants, nor does the case in *Punchanan Sarkar v. Basanta Kumari* (7), on which he placed reliance, a case in which Ouming, J. fell in line with the final decision in *Sures Chandra v. Shiti Kanta* (8). We hold accordingly that Art. 144, Lim. Act, and not Art. 142 applies in this case.

The right obtained by adverse possession for more than 12 years would be co-extensive with the assertion of the claimant. Defendants Nos. 7 to 10 did not claim in themselves proprietary rights. They claimed only a subordinate right, that of tenants. If the Govt. had not acknowledged, as it did in 1923, the plaintiffs' title the benefit of the possession of defendants No. 7 to 10 would have accrued in favour of the Govt., but after the deed Ex. 1-A of 1923 the Govt. cannot be allowed to turn round and say that the plaintiffs title has been completely extinguished by reason of its tenants remaining in possession for more than 12 years before the suit. The effect of the possession of defendants Nos. 7 to 10 for more than the statutory period was to make the lands so possessed a part of their tenancy. As the statutory period had run out before the Govt. executed Ex. 1-A in favour of the plaintiffs, the lands of Sch. A and portions of Schs. B and C which we have called B-2 and C-2, had become a part of the tenancy of the said defendants, and consequently the subsequent act of the Govt. by executing Ex. 1-A in favour of the plaintiffs cannot

deprive the said defendants Nos. 7 to 10 of the benefit which they had already acquired under the statute of limitation. If the Govt. had not acknowledged the plaintiffs' title and if it had not executed in their favour Ex. 1-A, the plaintiffs' title would have been completely extinguished and the Govt. and the defendants Nos. 7 to 10 would between them have become the owners in fee of the said lands. It is the act of the Govt. which has kept alive a portion of the plaintiffs' rights and they, the plaintiffs, accordingly cannot turn out the said defendants whom the Govt. could not turn out at the date of the suit and obtain *khas* possession of Sch. A and those portions of Schs. B and C indicated above. On the other hand defendants Nos. 7 to 10 cannot take up the position that the plaintiffs cannot even get a declaration of title on the ground that their title was not subsisting at the date of the suit, for the Govt. as their landlord after its relinquishment in favour of the plaintiffs in 1923 was not entitled in law to the benefit of its tenants' encroachment on a neighbour's land.

The correct position in respect of the said lands, accordingly, seems to us to be that the plaintiffs are entitled to get a declaration of their title and to have their possession confirmed in the same through defendants Nos. 7 to 10, the latter being regarded at the date of the suit as their tenants. In the view we have thus taken above, it is not necessary for us to determine the question as to whether the landlord acquires or not title by adverse possession to the encroachments made by his tenant on a neighbour's land as soon as his tenant completes his possession for twelve years. One view may be that he does, and on that view the good title which the Govt. had already acquired before 1923 was conveyed to the plaintiffs, the former owners whose title had been extinguished before 1923, and Ex. 1-A would then be operative to confer a new root of title so far as the plaintiffs were concerned. In this view of the matter they, the plaintiffs, became the representatives-in-interest of the Govt. and so could not take *khas* possession from defendants Nos. 7 to 10 as long as the latter's tenancy under the Govt. subsisted, and it was certainly subsisting in September, 1925. The other view which has been expressed in *Surendra Kumar v. Ahmad Nawab* (8), is that the landlord acquires no

(7) 30 O W N 497; 88 Ind Cas. 567; A I R 1925 Cal 1230.

(8) 63 O 300; 163 Ind. Cas. 897; A I R 1935 Cal 300; 63 O L J 177; 9 R O 93.

such right or title during the subsistence of the tenancy but can get the benefit of his tenant's encroachment on another's land only after the determination of the tenancy. We have already said it is not necessary, for the reasons on which we rest our judgment as stated above, to determine this question, but we desire to make it clear that we must not be taken to be in agreement with all that has been said in *Surendra Kumar v. Ahmad Nawab* (8). The facts of that case were different from the facts we have before us.

The result of our findings is that the plaintiffs are entitled to *khas* possession of 326 *bighas* 15 *cottas*, being the western part of Sch. B, which is the decree of the learned Subordinate Judge. They, the plaintiffs Nos. 1 to 31 and 32, are, however, entitled to have only a declaration of their title as *patnidars* and *zamindars* respectively of Estate No. 22 in respect of the lands of Sch. A and also in respect of the rest of Sch. B and in respect of that portion of the lands of Sch. C as is covered by Dags Nos. 1 to 15 of the settlement map. They cannot get a decree for *khas* possession in the same but are only entitled to be confirmed in possession through defendants Nos. 7 to 10 on the basis that defendants Nos. 7 to 10 were their tenants at the date of the suit. Mr. Mukherjee appearing on behalf of the plaintiffs-respondents has contended before us that the rights of defendants Nos. 7 to 10 to hold the suit lands as tenants under the Govt. had come to an end on March 31, 1930, for the Govt. had granted a new settlement to them for another term of years excluding the lands of Schs. A, B and C. He further says that although the lease Ex. 21 (II. 158) which was for a term of 16 years gave by its terms a right of renewal to the tenants, the said lease was not binding on the Govt. as it was not sanctioned by the Board of Revenue, which was according to him the sanctioning authority in the case. The learned Subordinate Judge has found that the Board of Revenue was the sanctioning authority and no sanction having been given by the latter, the said lease was not binding on the Govt. On this finding he asks us to depart from the usual rule that a suit must be decided in all its stages on the cause of action at its institution and as laid in the plaint, and to give his clients a decree for *khas* possession on the ground that though the defendants may have occupied the position of tenants at the date of the suit and for about five years more, they

have ceased to be so since March 31, 1930. He urges that the renewal clause in Ex. 21 was not binding on the Govt. and so not binding on his clients regarded by reason of Ex. 1-A as the assignee of the Govt.'s rights so far as the lands in suit are concerned. Exhibit 21, had, however, the sanction of the Commissioner of the Division (Ex. Q, II. 97).

In the settlement report, on the basis of which the lease to Jaha Bux and others was given by Ex. 21, the Settlement Officer stated that the Commissioner of the Division was the sanctioning authority [Ex. Z (1) II, 43 at 49]. The rule on the subject then in force is r. 5, Ch. XVI of Part 3 at p. 118 of the Survey and Settlement Manual of 1900. The Board of Revenue is the confirming authority in the case of a permanent settlement and in the case of a regular temporary settlement at an annual revenue of Rs. 25,000 or over. In the case of a temporary regular settlement where the Govt. demand is below the said figure, the Commissioner of the Division is the confirming authority except in some cases where it is the Collector. It is doubtful if Ex. 21 evidences a permanent settlement. It is for a term of years with a right of renewal. It is not necessary to pursue the point further, for we have come to the conclusion that the questions as to whether defendants Nos. 7 to 10 had ceased to be tenants on March 31, 1930, what were and are their precise rights as tenants and what were their precise status ought not to be allowed to be agitated at the appellate stage, and must be left open between the parties in this suit. The finding of the learned Subordinate Judge that Ex. 21 required the sanction of the Board of Revenue and all findings consequent thereon are set aside, the matter being left open. The plaintiffs' suit for *khas* possession in respect of these portions of the lands in suits [Schs. A and B (2) and C (2)] is dismissed on the footing that at the date of the suit defendants Nos. 7 to 10 had become their tenants. As the plaintiffs cannot in this suit turn on defendants Nos. 7 to 10 from the said lands, the possession of defendant No. 2 who holds the lands of Sch. A, the northern portion of the eastern part of Sch. B and Dags Nos. 1 to 15 of Sch. C as a tenant under defendants Nos. 7 to 10 cannot also be disturbed.

We have already found that neither defendant No. 2, nor defendants Nos. 7 to 10 through the former had been in

possession of the rest of Sch. C lands, i. e. of C (1) for 12 years before suit. These lands therefore stand on the same footing as the western 326 *bighas* 15 *cottas* of Sch. B, i. e. B (1). But there is this difference that whereas B (1) is not within the tenancy of defendant No. 2, C (1) is. If defendant No. 2 is a *ryot* and not a tenure-holder, he cannot be ejected by the plaintiffs, for it has been held by the Full Bench in *Bindalal Pakrashi v. Kale Pramanik* (1), that if a non-occupancy *ryot bona fide* holds under a trespasser, he cannot be ejected by the rightful owner who had established his rights against the trespasser. In *Krishna Nath v. Mohammad Wafiz* (9), it has been pointed out that there must be *bona fides* both on the part of the *de facto* lessor and the *ryot* to attract the principle of *Bindalal's case* (1), which is an encroachment on the general principles of law. Here there cannot be any doubt that there were *bona fides* on the part of the *ijaradars* of the Govt. and defendant No. 2 when he went into occupation. The learned Subordinate Judge has held that defendant No. 2 is a *ryot* and that finding has been challenged in the memorandum of cross-objections. The Record of Rights records him as a tenure-holder [Ex. Z (D)—II, 79] and the area of his tenancy is more than 100 *bighas*; the presumption is that he is a tenure-holder. The original letting to his predecessors-in-interest was in the year 1846. The area then let out was 80 *bighas* only. (Exhibit F, II, 22.) He and his predecessors extended their possession as the river receded and these gradual additions must be taken to have been held in the same right under which the original 80 *bighas* was held. On the construction of Ex. F (II, 22) we hold that a *ryoti* settlement was concluded and the presumption of the Record of Rights as also the one founded on s. 5, sub-s. (5), Ben. Ten. Act, have been rebutted. The fact that his predecessors had been described as *jotedars* is not of much help, for the word '*jote*' by itself is an ambiguous word, which may mean a tenure or a holding. We accordingly hold that defendant No. 2 is a *ryot*, and so he cannot be ejected. Two further points have been taken in support of the cross-objections. They are (1) that full costs ought to have been awarded by the Court below to the plaintiffs against defendants Nos. 7 to 10. As we are modifying the decree of the

Subordinate Judge, we think that the Subordinate Judge's order giving the plaintiffs half costs against those defendants ought to stand. The other point is a trivial one. The plaintiffs paid the costs of hire of the theodolite. The sum, which is Rs. 114, has not been included in their schedule of costs. The plaintiffs ought to have the same.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge is modified. A self-contained decree will be drawn up in this Court in the following manner, namely, that it is declared that the lands in suit are the lands of village Sovarampore appertaining to Touzi No. 22 of the Tipperah Collectorate and that plaintiffs Nos. 1 to 31 have 13 annas *patni* interest and plaintiff No. 32 three annas *zemindary* interest in the same. That the plaintiffs would recover *khas* possession of 326 *bighas* 15 *cottas* out of the lands of Sch. B which lie to the west of the western District Settlement line as depicted in the Commissioner's map by evicting the defendants. That the plaintiffs' possession is confirmed in the lands of Sch. A, the rest of Sch. B and in Dags Nos. 1 to 15 of Sch. C through defendants Nos. 7 to 10 on the footing that they were at the date of the suit the plaintiffs' tenants. That the plaintiffs do recover possession through defendant No. 2 of the rest of the lands of Sch. C by evicting the other defendants. That defendants Nos. 1 to 14 do pay to the plaintiffs half the costs of the Court below, i. e. of half of the costs as appearing at Part I, p. 278 of the paper-book plus the full sum of Rs. 114 with interest at the rate of 6 per cent. per annum from the lower Court's decree. That the other defendants do bear their respective costs of the Court below. That the plaintiffs will be entitled to get mesne profits from defendants Nos. 7 to 10 in respect of the aforesaid 326 *bighas* 15 *cottas* in which the plaintiffs get *khas* possession, such mesne profits to be assessed in a subsequent proceeding. As the appeal has succeeded substantially but not in full, we direct that the plaintiffs do pay to the defendants-appellants half the costs of this Court. No costs in the cross-objections. Hearing fee assessed at Rs. 300.

D.

Appeal substantially allowed.

OUDH CHIEF COURT

Civil Revision Application No. 39 of 1938

December 7, 1939

ZIA-UL-HASAN, J.

B. AMBIKA PRASAD—DEFENDANT

—APPLICANT

versus

Mst MAQBULUNNISSA AND OTHERS—

OPPOSITE PARTY

U. P. Encumbered Estates Act (XXV of 1934), s. 7 (1) (a) and (b)—Cl. (b), if applies to suits or proceedings remanded by Appellate Court—Cls. (a) and (b) do not apply to suits instituted by landlord.

Clause (b) of s. 7 (1), U. P. Encumbered Estates Act, applies to a suit or other proceeding filed by a party after the passing of an order under s. 6 and does not contemplate suits or proceedings remanded by a Court of Appeal for trial *de novo*.

Moreover, both the clauses of s. 7 (1) contemplate suits or proceedings against landlords for enforcement of debts due by them and not to suits or proceedings that the landlord themselves are entitled to institute under any law, e. g., suit under s. 33, U. P. Agri Rel. Act. 177 Ind. Cas. 215 (1), relied on.

O. R. App. of the order of the Munsif, Haveli, Lucknow, dated June 3, 1937.

Mr. Ganesh Prasad, for the Applicant.

Mr. M. H. Kidwai, for Opposite Party No 1.

Order.—This is an application under s. 115, Civil P. C. against an order of the learned Munsif Haveli, Lucknow, disallowing the applicant's objection to continuance of a suit in his Court.

On September 14, 1935, Maqbulunnissa, opposite party, and her four sons executed a deed of mortgage in respect of a share in a village in favour of the present applicant and another. On September 28, 1935, she filed a suit in the Court of the Civil Judge under s. 33 of the Agriculturists' Relief Act against the present applicant and the other mortgagee. The valuation of the suit was Rs. 500 only and in view of a notification of this Court amending para. 268 of the Oudh Civil Rules, the plaint was returned by the Civil Judge on February 17, 1936, to be presented to the proper Court. On the next day, that is, February 18, 1936, the suit was filed in the Court of the Munsif, Haveli. It was decreed by the Munsif on August 25, 1936. An appeal against the decree of the learned Munsif was filed by the present applicant on October 15, 1936, and on February 12, 1937, the Appellate Court remanded the case to the trial Court for re-trial after making Maqbulunnissa's sons parties. In the meantime on October 27, 1936, Maqbulunnissa applied under s. 4 of the Encumbered Estates Act, and when the

suit was resumed by the learned Munsif, the present applicant contended firstly that s. 33 of the Agriculturists' Relief Act did not apply to mortgage debts, and secondly, that the suit should be stayed under s. 7 of the Encumbered Estates Act. Both these objections were overruled by the learned Munsif. An appeal was filed by the applicant in the Court of the District Judge but the learned Judge held that no appeal lay to his Court. Hence the present application for revision of the learned Munsif's order.

So far as the first contention of the applicant, namely, that s. 33 of the Agriculturists' Relief Act does not apply to mortgage debts is concerned, it is conceded by the learned Counsel for the applicant that this contention cannot prevail in view of the decisions of this Court. The only question, therefore, that is before me is whether or not the learned Munsif was right in holding that the opposite parties' suit under s. 33 of the Agriculturists' Relief Act cannot be stayed on account of the provisions of s. 7 of the Encumbered Estates Act.

I have gone through the order of the learned Munsif and considered the arguments of the learned Counsel for the applicant but am of opinion that the learned Munsif's order is perfectly right. While cl. (a) of s. 7 (1) of the Encumbered Estates Act deals with proceedings pending in any Civil or Revenue Court at the date of the order of the Collector under s. 6, and provides that such proceeding shall be stayed, cl. (b) prohibits the filing of a fresh suit or other proceeding in respect of any debt after the Collector has passed his order under s. 6. In the present case the Collector passed his order under s. 6 on October 27, 1936, but at that time the opposite parties' suit under s. 33 of the Agriculturists' Relief Act was not pending, but had been decided by the learned Munsif and was in appeal before the District Judge but under cl. (a) there is no bar to an appeal being pending in any Court on the date of the Collector's order. Therefore neither cl. (a) nor cl. (b) of s. 7 applies to the present case.

It is argued that as the case had been remanded by the Appellate Court for trial *de novo* on February 12, 1937, the suit should be deemed to have been filed afresh on that date and should be dealt with under cl. (b). I am unable to accept this argument. Clause (b) of s. 7 (1) appears on the face of it to apply to a

suit or other proceeding filed by a party after the passing of an order under s. 6 and does not contemplate in my opinion suits or proceedings remanded by a Court of Appeal.

Moreover, both the clauses of s. 7 (1) appear to me to contemplate suits or proceedings against landlords for enforcement of debts due by them and not to suits or proceedings that the landlords themselves are entitled to institute under any law. I am supported in this view by the case of *Chaudhuri Sheo Baran Singh v. Ranbir Prasad*, (A. I. R. 1938 All. 477) (1) in which it was held that the proceedings, attachments, processes and suits mentioned in cls. (a) and (b) of s. 7 are proceedings, attachments, processes and suits against the landlord in respect of debts and that the landlord himself is not necessarily under any disability for taking proceedings which he may be entitled to take under the law for the protection of his interest.

The result is that the application fails and is dismissed with costs.

S. Application dismissed.

(1) A I R 1938 All. 477; 177 Ind. Cas. 215; (1938) A L J 541; 11 R A 182; 1938 A L R 724.

NAGPUR HIGH COURT

Second Civil Appeal No. 215 of 1937

March 20, 1939

GRILLE, J.

Seth MISHRILAL—PLAINTIFF

—APPELLANT

versus

BARIK AND OTHERS—DEFENDANTS NOS. 1 TO 4

—RESPONDENTS

Civil Procedure Code (Act V of 1908), O XXI, rr. 63, 62—Attachment of property in execution of simple money decree—Objection by third person that property was subject to his mortgage—Objection allowed and property sold subject to encumbrance—Fact that property is subsequently released from attachment whether relieves decree-holder of his duty to bring suit within one year—Auction-purchaser knowing fictitious nature of mortgage but keeping silent to get property cheaper—Whether can challenge validity of mortgage in suit by mortgagee—Sale as result of order under r. 63, effect—Distinction between where property is sold subject to mortgage and where notice of alleged mortgage is given in sale proclamation.

The order in objection proceedings that property attached is subject to the mortgage of the objector is conclusive as against the decree-holder unless he brings a suit which would terminate in his favour, within the period of one year. The fact that the property was released from attachment afterwards in no way annuls the duty that

lies on him if he wishes to bring the property to sale unencumbered. [p. 729, col. 2.]

When upon attachment of property in execution of a simple money decree, a mortgagee objects to the attachment on the ground that the property was subject to his mortgage and the objection is supported by the judgment-debtor and the property is sold subject to the mortgage, and the auction-purchaser knowing that the mortgage was fictitious keeps silent in the hope of purchasing the property cheaper, he cannot, in a suit brought by the mortgagee, challenge the validity of the mortgage. No equitable considerations can be brought into play in his favour.

The phrase "subject to such mortgage" must mean that what is sold is the equity of redemption and that a distinction is made between an express order directing the property to be sold subject to a mortgage and cases where notice of an alleged mortgage is given in the sale proclamation. In the former case a prospective purchaser is told exactly what he is buying; in the latter he takes a chance that the mortgage which is alleged to exist may prove unenforceable either from inherent defects or possibly because it may have been satisfied by the time of the sale, and the price which the property would fetch would vary considerably according whether the property is definitely stated to be sold subject to an ascertained encumbrance or merely subject to the risk of encumbrances existing. *Shib Kunwar Singh v. Sheo Prasad Singh* (2), 55 Ind. Cas. 189 (3) and 153 Ind. Cas. 57 (5), relied on. [p. 730, col. 1.]

S. C. A. from the appellate decree of the Court of the Second Additional District Judge, Hoshangabad, dated November 12, 1936.

Mr. V. V. Kelkar, for the Appellant.

Mr. R. S. Dabir, for the Respondents.

Judgment.—The plaintiff-appellant Mishrilal brought a suit for foreclosure on the basis of a mortgage of which he was the transferee. The transfer was made by the mortgagee Tukaram, son of Tanu in the year 1934, and the mortgage was executed in his favour by Barik and his son Tukaram in 1929. In order to avoid confusion, Tukaram, son of Barik, whose interests were identical with those of his father, will not be referred to again. The defendant No. 4 was Umrao who was impleaded as an auction-purchaser of part of the mortgaged property at an auction-sale in execution proceedings as the result of a simple money decree which had been obtained by one Bhabichand against Barik. In those execution proceedings the property was ordered to be sold subject to Tukaram's mortgage; the actual sale took place in 1933. Barik and Tukaram did not resist the plaintiff's claim, but the auction-purchaser Umrao contended that the mortgage in question was bogus, fraudulent and without consideration and made with the intention to defeat the claims of Shabi

chand, Barik's creditor, and that all these persons had entered into a conspiracy in order to defeat Bhabichand's claim against Barik.

The principal questions at the trial were whether the mortgage and the subsequent assignment of it to the plaintiff were bogus and fraudulent and whether the auction-purchaser had any right at all (the plaintiff denied that he had such a right) to challenge the mortgage inasmuch as he had in execution proceedings purchased the land subject to the mortgage existing and whether the decision that there was a mortgage was conclusive against him. Both the Courts below have agreed that the mortgage and the assignment were fictitious and they also concur, although for somewhat different reasons, in finding that the auction-purchaser was entitled to challenge the validity of the mortgage. The trial Court dismissed the plaintiff's suit entirely, holding that no suit can be based upon a deed of mortgage which is not genuine and which is fictitious and wholly without consideration. The lower Appellate Court, however, modified this decision by decreeing the plaintiff's claim as against Barik and Tukaram, holding that the transaction was not void but only voidable and that, since Barik and Tukaram had admitted the mortgage, there was no reason why a decree should not be passed against them. The plaintiff's claim, however, was rejected so far as that portion of the mortgaged property which had passed to the auction-purchaser Umrao in Bhabichand's execution proceedings, was concerned, and a date for redemption by them was fixed. In this second appeal by the plaintiff no appearance has been entered on behalf of Barik and Tukaram, and the only contesting respondent is Umrao. I would also note that there has been no cross-appeal against the lower Appellate Court's decision by Barik and Tukaram.

For the proposition that the auction-purchaser Umrao was entitled to challenge the validity of the mortgage in a suit brought by the mortgagee or his representative, the auction-purchaser not being the decree-holder himself, reliance was placed by the trial Court on *Dhoka v. R. B. Beharilal* (1). This view was not accepted by the lower Appellate Court in the following words:

"It is held by the learned Subordinate Judge that the respondent No. 4 is entitled to challenge the validity of the mortgage on the ground that he is

stranger and not a decree-holder himself. This view seems incorrect and I believe the case of *Dhoka v. R. B. Beharilal* (1) relied upon by the lower Court does not lay down that proposition."

The learned Counsel for the appellant states that he is in agreement with that view and that proposition is not challenged by the learned Counsel for the respondent. The trial Court, considering that it was bound to follow what it considered to be the ruling in *Dhoka v. R. B. Beharilal* (1), felt itself unable to follow the contentions which had been advanced on behalf of the plaintiff, supported by *Shib Kunwar Singh v. Sheo Prasad Singh* (2) and *Kalidas Chaudhuri v. Prasanna Kumar Das* (3) that a purchaser who is not the decree-holder is conclusively bound by an order under O. XXI, r. 62, as the result of which the auction-purchaser is bound by an entry in the sale proclamation declaring that the sale is definitely subject to a mortgage, as opposed to an auction-purchaser's right subsequently to challenge an entry in a sale proclamation under O. XXI, r. 66, which is merely a statement that an encumbrance may exist the correctness of which has not been determined by the executing Court. The trial Court found some support for its view that the proposition just stated was incorrect in the observations made in *Kesho Ram v. Chunni Singh* (4) where *Shib Kunwar Singh v. Sheo Prasad Singh* (2) was distinguished. The lower Appellate Court, however, accepted the proposition of law that there was a clear distinction between an order passed under r. 62 of O. XXI, and a mere notification of an encumbrance in a sale proclamation under r. 66 of O. XXI, and that when the Court had held an inquiry and found that a mortgage subsisted and the property was put up to sale subject to a mortgage, the auction-purchaser could not challenge the validity of the mortgage, whether he was a stranger or the decree-holder himself. The lower Appellate Court referred to the ruling in *Gailu v. Lekha Singh* (5) where the judgment in *Shib Kunwar Singh v. Sheo Prasad Singh* (2) was quoted with approval and that in *Kesho Ram v. Chunni Singh* (4) was distinguished. Nevertheless, although holding that the auction-purchaser would ordinarily be bound by a specific declaration

(2) 28 A 418; 3 A L J 200; A W N 1908, 68.

(3) 47 O 446; 55 Ind. Cas. 189; A I R 1920 Cal. 354; 30 O L J 496; 24 O W N 269.

(4) 52 A 1032 at p. 1035; 131 Ind. Cas. 674; A I R 1931 All. 139; (1931) A L J 1; Ind. Rul. (1931) All. 418.

(5) A I R 1935 Oudh 23; 153 Ind. Cas. 57; 10 Luck 343; 11 O W N 1475; 7 R O 278.

in a sale proclamation that the property was to be sold subject to the mortgage, the Court considered that there were cases in which an auction-purchaser would be entitled to challenge the validity of the mortgage subject to which he had purchased the property; and its justification for holding so in the present case was stated to be that there was nothing to show that in the objection proceedings the judgment-debtor Barik was a party, and that he did not become a party by the mere fact that he was a judgment-debtor. The lower Appellate Court cites as its authority for this view a comment of the author in Mulla's Civil P. C. under the heading "Parties to suits under this rule" in the comments on O. XXI. r. 63. Apart from the fact that the learned Judge has not connected the auction-purchaser with the judgment-debtor as having a common interest, the point of the argument which appears to be drawn from the Full Bench decision in *Krishnasami Naidu v. Sundaram Chettiar* (6) is that the judgment-debtor who was not a party to the proceedings would not be precluded from instituting a suit on the ground that the order was not binding on him, more than one year after the date of the order, so long as he was within the period of limitation otherwise prescribed. Now, in the case before me it is quite clear that Barik had at no time any intention of filing any suit, and inasmuch as he admittedly appeared on behalf of the objector Tukaram in the execution proceedings in order to support Tukaram's claim that his property was subject to Tukaram's mortgage, it is difficult to sustain the position that Barik was not a party to the proceedings. Bhabichand attempted to execute his decree and attached the fields. Tukaram intervened as an objector and pleaded his mortgage. The judgment-debtor, who would normally be expected to resist a claim that the property had been mortgaged, as in a sale on a simple money decree he would hope to receive a balance if the property was unencumbered, agreed that his property was encumbered and that the claim was justified. Thereupon the executing Court came to the conclusion that there was a subsisting mortgage and disposed of the objection in the applicant's favour on March 21, 1931. The decree-holder was not present on that date, and on March 27, as the decree-holder was absent, the case was struck off and the property was

(6) 30 M 335; 17 M L J 95.

ordered to be released. It may here be pointed out that the other ground on which the lower Appellate Court considered that the auction-purchaser was entitled to question the validity of the mortgage was that as the result of the order of March 27, the order of six days before was a nullity and that the very foundation of the order which would have become conclusive under r. 63 of O. XXI was gone. In this I am of opinion that the Court is wrong. The order which was passed on March 21, 1931, was conclusive as against the decree-holder unless he brought a suit which would terminate in his favour, within the period of one year. The fact that the property was released from attachment afterwards in no way annulled the duty that lay on him if he wished to bring the property to sale unencumbered; and indeed when he attached the property again more than a year later and Tukaram renewed his objection, the decree-holder at once conceded that he was unable to resist the application inasmuch as he had failed to bring a suit and he consequently agreed that the property should be sold in execution of his decree subject to the mortgage which had been held two years before to be subsisting.

The orders of the Court and the proclamation leave it in no doubt that the Court had found that there was a subsisting mortgage and that the property could only be sold subject to it. The order of the Subordinate Judge, dated January 7, 1933, runs:

"As the decree-holder did not file any declaratory suit to get the order, dated March 21, 1931, set aside it is conclusive against the decree-holder and the attached property will be sold subject to the objector's mortgage, dated October 18, 1929. The attached property will, therefore, be sold subject to the objector's mortgage, dated October 18, 1929, and the Collector will be informed accordingly."

In Collector's proceedings the following order was passed:

"Decree-holder in person. Judgment-debtor absent. The attached land be sold subject to objector's mortgage as directed by the Civil Court after proclamation at Multai. Sale on April 30, 1933."

The sale proclamation against the schedule of property and under the heading "Details of any encumbrances to which the property is liable" the following entry is made:

"This property will be sold subject to the mortgage of Tukaram."

Now in this Court the plaintiff-appellant relies on the cases which have already been cited for the proposition that even when the purchaser is the decree-holder, there can be no doubt that he can have no right

to challenge (*vide Govind v. Dhekle* (7), that is to say, *Kalidas Chaudhuri v. Prasanna Kumar Das* (3); *Shib Kunwar Singh v. Sheo Prasad Singh* (2) and *Gailu v. Lekha Singh* (5). These decisions the learned Counsel for the respondent challenges as incorrect law. The learned Counsel for the appellant states that *Kesho Ram v. Chunni Singh* (4) is distinguishable, and I am of opinion that his contention is correct. There the learned Judges were considering a case of a decree-holder auction-purchaser, and the *ratio decidendi* on which it was held that he was allowed to challenge the validity of the mortgage was that he had in fact brought a suit within one year of the order of the executing Court allowing the mortgagee's claim; and in that case *Shib Kunwar Singh v. Sheo Prasad Singh* (2) was queried mainly as the ruling did not consider the case of a decree-holder auction-purchaser who desired to bring a suit contesting the validity of the order in the execution department. I am, with great respect, unable to follow the comment that *Shib Kunwar Singh v. Sheo Prasad Singh* (2) is incorrect in holding that all that is sold as the result of an order under O. XXI, r. 62, is the equity of redemption and that what is actually sold is the property itself subject to the mortgage and not merely the right of redemption. I am in respectful agreement with the Bench of the Oudh Chief Court in holding that the phrase "subject to such mortgage" must mean that what is sold is the equity of redemption and that a distinction is made between an express order directing the property to be sold subject to a mortgage and cases where notice of an alleged mortgage is given in the sale proclamation. In the former case a prospective purchaser is told exactly what he is buying; in the latter he takes a chance that the mortgage which is alleged to exist may prove unenforceable either from inherent defects or possibly because it may have been satisfied by the time of the sale, and the price which the property would fetch would vary considerably according whether the property is definitely stated to be sold subject to an ascertained encumbrance or merely subject to the risk of encumbrances existing. This judgment on the material points repeats the judgment in *Shib Kunwar Singh v. Sheo Prasad Singh* (2) almost *verbatim*. Again the distinction has been noted in *Kalidas Chaudhuri v. Prasanna Kumar Das* (3) where

(7) 19 N L R 15; 82 Ind. Cas. 771; A I R 1923. Nag. 282.

it is stated :

"If a person purchases an estate subject to a mortgage, whether under a voluntary conveyance or under a sale *in invitum* or undertakes to discharge it, he cannot be heard to deny the validity of the mortgage subject to which he made his purchase. Where, however, the purchaser merely buys an estate which is under mortgage, but does not take it subject to the encumbrance or undertakes to discharge it, he is not precluded from impeaching the validity of the mortgage. The distinction between the two classes of cases depends upon the question, whether the property has been sold subject to the mortgage or whether mere notice of the alleged mortgage has been given in the proclamation of sale. The former contingency is provided for by O. XXI, r. 62, the latter is contemplated by O. XXI, r. 66."

As will be shown later, Umrao was well aware what he was purchasing, and it must be held that he has no right to challenge the mortgage.

On this finding it is not really necessary to advert to the contention that the respondent Umrao has not been able to prove that the mortgage was fictitious and that the burden has been wrongly cast. It appears that both the Courts below have been influenced in their consideration of law by the fact that they have held that the transaction was fictitious from beginning to end and was made for the purpose of defeating the claims of Bhabichand, who, as the result of the order under O. XXI, r. 62, which he did not challenge, has been able to satisfy his claim only in part, and that Umrao is an innocent purchaser who was unable to challenge the finding in execution proceedings, as naturally he did not appear on the scene until after the sale had been concluded. But Umrao from his own deposition as a witness is deserving of no such sympathy which would justify the Court in seeking equitable considerations on his behalf. He has stated in the witness-box that he had ascertained before hand that the transaction embodied in the mortgage was a fraudulent and fictitious one and that he also obtained an assurance from Tukaram that, if he purchased the property, he would not be called on to pay any part of the mortgage money as in fact there was nothing owing to Tukaram. He was aware that the objection had been made by Tukaram and that the objection had been found valid and that the Court had come to the conclusion that there was a mortgage and declared that the sale was to be held subject to the mortgage. He has also admitted that as the result of this order he was able to obtain the property much cheaper than he would have done otherwise, that it was a good stroke of business to

keep silence about his knowledge that the mortgage was fictitious, and that in fact he had saved a considerable sum of money thereby. Equitable considerations cannot be called into play on behalf of such a person. It may be unfortunate from his point of view, assuming that his statements are true, that the executing Court was persuaded into coming to a definite decision that there was a subsisting mortgage and directing the property to be sold subject to that mortgage. That declaration having once been made is final, and an auction-purchaser can in no circumstances be allowed to challenge that finding because of his knowledge that the finding is incorrect and his hopes of obtaining a surreptitious profit by utilizing that knowledge. He may have a cause of action against Tukaram, but he cannot be entitled to resist Mishrilal's claim based on the mortgage.

The appeal accordingly succeeds. The respondents Barik and Tukaram have apparently failed to redeem the mortgage as directed in the Courts below. A decree will be passed for the full claim with costs against all the respondents with interest at the rate given in the Court below. I fix the date of redemption at three months from the date of the delivery of this judgment, failing which the whole property will be foreclosed.

D.

Appeal allowed.

OUDH CHIEF COURT

First Civil Appeals Nos. 82 and 83 of 1937
November 29, 1939

THOMAS, C. J., AND RADHA KRISHNA, J.
THE DEPUTY COMMISSIONER, KHERI,
MANAGER, COURT OF WARDS,
MAHEWA ESTATE—PETITIONER—

APPELLANT

versus

KR. KHUSHWAQT RAI—CLAIMANT—
RESPONDENT

U. P. Encumbered Estates Act (XXV of 1934), s. 14, cl. (4) (a), (b), (6)—Cl. 6, whether makes distinction between a case where prior debt of date earlier than December 31, 1916, is renewed by successor-in-interest of original debtor and case where that liability is undertaken by person other than such legal representative.

Clause (6) of s. 14, U. P. Encumbered Estates Act, makes no distinction between a case where the prior debt (principal plus interest), of a date earlier than December 31, 1916, is renewed by the successor-in-interest of the original debtor, and a case where that liability is undertaken by a person other than such legal representative.

A mortgaged certain property to B for Rs. 20,000 on April 26, 1915. He then mortgaged the same

property together with other property to C for one lakh rupees on May 28, 1921, leaving out of the consideration a sum of Rs. 20,000 for payment to A. C did not pay this amount. C then executed a mortgage on July 28, 1923, in favour of A for Rs. 30,000. The principal amount of Rs. 20,000 and interest thereon up to that date amounting to Rs. 1,884-14-9 was set off towards the mortgage consideration and a sum of Rs. 8,115-1-3 was received in cash. The estate of C went under the management of Court of Wards and the manager applied under s. 4, U. P. Encumbered Estates Act. A claimed Rs. 63,958 on the basis of his mortgage:

Held, that the principal amount for the purposes of s. 14 consisted of Rs. 20,000 originally advanced by A on April 26, 1915, and Rs. 8,115-1-3 further advanced in cash on July 28, 1923, both of which were still due at the date of the application. Under s. 14 (4) (a) the claimant was not entitled to more than that amount as interest. Thus he would get only Rs. 56,230-2-6 and no more.

F. C. As. against the order of the Special Judge, First Grade, Kheri, dated May 1, 1937.

Mr. H. S. Gupta, for the Appellant.

Mr. Ali Hasan for Mr. M. Wasim, for the Respondent.

Judgment.—The facts giving rise to these appeals are that Messrs. L. D. W. Hearsey and G. E. O. Hearsey executed a mortgage deed on April 26, 1915, for a principal sum of Rs. 20,000, carrying interest of annas 10 per cent. per mensem in respect of three villages in favour of the respondent (*vide* Ex. A-3 in appeal No. 83 of 1937). The same two persons on May 26, 1921, mortgaged 16 villages, including the three villages mortgaged under the mortgage deed dated April 26, 1915, for a sum of Rs. 1,00,000, in favour of Rani Rajeshwari Devi, the senior Rani of Thakur Jai Indra Bahadur Singh, the *taluqdar* of Mahewa, leaving out of the consideration a sum of Rs. 20,000 for payment to the respondent (*vide* Ex. A-4 in appeal No. 83 of 1937). The amount of Rs. 20,000, made *dehandid* and due on the mortgage of April 26, 1915, was not paid by Rani Rajeshwari Devi.

The said Rani together with her husband Thakur Jai Indra Bahadur Singh executed on July 28, 1923, a deed of mortgage for a sum of Rs. 30,000 in favour of the respondent. The principal amount of Rs. 20,000, and interest thereon up to that date amounting to Rs. 1,884-14-9, was set off towards the mortgage consideration and a sum of Rs. 8,115-1-3 was received in cash, (*vide* Ex. 1). The estates of Rani Rajeshwari Devi and Thakur Jai Indra Bahadur Singh are now under the superintendence of the Court of Wards.

The Deputy Commissioner of Kheri, Manager of the Court of Wards, representing the estates of Thakur Jai Indra Bahadur Singh and Rani Rajeshwari Devi, made two separate applications on behalf of each of them under s. 4 of the U. P. Encumbered Estates Act praying that the provisions of that Act be applied to them. The applications were forwarded to the Special Judge, First Grade, Kheri, and necessary notices under s. 9 of the Act were published in the *Gazette*.

Thereupon the respondent to the two appeals, who held the mortgage in his favour dated July 28, 1923, filed a written statement of his claim under s. 9 (1) of the U. P. Encumbered Estates Act in each case claiming a total amount of Rs. 63,958 on the basis of the said mortgage.

The claims in the two cases were decided together. The debtors in their written statements contested the claim of the ground that the principal amount for the purposes of s. 14 of the U. P. Encumbered Estates Act could not exceed Rs. 28,115-1-3. They further alleged that the claimant had agreed to accept Rs. 56,230-2-6 in full satisfaction of his claim, and no more than that amount could be allowed to him.

The learned Special Judge decreed the claim for Rs. 60,000, i. e. double of Rs. 30,000, the amount for which Ex. 1 was executed with proportionate costs and interest at $3\frac{1}{4}$ per cent. per annum from the date of the application till the date of the payment. The learned Special Judge incorporated in the decree a condition to the effect that the claim will be enforced either against Thakur Jai Indra Bahadur Singh or against Rani Rajeshwari Devi or against both, but in all to the extent of the amount decreed only.

The debtors have filed the two appeals mentioned above one from the decree in one case and the other from the decree in the other case. These appeals have been heard together.

The points that have been urged in these appeals are that the principal amount for the purposes of s. 14 of the U. P. Encumbered Estates Act should have been taken as Rs. 28,115-1-3, i. e. Rs. 20,000 actually advanced as principal by the deed dated July 28, 1915, and Rs. 8,115-1-3 representing the cash advanced at the time of the execution of Ex. 1, and that in the circumstances of the case no costs should have been allowed to the claimant.

The learned Special Judge has treated the entire consideration of the mortgage

deed (Ex. 1) as principal money for the purposes of s. 14 of the U. P. Encumbered Estates Act on the ground that the applicants are not the representatives of the mortgagors of the deed dated April 26, 1915, executed by Messrs. L. D. W. Hearsey and G. E. O. Hearsey, and, therefore, as regards them the amount of principal is Rs. 30,000 and not Rs. 20,000. The second ground in support of his finding is that it could not be said that the mortgage deed in suit was in the course of the original transaction.

Having regard to the provisions of s. 14 (4) (a) of the U. P. Encumbered Estates Act, we are of opinion that the principal, which was at the date of the application still due to the claimant, must be the amount of Rs. 20,000 plus Rs. 8,115-1-3, which was advanced on July 28, 1923, in cash. The ordinary meaning of the word "principal" is "the capital sum lent as distinguished from interest". It may be that the total liability, barring the cash advance, undertaken by the debtors when executing Ex. 1 on July 28, 1923, was fixed at Rs. 28,115-1-3 but this amount consisted of the capital amount by which the claimant was out of pocket plus interest thereon from May 26, 1921, to July 28, 1923. By cl. (5) and (6) of the section, a rule has been laid down by the U. P. Encumbered Estates Act for the purpose of ascertaining the principal under cl. (a) and they lay down that any amount of interest accruing or accumulating after December 31, 1916, cannot be treated as part of principal. In the present case it is to be noted that if we add Rs. 1,884-14-9 to Rs. 20,000 and treat the total as principal as agreed in Ex. 1, then we shall be transgressing the provisions of cl. (6) mentioned above. This clause abrogates all contracts between the parties by which interest accumulating after December 31, 1916, is converted into principal. Further, it is to be noticed that cl. (6) makes no distinction between a case where the prior debt, (principal plus interest), of a date earlier than December 31, 1916, is renewed by the successor-in-interest of the original debtor and a case where that liability is undertaken by a person other than such legal representative. We are of opinion that the question whether Thakur Jai Indra Bahadur Singh and Rani Rajeshwari Devi were the successors-in-interest of Messrs. L. D. W. Hearsey and G. E. O. Hearsey or not is entirely immaterial to the question

under consideration. They are applicants under s. 4 of the Act and that is enough.

The contention raised by the learned Counsel for the respondent that the statement of (?) settlement of accounts and the contract subsequent to December 31, 1916, contemplated by cl. (6) of s. 14 of the U. P. Encumbered Estates Act must be between the parties to the original transaction, or their legal representatives, seems to have no force in view of the clear language of the clause.

The other ground upon which the learned Special Judge decided against the debtors is that the mortgage deed (Ex. 1), was not executed in the course of the original transaction. In our opinion this argument is the same as the first argument but only in another form.

In our opinion the principal amount for the purposes of s. 14 of the U. P. Encumbered Estates Act consists of Rs. 20,000 originally advanced by the respondent on April 26, 1915, and Rs. 8,115-1-3 further advanced in cash on July 28, 1923, both of which were still due at the date of the application. Under s. 14 (1) (a) of the U. P. Encumbered Estates Act the claimant was not entitled to more than that amount as interest. The claimant had claimed a sum of Rs. 63,958. He will be allowed Rs. 56,230-2-6 and no more.

As regards costs in the Court below, we are of opinion that the same principle should apply as applicable to a mortgage suit by a mortgagee. Under s. 14 (4) and (7) the learned Special Judge had complete discretion in the matter of allowing costs. He has allowed proportionate costs in his Court to the claimant and we see no grounds either on the principle or on the facts of the present case to interfere with that order.

The result is that the appeals are partly allowed, the decrees passed by the learned Special Judge are modified only to this extent that in place of Rs. 60,000, Rs. 56,230-2-6 will be substituted in them. The rest of the decrees shall stand.

As regards the costs of these appeals, we order that the appellants will get their costs in this Court, but the Pleader's fee will be taxed only in one appeal, i. e. Appeal No. 82 of 1937 and not in the other appeal.

s.

Appeal partly allowed.

RANGOON HIGH COURT

Special Second Appeal No. 80 of 1938

January 13, 1939

MYA BU, J.

MO MAUNG U—APPELLANT

versus

MA BLA ON—RESPONDENT

Specific Relief Act (I of 1877), s. 41—Minor transferor entering into transaction of transfer—Alleged misrepresentation as to age—Transaction not influenced by misrepresentation—Consideration, if should be ordered to be refunded.

Where a minor by false representation as to his or her age induces another to enter into a transaction, it is just that the latter should be refunded the money that was paid to the minor as consideration. 85 Ind. Cas. 79 (3), relied on. [p. 735, col. 2.]

But where the misrepresentation of his age by the minor transferor has no influence on the transaction of the transfer and the parties would have still entered into the transaction, in spite of the misrepresentation as to transferor's age, the alleged misstatement as to the age cannot be regarded as inducement to enter into the transaction nor does it support the theory that the transferor has misrepresented his age on the occasion. In such a case it is not proper to exercise the discretion under s. 41, Specific Relief Act, in favour of a transferee from a minor upon the cancellation of the instrument of transfer on the ground of the transferor's minority at the time of the transaction, unless the transaction has been the consequence of the false representation by the minor as to age, by ordering the refund of the money paid to the transferor as consideration. *Mohori Bibee v. Dharmodass Ghose* (1) and 111 Ind. Cas. 175 (2), distinguished.

Sp. S. A. against the decree of the District Court, Maubin, in O. A. No. 3 of 1937.

Dr. Ba Han, for the Appellant.

Mr. U Zeya, for the Respondent.

Judgment.—This appeal has arisen out of a suit instituted by the respondent under s. 39, Specific Relief Act, for cancellation of a deed of sale on the ground that it was void on account of her minority at the time of the transaction. The appellant who contested the suit on various grounds, such as that the respondent was not a minor at the time of the transaction, also claimed that in the cancellation of the deed the respondent should be ordered to make a refund of the purchase money which he (the appellant) had paid for the land that was transferred under the deed. This claim was made under s. 41, Specific Relief Act. Both the trial Court and the lower Appellate Court decided all the points in dispute in favour of the respondent, and held that as the respondent was a minor at the time of the transaction, the transaction was void, and consequently directed the cancellation of

the deed of sale. With reference to the appellant's claim under s. 41, Specific Relief Act, the trial Court upon the evidence came to the conclusion that there was active misrepresentation on the part of the respondent as to her age, which was alleged to be 19 years, and that therefore the appellant was entitled to have the amount which he paid as purchase money refunded to him by the respondent upon the cancellation of the deed of sale. The lower Appellate Court, however, came to the conclusion upon the evidence in the case that no active misrepresentation on the part of the respondent as to her age was proved and that the appellant entered into the transaction with his eyes open to the fact that the respondent was a minor, and therefore held that the appellant was not entitled to have the amount paid by him as purchase money refunded to him. Before the filing of this suit, the respondent had filed a suit to enforce an unregistered written agreement entered into at the time of the execution of the deed of sale under which the appellant promised to recover the property mentioned in the deed on the respondent paying him the purchase money with an additional sum. The appellant contested that suit which failed on the ground that the agreement relied upon by the respondent not being a registered one was invalid. Both parties to the suit led evidence upon various issues of fact which were framed in that proceeding. Therefore, in the present litigation the parties agreed in the trial Court that the evidence taken in the previous suit should be treated as evidence in the present case. In addition to such evidence the parties were given the liberty to adduce such further evidence that they desired to adduce in this case. Therefore the evidence relied on by the parties in this case has been mainly evidence which was not recorded by the learned Judge who tried this case.

In addition to the interested parties to this litigation, namely the appellant, the respondent and a cousin of the respondent named Maung Ba Maung, there are three witnesses who were examined with reference to the allegation of active misrepresentation on the part of the respondent. The evidence in the affirmative comes forth from the witnesses Po Sa and Maung Kun called by the appellant, while the evidence of Maung Nyo called by the respondent supports the denial of the respondent that there was any misrepresentation on her part as to her age. These three witnesses

were admittedly present at the time of the drawing up of the deed in question. Po Sa being the writer and Maung Kun, who is related both to the appellant and the respondent who are also related as cousins, and Maung Nyo being attesting witnesses to the deed. The evidence of Po Sa and Maung Kun supports the appellant's allegation to the effect that when Po Sa was about to write the deed, Po Sa questioned the respondent as to her age and that the respondent's answer was that she was 19 years old. The evidence of Maung Nyo is to the effect that he never heard anybody questioning the respondent as to her age, nor did he hear any statement made by the respondent upon this point. It is undoubtedly a weak point in the case for the appellant that there was no circumstance which would show that there was any need for Po Sa to put the alleged question. But Po Sa says that he questioned the respondent as to her age because respondent was *dwarfish*, and it is perfectly clear that the question was not put by him on account of the realization on his part that a contract entered into by a minor was invalid in law. Thus the question that he put was not put in connection with the transaction of which he was about to draw the deed, but merely to satisfy his personal curiosity. Be that as it may, it must be conceded that this weak point in the appellant's case is not sufficient, in my opinion, to justify interference by the lower Appellate Court with the finding of the trial Court though the trial Court did not in this case have the ordinary advantage over the Appellate Court of having the evidence of witnesses recorded before it.

But that is not the end of the matter, because in the circumstances of the case it appears to me that the parties would have entered into the transaction even if this alleged statement was not made, and I am unable to attribute the entry of the parties into the transaction to this statement at all. The writer of the deed, Po Sa, was a petition-writer, but he confesses that he did not know what the legal effect of the deed signed by a minor would be. Therefore so far as the question of minority was concerned, it was a matter of indifference to him. The transaction was brought about by Maung Ba Maung, respondent's cousin, in whose care the respondent was living at the time. He was a fishery lessee who needed money to pay the arrears of revenue due for the fishery, therefore he approached the appellant to let him have the money

upon the respondent entering into this transaction. It was only after he had made all the arrangements that the respondent was taken to the place where the deed was to be drawn up to give the transaction its finality. The appellant was also related to the respondent as a cousin and they all lived in the same village until about eight years before the suit when the appellant left this village and took up his residence elsewhere which, however, does not appear to be so distant as to render improbable their meeting with each other on some occasions during the period. The arrangements had brought the matter to the stage when the final deed was to be drawn up, and up to that time it is reasonably clear that the appellant never had in his mind the question of minority or majority of the person who was going to execute the deed of sale in his favour. Therefore, upon the facts of the case in my opinion it is safe to hold that it was not the alleged declaration of her age to be 19 that had any influence on the transaction at all, and that this transaction would have been entered into whether that statement was made or not.

The question is whether in these circumstances the Court should exercise the discretionary power under s. 41; that is whether the Court will require the respondent to make any compensation to the appellant, and it resolves itself into whether justice requires the making of such an order. In *Mohori Bhee v. Dharmodass Ghose* (1), it was held that a false representation made to a person who knows it to be false is not such fraud as to take away the privilege of infancy. In that case the Courts found that the agent of the mortgagee had not acted upon nor was misled by, the statement by the mortgagor as to his age but had been fully aware at the time the mortgage was executed of the minority of the mortgagor. In those circumstances their Lordships upheld the view of the Courts in India that under the circumstances of the case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy. In *Khan Gul v. Lakha Singh* (2), a Full Bench of the Lahore High Court held, Harrison, J. dissenting, that a minor who had entered into a contract by means of a false representation as to his age, though not liable

under the contract may, in equity, be required to return the benefit he had received by making a false representation as to his age. There the facts of the case showed that the minor had falsely represented himself to be a major and induced a person to enter into a contract with him. I do not think that the alleged statement made by the respondent to Maung Po Sa can be regarded as an inducement by the respondent to the appellant to enter into the transaction, because, as I have pointed out upon the facts and circumstances of the case, the appellant would have taken the sale from the respondent even if she never made that statement to Po Sa. In *Muhammad Said v. Bishambhar Nath* (3), at p. 649 Sir Grimwood Mears, C. J. and Piggott, J. of the Allahabad High Court pointed out that in each case the test must be the conduct of the parties, and observed in the course of the judgment:

"Purchasers or money-lenders who deal with persons who are hovering upon majority, and the ascertainment of whose age is impossible, must not complain if their cupidity leads them at times into litigation and loss."

My view as to the principle laid down by this case is where a minor by false representation as to his or her age induces another to enter into a transaction it is just that the latter should be refunded the money that was paid to the minor as consideration. In my opinion it is not proper to exercise the discretion under s. 41, Specific Relief Act, in favour of a transferee from a minor upon the cancellation of the instrument of transfer on the ground of the transferor's minority at the time of the transaction, unless the transaction has been the consequence of the false representation by the minor as to age. Before I conclude I must mention that in 1932 when Maung Ba Maung was required by the Revenue Officer to furnish security for the fishery license fees the respondent, who was then only 13 years of age, offered herself as his surety by a petition in which she stated her age to be 16. It is surprising to find that the Revenue Officer concerned accepted her suretyship and the lease was issued to Maung Ba Maung. Judging by that conduct it seems that the respondent was a person who would be willing to make a misstatement of her age at the back and call of Maung Ba Maung, but it cannot be said that she put herself forward as a major, and the circumstance does not by itself support the theory of her having

(1) 30 I A 114; 30 O 539; 8 Sar. 374; 7 O W N 441 (P O).

(2) 9 L 701; 111 Ind. Cas. 175; A I R 1928 Lah-609; 30 P L R 60.

(3) 45 A 644 at p. 649; 85 Ind. Cas. 79; A I R 1924 All. 156; 21 A L J 596.

actively misrepresented her age on the occasion of the transfer in question. In all the circumstances of the case, I see no sufficient reason for interfering with the judgment of the lower Appellate Court on this point. The appeal fails and it is dismissed with costs.

D.

*Appeal dismissed.***OUDH CHIEF COURT**

Appeal No. 15 of 1937

October 9, 1939

HAMILTON AND RADHA KRISHNA, JJ.

Pandit JAI MANGAL TEWARI AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

BINDESHURI SINGH AND OTHERS

—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 142—Question of applicability of particular article—Duty of Court—Applicability of Art. 142—Whether applies to suits on proprietary title.

In order to determine the particular Article applicable to a suit, it is the duty of the Court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of dispossession in the plaint but the facts show that the defendants entered or must have entered on the land while it was in the possession of the plaintiff, the Article applicable would be Art. 142. It would be absurd to hold that a plaintiff can at his sweet will avoid the operation of Art. 142 by framing his suit in such a manner as if there was no dispossession. [p. 737, col. 1.]

Article 142, Lim. Act, is very general in its scope and application. There is no reason to confine the word "plaintiff" in this Article to plaintiffs bringing their suits on possessory title only. The Article will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his possessory title. There is nothing in the Article itself, to make it applicable to suits on possessory title only. 147 Ind. Cas. 805 (1) and 168 Ind. Cas. 309 (2), held no good law, 152 Ind. Cas. 1 (4), relied on. [p. 737, col. 2.]

[Case-law referred to.]

A. against an order of Mr. Justice Zia-ul-Hasan, dated March 1, 1937.

Mr. Murlī Manohar Lal, for the Appellants.

Mr. R. B. Lal, for Appellant No. 1.

Mr. Mohammad Ayub, for Respondents Nos. 1, 2 and 3.

Judgment.—This is a plaintiffs' appeal under s. 12 (2) of the Oudh Courts Act. The plaintiffs-appellants brought a suit for possession of three plots in dispute on the allegation that they were the proprietors of the plots in suit with which the defendants had no concern and that the defendants were in illegal possession of plot No. 582/2 for the last eight years and of

plots Nos. 582/1 and 583/2 for the last ten years. The defendants-respondents alleged that they had been in adverse possession of the said plots for the last 25 years or 30 years. In para. 8 of the written statement, they pleaded that in 1910 there were proceedings under s. 145 of the Criminal P.O. between the parties in which their possession was upheld and no suit having been filed within time by the plaintiffs, their suit now was time-barred.

The trial Court framed the following issues:—

(1) Are the plaintiffs owners of the plots in suit?

(2) Whether defendants have perfected their title by adverse possession?

(3) Is the suit barred by limitation, as alleged in para. 8 of the written-statement?

(4) To what relief, if any, are plaintiffs entitled?

On issue No. 1 it held that the plaintiffs were the proprietors of the land in suit. Issue No. 2 was decided in the negative and on Issue No. 3 it was held that the plea that the suit was barred by Art. 47 of the In. Lim. Act had no force. The learned Munsif did not consider Art. 142 of the Lim. Act obviously for the reason as indicated above that it was not raised in the written statement. In the result, the suit was decreed.

In appeal the learned Subordinate Judge (now Civil Judge) of Gonda held that on the allegations in the plaint the suit was governed by Art. 142 of the Lim. Act. He framed a fresh issue as follows and remanded the case for a fresh decision of the point of limitation:—

"Have the plaintiffs been in possession of the plots in a suit within limitation?"

An appeal against the said order of remand was dismissed by a Single Judge of this Court from whom the appellants obtained leave to appeal to a Bench of this Court under s. 12 (2) of the Oudh Courts Act and the present appeal is the appeal filed in pursuance of that leave.

We have heard the learned Counsel for the parties at length. On behalf of the appellants the following points have been argued:—

(1) That the Article of the Lim. Act applicable to a suit must be discovered on the allegations in the plaint. It is not open to a Court to hold an enquiry on that point by going into evidence.

(2) That the present suit is a suit for possession on title alone and is not based

upon dispossession by the defendants and is governed by Art. 144 and not by Art. 142 of the Lim. Act.

On the first point we are of opinion, that the suit is clearly based upon an allegation of dispossession of the plaintiffs by the defendants. The allegation in para. 2 of the plaint that the defendants are in illegal possession of some property in suit for the last eight years and of the rest for the last ten years amounts clearly to an allegation that the plaintiffs were dispossessed of the plots in dispute eight or ten years ago. The language of para. 2 is not capable of bearing any other interpretation. In fact one of the plaintiffs who was examined as P. W. No. 4 stated that he had been formerly in possession of the plots in dispute and the defendants had taken possession about 9 years ago. This is the view taken by the learned Single Judge of this Court who heard the second appeal and we find ourselves in full agreement with him. It is thus clear that the only Article applicable is Art. 142.

Even assuming that there was no allegation of dispossession involved in para. 2 of the plaint, we are of opinion, that the contention of the learned Counsel for the appellants that the Court in discovering the Article of the Lim. Act applicable to the suit is tied to the statements in the plaint, is incorrect. In our opinion, in order to determine the particular Article applicable to a suit, it is the duty of the Court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of dispossession in the plaint but the facts show that the defendants entered or must have entered on the land while it was in the possession of the plaintiffs, the Article applicable would be Art. 142. It would be absurd to hold that a plaintiff can, at his sweet will, avoid the operation of Art. 142, by framing his suit in such a manner as if there was no dispossession. We are aware that in some cases observations have been made to the effect that Art. 142, cannot apply to cases in which the plaintiff has not alleged in the plaint his possession and dispossession and that Art. 144, would apply to such a suit. But we are of opinion, that such a view is not correct on principle. It involves the shutting out of a defence by the defendant to the effect that on true facts the suit is governed by Art. 142.

The defendant to a suit for possession cannot on any principle be precluded from showing that on the true facts of a case the

Article applicable to the suit is Art. 142. Further, the interpretation of law urged by the learned Counsel for the appellants is against the plain language of Art. 142 of the Lim. Act. Article 142 applies to suits for possession when the plaintiff while in possession of the property has been dispossessed or has discontinued the possession, i. e. when on the facts proved in a particular case the plaintiff while in possession has been dispossessed or has discontinued the possession. To accept the argument of the learned Counsel for the appellants that Art. 142 would apply where on the face of the plaint there is an allegation of dispossession would be reading certain extra words into the section which do not find a place therein.

On the second point it was argued that as the present suit was for recovery of possession on the basis of title, Art. 142 of the Lim. Act was inapplicable inasmuch that Article applied to suits on possessory title only. Article 142 is applicable on its terms and language to all suits for possession of immovable property where the plaintiff while in possession of the property has been dispossessed or has discontinued his possession. Article 144 is a residuary Article and is applicable to suits for possession not otherwise specially provided for in the Act. If Art. 142 is applicable to a case, then it is obvious that Art. 144, would be inapplicable. Article 142, is very general in its scope and application. There is no reason to confine the word "plaintiff" in this Article to plaintiffs bringing their suits on possessory title only. In our opinion, Art. 142, will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his possessory title. There is nothing in the Article itself, as we have observed above, to make it applicable to suits on possessory title only. The learned Counsel for the appellants has placed great reliance upon two decisions of this Court, *Mohammad Mahmud v. Mohammad Afaq*, A. I. R. 1934 Oudh 21=11 O. W. N. 104 (1) and *Sheo Moorat v. Chhangoo*, 1937 O. W. N. 585 (2). The latter case followed the former. The former case was decided by a Bench consisting of the late Mr. Justice Raza and the late Mr. Justice Smith. It is difficult to gather all the facts of this case except that the suit

(1) A I R 1934 Oudh 21; 147 Ind. Cas. 805; 11 O W N 104; 1934 O L R 187; 6 R O 299 (2).

(2) 1937 O W N 585; 168 Ind. Cas. 309; 1937 O L R 250; 9 R O 462; A I R 1937 Oudh 328.

was for possession of a house in a town. It is enough to say about this case that the learned Judges based their judgment upon a decision of the Allahabad High Court reported in *Kanhaiya Lal v. Giwar*, I. L. R. 51 Allahabad, 1042 (3), which case has since been held as not laying down the correct law in the latest Full Bench case of that Court in *Bindhyachal Chand v. Gharib Chand*, I. L. R. 57 Allahabad, 278 (4). We are in full agreement with the view of law contained in the Full Bench case of the Allahabad High Court if we may say so respectfully. The second case of this Court reported in *Sheo Moorat v. Chhangoo*, 1937 O. W. N. 585 (2), is a Single Judge decision of this Court and followed *Mohammad Mahmud v. Muhammad Afaq*, 11 O. W. N. 104 (1). In our opinion, the two decisions mentioned above do not lay down correct law. The learned Counsel for the appellants also relied upon the following cases:—

Wadero Warsidino Allahdino v. Bhai Pursumal Bhai Parumal, A. I. R. 1937 Sind, 226 (5), *Naru Shidu Gaikwad v. Krishna Shidu Gaikwad*, A. I. R. 1938 Bombay, 210 (6), *Abdul Latif v. Nawab Khajeh Habibullah*, A. I. R. 1939 Cal, 354 (7) and *Mehtab Singh v. Dayal Singh*, A. I. R. 1939 Lahore 172 (8).

The Sind decision in *Wadero Warsidino Allahdino v. Bhai Pursumal Bhai Parumal*, A. I. R. 1937 Sind, 226 (5), is based upon the decision in *Mohammad Mahmud v. Muhammad Afaq*, 11 O. W. N. 1104 (1), about which we have already said that it does not lay down correct law. This case, therefore, need not detain us any further.

The cases reported in *Naru Shidu Gaikwad v. Krishna Shidu Gaikwad*, A. I. R. 1938 Bombay 210 (6) and *Mehtab Singh v. Dayal Singh*, A. I. R. 1939 Lahore, 172 (8), are Single Judge decisions and are not helpful on the particular point arising in this case.

Abdul Latif v. Nawab Khajeh Habibullah, A. I. R. 1939 Cal. 354 (7), was a suit in respect of lands subject to alluvion and dilu-

vion. The land had begun to rise above water from ten or twelve years before the suit and had become fit for cultivation seven or eight years before the suit. The land had never been in the physical possession of the plaintiffs themselves or of person who held under them at any time after the land had reformed. Having regard to the nature of the land in that case, it was held that there could be no question of any possession or discontinuance of possession in the case and the suit would be governed by Art. 141. This case is clearly distinguishable from the facts of the present case.

In the result, we find ourselves in complete agreement with the view of law taken by the Single Judge of this Court, who heard the second appeal. The appeal, therefore, fails and is dismissed with costs.

s.

Appeal dismissed.

PATNA HIGH COURT

Criminal Reference No. 31 of 1939

October 11, 1939

HARRIS, C. J. AND MANOHAR LALL, J.

CAPT. M. O. ANGLO—PETITIONER

versus

KANDAN MANJHI AND ANOTHER—

OPPOSITE PARTY

Chota Nagpur Tenancy Act (VI of 1908), ss. 63 as amended by (Act II of 1938), 258—Offence under s. 63—Only committed when landlord or his agent makes demands from tenants in excess of rent—Manager, Court of Wards, making such demands—Offence is committed—Offence to be investigated and tried according to provisions of Criminal Procedure Code—Appointment of such manager with previous sanction of Government—Sanction for his prosecution under s. 197, Criminal Procedure Code (Act V of 1898), if necessary—Ss. 63 and 258, whether deprive Criminal Courts of their jurisdiction to try offence—Court of Wards Act (IX of 1879), s. 70—Rules made under, r. 115—If ultra vires.

An offence under s. 63, Chota Nag. Ten. Act is only committed if the landlord or his agent levies or makes certain demands over and above the rent legally due from the tenants. There is no offence if anybody other than the landlord or an agent of the landlord demands commodities from persons who are not his tenants. Where the Manager of the Court of Wards demands certain commodities or animals or birds from the tenants of the estate which he is not entitled to demand, he commits an offence under s. 63. [p. 740, col. 1.]

Section 63 (1) (a) of the Chota Nag. Ten. Act creates an offence but does not deal with the method in which investigation is to be made and the trial to be held; therefore by reason of s. 5 (2) of the Criminal P. O., it must be investigated into and tried according to the provisions of the Code. [p. 741, col. 2.]

There is nothing in s. 63 which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that section. Section 258 does not

(3) 51 A 1042, 119 Ind. Cas. 6; A I R 1929 All. 753; Ind. Rul. (1929) All. 866; (1929) A L J 1103.

(4) 57 A 278; 152 Ind. Cas. 1; (1934) A L J 973; A I R 1934 All. 993; 18 R D 541; 7 R A 302 (F B).

(5) A I R 1937 Sind 226, 170 Ind. Cas. 621; 30 S L R 472; 10 R S 66

(6) A I R 1938 Bom. 210; 175 Ind. Cas. 93; 40 Bom L R 166; 10 R B 519.

(7) A I R 1939 Cal. 354; 185 Ind. Cas. 714; 69 O L J 28.

(8) A I R 1939 Lah. 172; 183 Ind. Cas. 140; 12 R L 99.

deprive a Criminal Court of its jurisdiction to try criminal offence. [*ibid.*]

Under s. 59-A, Court of Wards Act, a Manager of Court of Wards is a public servant, and where according to the rules made by the Court of Wards under s. 70 of that Act such a person getting certain salary cannot be appointed without the previous sanction of the Govt., it follows that he cannot also be dismissed without the sanction of the Govt. When such a manager therefore commits an offence under s. 63, Chota Nag. Ten. Act while acting in his capacity as a manager of the estate, a sanction of the Govt. under s. 197, Criminal P. C., is necessary for his prosecution. 181 Ind. Cas. 317 (1), referred to.

Rule 115 of the rules made by Court of Wards under s. 70 of the Court of Wards Act, does not take away the power expressly given to the Court by s. 20 to appoint and remove managers but it only requires the previous sanction of Govt. Sections 69 and 70 of the Act empower the making of such a rule and it is not therefore *ultra vires*. [p. 41, col. 1.]

Or. Ref. made by the Deputy Commissioner of Hazaribagh, in his letter No. 12750-G, dated August 14, 1939.

Mr. B. P. Sinha, in support of the reference.

Mr. Basanta Chandra Ghosh, against the reference.

Harries, C. J.—This is a reference made by the learned Deputy Commissioner of Hazaribagh recommending that certain criminal proceedings against one Capt. Angelo which were commenced without the previous sanction of the Provincial Govt. be quashed.

On February 3, 1939, one Kandan Manjhi filed a petition before the Sub-Divisional Officer of Giridih alleging that on the previous Friday, namely, January 27, 1939, the Manager of the Court of Wards of the Ganwan Estate had demanded various commodities from the tenants who resided in the village of Chhattamar. Amongst these commodities were rice, dal, milk, ghee, oil and two fowls and one goat were also demanded. It was alleged that these commodities, fowls and goat were taken to the Manager. The petitioner alleged that other goats had been received by the Manager and that he had been directed to take them to Ganwan, the headquarters of the estate. The petitioner stated that he set out with two goats to Ganwan accompanied by a peon. On the way, it is said that he met some Congress people including a lawyer who induced him to file a complaint before the Second Officer who was at Satgawan. The Second Officer directed him to file a complaint before the Sub-Divisional Officer at Giridih and this was done. The Sub-Divisional Officer ordered

a Magistrate to make an inquiry, and the learned Magistrate found that presents of small value had been given by certain persons such as are usually given to the landlord or his employees whenever they visited the village. The Sub-Divisional Officer then called upon the Manager and the peons to show cause why action under s. 63 of the Chota Nag. Ten. Act should not be taken against them. Cause was shown, and it was urged on behalf of Capt. Angelo that he was a public servant and, therefore, no cognizance of the offence alleged to have been committed by him could be taken without the previous sanction of the Provincial Govt. The learned Sub-Divisional Officer, after hearing argument on this point, came to the conclusion that Capt. Angelo was a public servant; but he further held that the acts could not be said to have been done by Capt. Angelo in discharge of his official duties. In the result he held that the sanction of the Provincial Govt. for the prosecution of Capt. Angelo was not necessary and directed the proceedings to continue. A petition was then filed on behalf of Capt. Angelo before the learned Deputy Commissioner who came to the conclusion that the sanction of the Provincial Govt. was necessary for the prosecution of Capt. Angelo, and accordingly he referred the matter to this Court with the recommendation that the proceedings pending against Capt. Angelo should be quashed.

The allegation made by the petitioner against Capt. Angelo was that he had demanded from the tenants certain gifts which he was not entitled to demand and that he had committed an offence under s. 63 of the Chota Nag. Ten. Act as amended by the Chota Nag. Ten. (Amendment) Act, 1938, (Act II of 1938).

The amended s. 63 of the Chota Nag. Ten. Act reads as follows:

"(1) (a) If a landlord or his agent levies, except under any special enactment for the time being in force, from a tenant of such landlord, any sum of money or anything in excess of the rent lawfully payable by such tenant for his tenancy and the interest payable on an arrear of such rent, or enforces compliance by any tenant with any preadial condition to which he is not lawfully entitled, such landlord or agent, as the case may be, shall be punishable with simple imprisonment for a term, which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

"(b) An offence under cl. (a) shall be bailable and shall be compoundable with the leave of the Court...

"(3) If in any suit, application or proceeding under this Act or any other law, the Court or presiding officer (not being the Deputy Commissioner) has grounds for believing that any landlord or his

agent is guilty of an offence under cl. (a) of sub-s. (1), such Court or Officer shall inform the Deputy Commissioner."

This section makes it an offence for a landlord or his agent to levy, except under any special enactment for the time being in force, from a tenant of such landlord, any sum of money or anything in excess of the rent lawfully payable by such tenant for his tenancy. The allegation against Capt. Angelo is that he, as Manager of the Court of Wards which was in charge of the Ganwan Estate, had demanded from the tenants something over and above the rent which was lawfully payable by them. He had demanded certain commodities and animals which it was usual in the past for landlords and their agents to demand from tenants when they were in their vicinity. There appears little doubt that demands for such commodities or birds or animals might well be an offence within this section. However, it must be remembered that an offence is only committed if the landlord or his agent levies or makes such demands. There is no offence if anybody other than the landlord or an agent of the landlord demands commodities of this kind from persons who are not his tenants.

The learned Deputy Commissioner was of opinion that Capt. Angelo was a public servant and therefore, that no Court could take cognizance of this offence except with the previous sanction of the Provincial Govt. It is common ground that the sanction of the Provincial Govt. was not obtained for instituting these proceedings against Capt. Angelo. Section 197 of the Criminal P. O. deals with the prosecution of public servants and is in these terms:

(1) When any person who is a Judge within the meaning of s. 19 of the I. P. O., or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Govt. or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Govt.

Before the learned Deputy Commissioner it was conceded that Capt. Angelo was a public servant; but before us it has been strenuously argued that he is not a public servant. Capt. Angelo is the Manager of the Court of Wards which has assumed superintendence of the Ganwan Estate. His monthly salary is Rs. 350, and there can be no doubt that Capt. Angelo must be deemed to be a public servant for the purposes of the I. P. O. Section 59-A of the Court of Wards Act (Act IX of 1879) ex-

pressly provides that every person employed by the Court of Wards under the Act shall for the purposes of the I. P. O., be deemed to be a public servant. If the prosecution here was a prosecution for an offence under the I. P. O., it could not be argued that Capt. Angelo was not a public servant. However, it is said that the prosecution here is for an offence created by the Chol Nag. Ten. Act and not by the I. P. O. and therefore, s. 59-A of the Court of Wards Act has no application.

Section 4, sub-s. (2) of the Criminal P. O. provides that all words and expressions used in the Criminal P. O. and defined in the I. P. O., but not defined in the Criminal P. O., shall be deemed to have the meanings respectively attributed to them by the I. P. O. The term "public servant" is not defined in the Criminal P. O., and, therefore, must be deemed to have the same meaning as given in the definition of the term in the I. P. O. If, for the purposes of the I. P. O., s. 59-A of the Court of Wards Act makes a servant of the Court of Wards a public servant, it would appear to follow that he must also be a public servant with the meaning of the term as used in the Criminal P. O. However, it is not necessary to decide this question because, in my view, it is clear on the facts of the present case that Capt. Angelo is a public servant. As I have stated his monthly salary is Rs. 350. Section 70 of the Court of Wards Act authorizes the Court of Wards to make rules consistent with the Act, and r. 11 which was made under s. 70 deals with appointments to posts on duly sanctioned establishments, and this rule makes it clear that all appointments to posts carrying a monthly remuneration of over Rs. 200 including commission are to be made by the Court with the previous sanction of the Govt. It has been said that Capt. Angelo was appointed before this rule came in force; but there is nothing to show that such was the case. Under this rule, a manager whose salary is Rs. 350, could not be appointed by the Court with the previous sanction of Govt. If he could only be appointed with the previous sanction of the Govt., it necessarily follows that he cannot be dismissed without the sanction and approval of Govt. It would be an absurd position if sanction of the Govt. was necessary for an appointment by the Court while the latter could terminate at once without any reference to Govt. An officer in the position of Capt. Angelo can only, in my view, be appointed with the previous

action of the Govt. and can only be dismissed with the sanction or approval of the Govt. A Manager of a Court of Wards undoubtedly performs public duties, is responsible for the management and pervision of the estate, and one of the main purposes of taking over estate is to ensure that all Govt. dues are paid. He occupies a public position, and as he cannot be appointed or dismissed without the sanction of the Govt. he is, in my view, a public servant. As I have stated earlier, this has always been conceded by the petitioner in the Courts below. It is strenuously argued that r. 115 *ultra vires* as s. 20, Court of Wards Act expressly gives the Court power to appoint and remove managers. The rule does not take away such power and only requires the previous sanction of Govt. In my judgment ss. 69 and 70 of the Act empower the making of such a rule and it is not *ultra vires*.

If he is a public servant, can a prosecution under the amended s. 63 of the Chota Nag. Ten. Act be instituted against him without the previous sanction of the Provincial Govt.? It has been urged before us that no sanction of the Provincial Govt. is necessary by reason of the fact that the Criminal P. O. can have no application whatsoever to proceedings under the Chota Nag. Ten. Act. It is said that the Chota Nag. Ten. Act is a self-contained Act and that the procedure in all proceedings under that Act is governed by the Act itself.

Section 63 (1) (a) of the Chota Nag. Ten. Act creates an offence and that offence is described in cl. (b) of that subsection as a bailable offence which can be compounded with the leave of the Court. The section is silent as to how the offence is to be tried. It has been contended that sub-s. (3) of s. 63 of the Chota Nag. Ten. Act makes it clear that the offence must be disposed of by the Deputy Commissioner. I have already set out this subsection which directs that if it is discovered that there are grounds that a landlord or his agent is guilty under sub-s. (1) (a) to s. 63 of the Act, the Court, during the suit, application or proceeding must inform the Deputy Commissioner. It is said that this sub-section means that the Deputy Commissioner is the only person who can try these offences. If that be so, then it is difficult to understand how the learned Magistrate who heard this case, had jurisdiction to proceed in the matter.

Sub-s. (3) of s. 63 does not give the Deputy Commissioner exclusive jurisdiction; it merely enjoins all Courts who have reason to believe that an offence has been committed to report the matter to the Deputy Commissioner. I am satisfied that there is nothing in s. 63 of the Chota Nag. Ten. Act which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that section. Reliance in the Court below was placed upon s. 258 of the Chota Nag. Ten. Act, and it was suggested that that section deprived the Criminal Courts of jurisdiction. All that s. 258 of the Chota Nag. Ten. Act does is to bar suits in certain cases. In other words it makes the decision of the Tribunal contemplated in the Act final in certain types of proceedings. The wording of s. 258 makes it clear that only proceedings of a civil nature were in the contemplation of the Legislature and such only are made final. The concluding words of the section are :

"and every such decision, order or decree shall have the force of a decree of a Civil Court in a suit between the parties and subject to the provisions of this Act relating to appeal shall be final."

This section cannot deprive a Criminal Court of its jurisdiction to try a criminal offence.

In my judgment s. 63 (1) (a) of the Chota Nag. Ten. Act creates an offence, and if it does, *prima facie* the Criminal P. O. will apply to the trial of such an offence. Section 5 of the Criminal P. O. is in these terms:—

"(1) All offences under the I. P. O. shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained; (2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

The offence under s. 63 of the Chota Nag. Ten. Act is an offence not under the I. P. O. but under a different Act. By reason of s. 5 (2) of the Criminal P. O. it must be investigated into and tried according to the provisions of the Code because, as I have already pointed out, there is nothing in the statute creating the crime dealing with the method in which investigation is to be made and the trial to be held. It was contended that the provisions of the Criminal P. O. would not apply to this case by reason of s. 1 (2) of the Criminal P. O. That sub-section directs that the Criminal P. O. shall extend

to the whole of British India; but, in the absence of any specific provision to the contrary, nothing contained in the Code shall affect any special or local laws then in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It was argued that the Chota Nag. Ten. Act is a local law and, therefore, the Criminal P. O. would not apply. As I have already pointed, the Chota Nag. Ten. Act is silent as to how the case is to be investigated and prosecuted, and that being so, the provisions of the Criminal P. O. must apply.

Holding as I do that in the prosecution of an offence under s. 63 of the Chota Nag. Ten. Act, the provisions of the Criminal P. O. apply, then the provisions of s. 197 of the Criminal P. O. must be complied with. That section expressly states that where a public servant who is not removable from his office save by or with the sanction of the Local Govt. is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Govt. I have already stated that Capt. Angelo is undoubtedly a public servant, and, in my view, is a servant who is not removable from his office save with the sanction of the Local Govt. In my view, as his appointment could only be made with the sanction of the Provincial Govt., his dismissal also would require such sanction. He is, therefore, in my judgment, a public servant within the meaning of s. 197 of the Criminal P. O.

The previous sanction of the Provincial Govt. is only required when the public servant is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and does not apply to all kinds of offences. It has been strenuously argued that the offence with which Capt. Angelo is charged is not an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty and, therefore, it is said, previous sanction of the Govt. is not necessary. I have already stated that the amended s. 63 (1) (a) of the Chota Nag. Ten. Act makes it an offence for the landlord or his agent to levy certain dues, and it is no offence if the person levying is neither a landlord nor a landlord's

agent. The charge in the present case against Capt. Angelo is that as Manager of the Court of Wards, he made the demands. If he made them as landlord or agent of the landlord, then he may have committed a crime. If he did not make them in his capacity as landlord or agent of the landlord, then no crime committed. The allegation in the present case is that whilst acting as agent of a landlord he made illegal demands, and, in my view, it is abundantly clear that Capt. Angelo was accused of an offence alleged to have been committed by him while acting purporting to act in the discharge of his official duty.

The meaning of the words

"is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty,"

was considered at length by the learned Judges of the Federal Court in the case of *Hori Ram Singh v. Emperor* (1). In that case the learned Judges were dealing with s. 270 (1) of the Govt. of India Act. Whilst dealing with the construction to be given to the words of that section, the learned Judges also discussed the authorities under s. 197 of the Criminal P. O. At p. 55 Sulaiman, J. observed:

"Nor it is necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a deviation from it. What is necessary is that the offence must be in respect of an act done or purporting to be done in execution of duty, that is, in the discharge of an official duty. It must purport to be done in the official capacity with which he is clothed at the time, that is to say under the cloak of an ostensibly official act, though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another the impression that he is so acting."

At p. 580*, Varadachariar, J. observed

"In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it."

He cited a number of Indian authorities in support of that proposition. He then mentions another group of cases where much stress had been laid upon the circumstance that the official character or status of the accused gave him the opportunity.

(1) 20 P. L. T. 539; 181 Ind. Cas. 317; 40 Cr. L. 468; 11 R. F. O. 60; (1939) M. W. N. 497; 5 B. R. 685; I. R. 1939 F. O. 43; 1939 O. L. R. 366; 50 L. W. (1939) 2 M. L. J. 23 Sup.; 41 P. L. R. 680; 43 C. W. F. O. 50; (1939) F. O. 159 (F. O.).

*Pages of 20 P. L. T.—[54]

tunity to commit the offence, and then remarked that it seemed to him that the first group of cases laid down the correct principle, and those cases insisted that there must be something in the nature of the act complained of that attached it to the official character of the person. In the present case, it is alleged, Capt. Angelo committed the act complained of in his official capacity, that is as agent of the landlord, and that being so, he committed an offence under s. 63 of the Chota Nag. Ten. Act. In my view the accusation in the present case is precisely the one contemplated in s. 197 (1) of the Criminal P. O. That being so, previous sanction of the Govt. was necessary before the learned Magistrate could take cognizance of this offence.

For these reasons I am satisfied that the learned trying Magistrate had no jurisdiction to order these proceedings to continue and that the learned Deputy Commissioner was right in referring the matter to this Court with the recommendation that the proceedings be quashed. I would, therefore, accept this reference and quash the proceedings which have been instituted against Capt. Angelo without the previous sanction of the Provincial Govt.

It will, however, be open to the Provincial Govt. after considering the facts of the case, to give their sanction to proceedings, and in such an event, a fresh complaint can be made, and proceedings can be carried on to conclusion.

Manohar Lall, J.—I agree. Capt. Angelo is the manager of an estate under the Court of Wards in Chota Nagpur. Therefore, by the operation of s. 59-A of the Court of Wards Act, 1879, he must be deemed to be a public servant within the meaning of the I. P. O. By r. 115, framed by the Court of Wards under s. 70 of the Act as Capt. Angelo is drawing a salary of over Rs. 200 per month, he cannot be removed by the Court of Wards without the sanction of the Provincial Govt. These facts being established, it follows as a necessary consequence, that the provisions of s. 197 of the Criminal P. O. come into operation: that is to say, no Court can take cognizance of any offence said to have been committed by Capt. Angelo while acting or purporting to act in the discharge of his duties as a public servant without the sanction of the Provincial Govt. The learned Advocate for the respondents strenuously argued that the offence created by the amended s. 63 (1) (a) of the Chota Nag. Ten.

Act was a special offence outside the jurisdiction of the Criminal Courts and that it cannot be tried by the ordinary Criminal Courts. He placed reliance upon the insertion and retention of s. 63 within s. 258 of the Chota Nag. Ten. Act even after the amendment in 1938. It may be that the legislature has omitted to remove s. 63, from s. 258, after the amendment of s. 63, or it may be that the section had to be retained in the category of sections enumerated in s. 258, because some proceedings, which may under the old s. 63 have started before the Act was amended, had not yet terminated. In any case the concluding words of s. 258 make it clear that an order passed under s. 63, shall have the force and effect of a decree of a Civil Court in a suit between the parties. It cannot be understood how an order passed convicting or acquitting an accused under the amended s. 63, can have the force and effect of a decree of a Civil Court in a suit between the parties. The obvious intention of s. 258, is, as was pointed out by my Lord the Chief Justice in the course of his elaborate judgment delivered just now, that the Act specifically bars the jurisdiction of any Civil Court to try a suit which would vary, set aside, alter directly or indirectly any order which may be passed under s. 63.

I am not at all impressed by the argument that although Capt. Angelo is a public servant within the meaning of the I. P. O., he is not a public servant within the meaning of the Criminal P. O. The Criminal P. O. does not create any offence; it is a procedural Act. It defines the procedure to be followed by the Courts before taking cognizance of an offence or after a Court has taken cognizance of an offence against an accused. The offence is created either by the I. P. O. or by some other law for the time being in force. In the present case the offence is created by the provisions of the amended s. 63 (1) (a) of the Chota Nag. Ten. Act. In that Act I do not find any procedure provided for the investigation of that offence; nor does the Code define the Court which would try that offence or could give sanction to compound the offence as provided by sub-s. (3). It follows, therefore, as pointed out by my Lord, the Chief Justice, that the ordinary procedure provided in the Criminal P. O. will come into operation and will guide the Courts in taking cognizance of the offence and investigating it if they possess jurisdiction to take cognizance

thereof. In the present case as no sanction was obtained from the Provincial Govt., the trial Court had no jurisdiction to take cognizance of the offence.

I should have dealt with the argument of the respondents that r. 115, was *ultra vires*. The argument took the shape that the Court of Wards has authority under s. 70, to make only such rules as are consistent with the Court of Wards Act. Reliance was placed upon s. 20 of the Act to show that whereas by this section the Court has the power to appoint a manager and also to remove the manager so appointed irrespective of the salary which he draws, r. 115, expressly limits the power of the Court to the appointment of those managers only whose salary does not exceed Rs. 200 a month. The argument is fallacious and omits to consider the effect of s. 69. Section 69, expressly authorises that

"In the exercise of the powers and in the discharge of the duties conferred and imposed respectively on the Court by this Act, the Court shall be guided by such orders and instructions as it may from time to time receive from the Provincial Govt."

The Court of Wards itself has framed r. 115, by which they have agreed to be guided by the orders of the Provincial Govts. with respect to the appointment of a manager where his salary is above Rs. 200 per mensem. I do not see any inconsistency between r. 115 and any other provision of the Act. Indeed the provisions of the Act are being carried out with greater efficiency under the control and direction of the Provincial Govt. itself.

It was also argued that the Provincial Govt. have only a power to sanction the appointment of the manager but have no power to remove the manager appointed with their consent or approval. The principle is well established that where an authority has a power to sanction the appointment, the persons so appointed cannot be removed without the sanction of that authority.

For these reasons I agree that the proceedings should be quashed, leaving it open to the parties to obtain the sanction of the Provincial Govt. if they so desire.

8.

Proceedings quashed.

LAHORE HIGH COURT

Second Appeal No. 41 of 1938

April 20, 1939

SKEMP, J.

Mst. SAHIBZADI—PLAINTIFF—APPELLANT
versus

ABDUL GHAFOOR—DEFENDANT—RESPONDENT

Muhammadian Law—Marriage—Dissolution—Suit for, on ground of husband's impotency—Limitation—Limitation Act (IX of 1908), s. 23.

Under Muhammadan Law marriage is a civil contract and the husband's impotency is a continuing breach of contract within the meaning of s. 23, Lim. Act. Consequently, a suit by the wife for dissolution of her marriage with her husband on the ground that he was impotent at the time of marriage and at the date of the suit he was still unable to perform the sexual act is incapable of being barred by limitation.

S. A. from the decree of the Additional District Judge, Shahpur at Mianwali, dated October 16, 1937.

Mr. Abdul Aziz Khan, for the Appellant.

Judgment.—The plaintiff, Mst. Sahibzadi, sued for dissolution of her marriage with the defendant, her husband Abdul Ghafoor, on the ground that he was impotent at the time of marriage and at the date of the suit he was still unable to perform the sexual act. The trial Judge found after consideration of the evidence that the defendant was impotent but he dismissed the suit as barred by time on the ground that the parties had been married ten years and the suit was governed by Art. 120, Lim. Act. He rejected the argument that the matter was covered by s. 23, Lim. Act. On appeal, the learned District Judge appeared to hold that the defendant was impotent but he agreed that the suit was barred by time. The plaintiff has come here in second appeal. The learned District Judge appeared to hold that the defendant was impotent but he did not do so definitely, holding that in any case the suit was barred by time. However, there are several expressions in his judgment which clearly imply that he believed the defendant to be impotent. The evidence leaves no doubt in my mind that the defendant was impotent. The plaintiff swore that she was a virgin, that the defendant had never had sexual intercourse with her and that he was impotent. The defendant did not go into the witness-box. There is medical evidence which supported the plaintiff. I hold under s. 103, Civil P. C. that the defendant was impotent. On the point of limitation, it is argued that under Muhammadan Law marriage is a civil con-

act and that the defendant's impotency is a continuing breach of contract. Section 23, Lim. Act, runs:

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

It seems to me that this section alone would justify the finding that the suit is within time. The plaintiff is and always has been unable to perform the contract and there is a continuing breach of the contract of marriage. This view is supported by authority both under the Muhammadan Law and under the ordinary civil law: for the former, see Syed Ameer Ali's Muhammadan Law, Vol. 2, p. 531; for cases under the Lim. Act, see *Ghizni v. Mehran* (1) which held that s. 23, Lim. Act, applies to a suit for restitution of conjugal rights. Sir Meredyth Plowen said:

"The unjustifiable withholding of her person by the wife is a breach of the contract of marriage, and a breach which continues so long as her person is withheld. And upon consideration, I can find no sufficient ground for holding that this is not a continuing breach of contract within the meaning of it is within the terms of s. 23, Lim. Act."

Later he said:

"Virtually, therefore, the suit of a Muhammadan husband against his wife for recovery of his wife is not capable of being barred by limitation."

This judgment was followed and these passages were quoted in *Binda v. Kaunsilia* (2) a case between Hindus, which also referred to an unpublished judgment of the Bombay High Court. *Ghizni v. Mehran* (1) was followed by a Division Bench of the Punjab Chief Court in *Khairuddin v. Budhi* (3). I therefore hold that the suit is within time and accept this appeal. I have already said that the defendant is impotent, but the case must now go back to the trial court in accordance with the rule of Muhammadan Law that after impotency is established, further hearing of the suit should be adjourned for a year in order that it may be ascertained whether the defect is removable. In this case I would hold that the year runs from the date of the lower Court's decree, April 26, 1937. The second appeal was admitted in this Court in January, 1938, and the hearing has been delayed because the husband has not been personally served. The appellant's Counsel alleges that he has been evading service. He has at last been served by substituted service but has not appeared.

I hold that the defendant is impotent, that the suit is within time and return the case to the Court of the Subordinate Judge to give the defendant an opportunity of proving that he is no longer impotent. The case is to be sent down promptly and the learned Subordinate Judge is to take prompt action. If the defendant is not personally served, he is to effect substituted service. If the defendant does not appear, the wife's statement will probably be enough to prove his continued impotency. The case is to be put before the learned Subordinate Judge, Fourth Class, Shahpur, on May 8, 1939. The parties are to bear their own costs.

D.

Appeal allowed.

OUDH CHIEF COURT

Criminal Revision Applications Nos. 83 and 84 of 1939

December 1, 1939

ZIA-UL HASAN, J.

BABU—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898) ss. 195 (1) (a), 144—Complaint under s. 195 (1) (a), absence of—Effect—There was held no complaint—Order under s. 144 against public generally—Scope of—Requirements of—Order held not in accordance with law.

The fact that no complaints required by the mandatory provisions of s. 195 (1) (a), Criminal P. O., were made makes the trials nugatory.

On a report of a Sub-Inspector of Police that certain persons had sacrificed a cow against the order passed by a Sub-Divisional Magistrate under s. 144, Criminal P. O., prohibiting such sacrifice within certain area, with a suggestion that cases under s. 188, I. P. O., should be started against those persons, the Sub-Divisional Magistrate sent the reports to the District Magistrate that those persons be prosecuted. The District Magistrate passed an order sanctioning the prosecution and making the case over to a particular Magistrate and returned the records to the Sub-Divisional Magistrate who then sent the cases to the Magistrate named:

Held, that the reports sent to District Magistrate were not complaints under s. 195 (1) (a). The mere fact that the Sub-Divisional Magistrate while giving evidence before the trying Magistrate several months after, called them complaints did not make them complaints. 148 Ind. Cas. 784 (1) and 140 Ind. Cas. 184 (2), relied on.

The scope of an order passed under s. 144, Criminal P. O., against the public generally is narrower than that passed against an individual and served personally on him. Although the word "public" has not been used with the expression "particular place" in s. 144 (3) still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public.

An order passed under s. 144, Criminal P. O., was addressed to the general public and was to the effect that nobody shall sacrifice a cow within a radius of a mile from certain villages:

(1) 60 P. R. 1879 (F. B.).

(2) 13 A. 126; A. W. N. 1891, 18.

(3) 180 P. R. 1892.

Held, that the order proclaimed was not in accordance with law. 131 Ind. Cas. 649 (3), relied on.

Or. R. App. of the order of the Additional Sessions Judge, Bahraich, dated August 23, 1939.

Mr. M. H. Kidwai, for the Applicant.

The Assistant Govt. Advocate, for the Crown.

Order.—There are two applications in revision against appellate orders of the learned Additional Sessions Judge of Bahraich upholding the convictions and sentences of the applicants under s. 188, I. P. O. Application No. 83 has been brought by Babu alone while Application No. 84 has been filed on behalf of nine persons.

It appears that on January 27, 1939, the Sub-Divisional Magistrate of Nanpara in the Bahraich District took proceedings under s. 144, Criminal P. O. and proclaimed a notice that as a breach of the peace was apprehended by the Muslims of villages Shankarpur and Muqam intending to sacrifice cows against previous practice, it was ordered that from January 31, 1939, to February 3, 1939 (both days inclusive) no person should sacrifice a cow within a radius of a mile from Shankarpur and Muqam and that five or more persons should not assemble at any place except for prayers.

On February 8, 1939, the station officer of Sunwan, within whose jurisdiction Shankarpur and Muqam are situated, made a report that twenty-eight persons named in the report sacrificed cows on February 1, 1939, inside the house of Abdul Razzaq (one of the twenty-eight persons reported against) in village Shankarpur. A similar report was made on the same date against three persons one of whom is Babu applicant in Application No. 83, and in both cases, the Sub-Inspector suggested that cases under s. 188, I. P. O. be started against the persons reported against. On these reports the Sub-Divisional Magistrate sent reports to the District Magistrate on February 8, praying that the persons mentioned in the Sub-Inspector's report be prosecuted under s. 188, I. P. O. In the case of Babu, the learned District Magistrate passed the following order on the Sub-Divisional Magistrate's report :—

"The prosecution of Babu and two others under s. 188, I. P. O. is sanctioned. The case is made over to Mr. Raghubir Singh Magistrate, First Class, for disposal."

A similar order was passed against the twenty-eight persons mentioned above in the above case. Thereupon twenty-eight persons including the applicants in Application No. 84 were prosecuted under s. 188 in one case and Babu and two others in the other case. Out of the twenty-eight accused the learned trying Magistrate acquitted seventeen and convicted eleven. In the other case two were acquitted and Babu was convicted. In the first case Abdul Razzaq was sentenced to six months rigorous imprisonment and a fine of Rs. 100 and his co-accused to four months rigorous imprisonment and to a fine of Rs. 25 each. In the other case Babu was given a sentence of six months' rigorous imprisonment and a fine of Rs. 25. All the convicted persons in the two cases appealed but their appeals were dismissed by the learned Additional Sessions Judge except with regard to two of Abdul Razzaq's co-accused to whom he gave the benefit of doubt and whom he acquitted. It is thus that the nine persons in one case and Babu alone in the other bring these applications for revision.

The first point taken before me is that the trial and conviction of all the applicants was illegal as no complaint as required by s. 195 (1) (a) of the Criminal P. O. had been made by the learned Magistrate who promulgated the order under s. 144. This contention appears to me to have force. The reports of the learned Sub-Divisional Magistrate in both the cases show that they were made to the District Magistrate with a view to obtaining his permission for the prosecution of the persons concerned. The learned Govt. Advocate argues that the said reports were in fact complaints under s. 195 (1) (a) but I am unable to agree with this view. Not only did the learned District Magistrate not treat these reports as complaints but the lists of papers that the learned Sub-Divisional Magistrate submitted along with his reports to the District Magistrate clearly show that the reports were not meant to be complaints but only reports for sanction of prosecution of the persons concerned. The list in one case comprises (1) the report of the station officer, (2) recovery list, (3) statements and Sub-Divisional Magistrate's orders on them to the station officer, (4) sketch of Abdul Razzaq's house, and (5) Parbhu Chaukidar's statement and in the other, (1) report of the station officer, (2) recovery list, (3) sketch (4) Lakshmi Narain's statement, and (5) statements of

four persons. The lists of papers submitted were such as could enable the District Magistrate to form an opinion as to the advisability or otherwise of prosecution. It seems clear to my mind that the intention was to obtain the District Magistrate's sanction for prosecution and not to make a complaint to him under s. 195 (1) (a). It may also be noted that after recording his order on February 9, in one case and on February 11, in the other the learned District Magistrate returned the records to the Sub-Divisional Magistrate and the latter sent the cases to Mr. Raghubir Singh with an endorsement:—

"To Mr. Raghubir Singh for favour of disposal".

This also shows that the learned District Magistrate did not treat the reports as complaints under the Criminal P. O. The learned Govt. Advocate refers to the evidence of the Sub-Divisional Magistrate who proved his reports before the trying Magistrate and called them complaints; but his calling them complaints several months afterwards does not, in my opinion, make them complaints when as I have shown above they are on the face of them mere reports for sanction and when they were treated as such by the learned District Magistrate.

The fact that no complaints required by the mandatory provisions of s. 195 (1) (a) were made makes the trials nugatory. In the case of *Kali Charan v. King-Emperor*, (11 O. W. N. 473) (1) the facts were on all fours with those of the present case, and it was held by a learned Judge of this Court that if a Court takes cognizance of an offence under s. 185 without a complaint as required by s. 195 (1) (a), Criminal P. O. and convicts the accused, the irregularity in the procedure cannot be cured by s. 537 (a), Criminal P. O. and the conviction cannot be legally sustained. In that case a person who had failed to pay up the balance due from him on the sale of an excise licence, was prosecuted under s. 185, I. P. O. and the prosecution had started on the following order of the learned District Magistrate on the report of the Excise Officer:—

"Prosecution under s. 185 is sanctioned. Case to Syed Mohammad Zakir"

With regard to this order of the District Magistrate which it will be noted, was

exactly similar to the order in the case now before me, the learned Judge remarked:—

"Now this order of the District Magistrate cannot by any stretch of language be deemed to be a complaint within the meaning of the term as defined under s. 4 (h) of the Criminal P. O."

In the case of *Abdul Rahman v. Emperor* (A. I. R. 1932 All. 190) (2) the facts were that the accused lodged information at the Police station to the effect that a motor lorry belonging to a certain person had been overloaded. On investigation this information was found to be false. The investigation officer then moved the Superintendent of Police for the prosecution of the accused under s. 182, I. P. O. The Superintendent of Police sent the report to the District Magistrate with the following note:—

"District Magistrate. The accused is the reader of the Tahsildar of Konch. Have you any objection to his prosecution."

The District Magistrate passed the following order:—

"I sanction the prosecution of Abdul Rahman, Judicial Moharrir, Konch. Case to Sub-Divisional Magistrate for disposal. The Moharrir will be suspended till the disposal of the case."

It was held by two learned Judges of the Allahabad High Court that there was no complaint either by the Superintendent of Police or by the District Magistrate, and consequently, the conviction of the accused was set aside.

Although the present application must be allowed on the ground mentioned above, but I consider it necessary to deal with another point raised on behalf of the applicants. It is that the order proclaimed under s. 144, Criminal P. O. was not in accordance with law. The order as I have already noted was addressed to the general public and was to the effect that nobody shall sacrifice a cow within a radius of a mile from the villages of Shankarpur and Muqam. Now looking to s. 144, Criminal P. O. it appears to me that the scope of an order passed under s. 144 against the public generally is narrower than that passed against an individual and served personally on him. Sub-s. 3 of s. 144 lays down:—

"An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place."

Now although the word "public" has not been used with the expression "particular

(1) 11 O. W. N. 473; 148 Ind. Cas. 784; 6 R. O. 434; 35 Cr. L. J. 789; A. I. R. 1934 Oudh 186; (1934) Cr. Cas. 583; 1934 O. L. R. 357; 9 Luck 594.

(2) A. I. R. 1932 All. 190; 140 Ind. Cas. 184; (1932) A. L. J. 155; (1932) Cr. Cas. 206; 33 Cr. L. J. 948; Ind. Rul. (1932) All. 633.

place" still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public. In the case of (*Devatha*) *Sriramamurthy*, (A. I. R. 1931 Mad. 242) (3), it was observed:—

"The order consists of two parts, one addressed to five individuals, the other to the public generally. So far as it is addressed to the public generally, it is clearly a violation of the express terms of s. 144(3), which states that an order under this section may be addressed to the public generally when frequenting or visiting a particular place. No order can be passed against the public without that limitation as to place, namely, that it must be one, whether publicly or privately owed, which at the time when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meeting held in private premises. But the place must be one which is open to the public as such. And this involves that the public cannot be prohibited from putting up flags in private houses first because those who put up the flags are owners or occupants of such houses and second because the public as such neither frequent nor visit private houses. It is a misuse of language to call house owners who use their houses members of the public for the purpose of this section, and I have not been shown any instance of such a use of the section."

The convictions and sentences of the applicants in both the cases must, therefore, be set aside and no question of re-trial arises owing to the view that I have taken of the order under s. 144, Criminal P. O.

The applications are accepted and the convictions and sentences of the applicants set aside.

B.

Applications accepted.

(3) A I R 1931 Mad 242; 131 Ind Cas 649; (1930) M W N 819; 60 M L J 370; 33 L W 610; 32 Or. L J 763; (1931) Or. Cas. 362; Ind. Rul. (1931) Mad. 553.

PATNA HIGH COURT

Criminal Revision No. 590 of 1939

December 4, 1939

FAZI ALI, J.

RAM CHANDRA SINGH AND OTHERS—
PETITIONERS

versus

BALDEO SINGH—OPPOSITE PARTY

Bihar and Orissa Village Administration Act (III of 1922), ss. 68, 53 (2)—Complaint filed before Magistrate transferred by him to Union Board—Accused wishing to get it transferred to proper Court—Procedure.

Section 68, Bihar and Orissa Village Administration Act, does not empower the Union Board to re-transfer a case to the Court of a Magistrate but it only empowers it to direct the complainant

to file a complaint before the proper Court. Where the complaint had already been filed before the Magistrate and transferred by him to the Union Board under s. 53 (2), the procedure to be followed by the accused if he wishes to get it transferred to the proper Court, is to move the District Magistrate or the Sub-Divisional Magistrate under s. 53 (2) (b) of the Act.

Or. R. against an order of the District Magistrate of Saran, dated September 15, 1939, confirming an order of the Union Board, Naini, dated August 6, 1939.

Mr. Rai T. N. Sahay, for the Petitioners.

Messrs. S. N. Sahay and K. P. Varma, for the Opposite Party.

Fazi Ali, J.—The only point raised in this case is that the Union Board of Naini has acted beyond its jurisdiction in trying this case. It appears that the opposite party preferred a complaint before a Magistrate charging the petitioners with an offence under s. 323, I. P. C. The Magistrate under s. 53 (2) of the Bihar and Orissa Village Administration Act, 1922, transferred the complaint to the Union Board. The accused were then summoned, whereupon as is stated in para. 4 of this petition, they filed a petition under s. 68 of the Act, praying that the case be retransferred to the proper Court at Chapra. The Union Board, however, rejected this petition and proceeded with the trial, and ultimately convicted the petitioners and sentenced petitioners Nos. 1 and 2 to pay a fine of Rs. 5 each and the remaining three petitioners to pay a fine of Rs. 9 each. The petitioners thereupon moved the District Magistrate against their conviction and sentence, but the learned District Magistrate rejected their application on the ground that he was unable to interfere with the conviction unless there was a failure of justice, and in his view there was no failure of justice, in the present case. The petitioners thereupon filed this petition for revision in this Court.

Section 68 of the Act provides that

"If the accused appears and claims to be tried by a Magistrate, the *panchayat* shall direct the complainant to file a complaint before the proper Court."

Now, what is stated in para. 4 of the petition is that the petitioners prayed before the Union Board that the case be re-transferred to the proper Court at Chapra. Section 68 does not empower the Union Board to re-transfer a case to the Court of a Magistrate but it only empowers it to direct the complainant to file a complaint before the proper Court. In the present case the complaint had already been filed

before the Magistrate and so the procedure to be followed by the petitioners was to move the District Magistrate or the Sub-Divisional Magistrate under s. 53 (2) (b) of the Act, which provides that

"the District Magistrate or Sub-Divisional Magistrate may transfer any case from one *panchayat* to another or to any other Court subordinate to him."

In my opinion no case has been made out for interfering with the order passed by the *panchayat*, and the application is, therefore, rejected.

S.

Application rejected.

MADRAS HIGH COURT

Full Bench

Second Appeal No. 318 of 1935

October 2, 1939

LEACH, C. J., MOCKETT AND

KRISHNASWAMI AYYANGAR, JJ.

KARINAGISETTI CHENNAPPA—

APPELLANT

versus

KARINAGISETTI ONKARAPPA—

RESPONDENT

Hindu Law—Guardian—Paternal grandmother of minor—Endorsement of payment made by her, if can bind minor under s. 21, Limitation Act (IX of 1908)—Desirability in matter of appointment of guardian, when relevant—Limitation Act (IX of 1908), ss. 21, 20—Lawful guardian, who is—Acknowledgment by de facto guardian, whether prevents debt being time-barred.

The ancient texts of Hindu Law do not provide for the management of a minor's property beyond stating that the guardianship shall vest with the king. The position of the king is now taken by the Court. Custom has, however, recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. But the custom has not extended the rule beyond the mother. Neither by Hindu Law nor custom is the grandmother recognized as the lawful guardian of the minor. No member of the family other than the father or the mother has been recognized as having the right of guardianship. All other things being equal, the nearest relative of the minor should have the position of guardian but if the father and the mother have died, no relative can become the lawful guardian without an order of the Court. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of s. 21, Lim. Act, even if such person happens to be the minor's nearest living relation. Hence the endorsement of payment made by the minor's paternal grandmother cannot bind the minor. 106 Ind. Cas. 863, (7), overruled. Opinion of Viswanatha Sastri, J., in 92 Ind. Cas. 821 (6), disapproved. [p. 753, col. 2.]

Per Mockett, J.—Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else.

Per Krishnaswami Ayyangar, J.—A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a *de jure* guardian in contrast to a *de facto* guardian. The law does make a real distinction between a *de jure* guardian and a *de facto* guardian. A *de facto* guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decision of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

An acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time-barred. 179 Ind. Cas. 201 (1), relied on. [p. 750, col. 1]

S. A. against a decree of the District Court, Bellary, in A. S. No 59 of 1933.

Messrs. A. Bhujanga Rao and D. R. Krishna Rao, for the Appellant.

Mr. K. Srinivasa Rao, for the Respondent.

Leach, C. J.—This appeal raises the question whether the paternal grandmother of a Hindu minor is his lawful guardian when she happens to be his nearest living relation. From 1917 to 1921, the respondent's father had on various occasions borrowed money from the appellant. On September 18, 1924, an account was taken and it was found that the respondent's father owed the appellant an aggregate sum of Rs. 3,825 for which he executed a promissory note. The instrument was not properly stamped and therefore was not admissible in evidence. Realizing the defect, the appellant filed a suit in the Court of the District Munsif of Bellary for relief on the basis of a settled account. The date of the institution of the suit was July 16, 1932, and unless the appellant was entitled to rely on certain endorsements on the promissory notes, his suit was time-barred. I should mention that the respondent's father had died on October 4, 1924, and the suit was against the respondent as his legal representative. The respondent's mother had pre-deceased his father and on his father's death, Neelamma, his paternal grandmother, took charge of his property. On September 6, 1927, she paid to the appellant a sum of Rs. 70 in reduction of the interest due on the loans and made an endorsement to this effect on the promissory note. On November 10, 1927, the District Court of Bellary acting under the provisions of the Guardians and Wards Act appointed one Basappa, the guardian

of the minor's property. On February 18, 1928, Basappa paid a sum in reduction of the amount due and made an endorsement on the promissory note recording the fact of payment. On July 18, 1929, Neelamma made another payment in reduction of the debt and this was also followed by an endorsement on the instrument. Basappa was then alive and was still the lawful guardian of the respondent, but he died a month later. The last payment to the appellant was made by Neelamma on August 25, 1929. This was a sum of Rs. 1 000 paid towards the principal. Again she made an endorsement on the promissory note recording the fact of payment. In order to save limitation the appellant has to rely on the endorsements made by Neelamma on September 6, 1927, and on August 25, 1929. The District Munsif and on appeal the District Judge of Bellary held that the suit was time-barred. The appellant then filed this second appeal which has been placed before a Full Bench in view of conflicting decisions of this Court bearing on the question whether Neelamma was under Hindu Law the lawful guardian of the minor when she made these particular endorsements. Section 20, Lim. Act, states that where interest on a debt is, before the expiration of the prescribed period, paid by the debtor or his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent, a fresh period of limitation shall be computed from the time when the payment was made, provided that, save in the case of a payment of interest made before January 1, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. Section 21 (1), states that the expression "agent duly authorized in his behalf" includes the person's lawful guardian. The fact that Neelamma was the *de facto* guardian of the minor would not help the appellant. It was expressly held by a Bench of this Court (Madhavan Nair and Abdur Rahman, JJ.). In *Nama Nagayya v. Kalle Narasayya* (1), that an acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time-barred. This decision followed a previous decision of this Court to the

same effect. The wording of s. 20 and s. 21, Lim. Act, leaves no room for doubt that this decision is correct. The appellant, however, says that Neelamma was the lawful guardian of the minor, except during the period when Basappa was acting in pursuance of the order passed under the Guardians and Wards Act. In support of this contention the learned Advocate for the appellant has relied on a passage in the edition of Strange's "Hindu Law" published in 1864, Edn. 4 and a passage in Macnaghten's "Principles and Precedents of Hindu Law" quoted in *Kristo Kissor Neoghy v. Kader Moye Dossee* (2). The passage from Strange is at p. 72* and reads as follows:

"The natural guardians of a minor are, first his father, then his mother, elder brother, paternal relatives and maternal relatives."

The passage from Macnaghten is in these words:

"A father is recognized as the legal guardian of his children, when he exists; and when the father is dead, the mother may assume the guardianship. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen according to their degree of proximity; but the appointment of guardians universally rests with the ruling power."

The learned Advocate would have it that these passages must be accepted as authoritative support for the proposition that the legal guardianship devolves upon the nearest paternal relative and in default of a paternal relative on the nearest maternal kinsman. I am not prepared to accept this argument. I consider that it is contrary to principle and accepted authority. It is common ground that the ancient texts of Hindu Law do not provide for the management of a minor's property beyond stating that the guardianship shall vest with the king. The position of the king is now taken by the Court. Custom has, however, recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. This has been accepted from time immemorial, so universally that the right of the father or of the mother, as the case may be, cannot now be disputed, but it appears to be equally clear that custom has not extended the rule beyond the mother. In *Kristo Kissor Neoghy v. Kader Moye Dossee* (2); Garth, C. J., referring to the passage from Macnaghten which I have quoted, said:

"We do not think that this passage means that (2) 2 O L R 583.

*Page of 2 O. L. R.—[Ed.]

(1) (1938) 2 M L J 501; 179 Ind. Cas. 201; A I R 1938 Mad. 853; 48 L W 268; (1938) M W N 878; 11 R M 551; 1 L R (1939) Mad. 65.

All the persons therein mentioned have in turn an absolute right to take upon themselves the guardianship of a minor, without any permission or authority from the ruling power. If it did mean this, the authorities cited would not appear to support it."

Garth, O.J., then went out to point out that Jagannathan, one of the authorities, cited after quoting from Manu this passage: "The king should guard the property which descends to an infant by inheritance, until he returns from the house of his preceptor, or until he has passed his minority," and from the Ratnacara this statement: "Wealth which descends to an infant by inheritance, and becomes the property of the minor, let the king guard; that is, let him protect it from the other heirs," and proceeded to add these observations of his own:

"Consequently, the meaning is, let him (the king) act in such manner that other heirs may not take the whole, defrauding the infant who is incapable for an age of conducting his own affairs; or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian."

There is here authority that no one in the family is entitled as of right to act as the guardian of the minor. The right to act then depended upon the decision of the king. The judgment in *Kristo Kissor Neoghy v. Kader Moye Dossee* (2), is of special importance in the present case as it related to a contest between the paternal grandmother and the paternal uncle on the one side and the maternal grandmother on the other for the custody of a minor. The Court held that none of them was entitled to claim custody as the lawful guardian. The judgment in *Kristo Kissor Neoghy v. Kader Moye Dossee* (2) was accepted as correctly stating the law in *Bhikus Koer v. Chamela Koer* (3), which was also decided by the Calcutta High Court. This was a case under the Guardians and Wards Act and the contesting parties were the maternal grandmother and step-sister of a minor who were his nearest relatives. Trevelyan and Stevens, J.J., held that there was not, even before the Guardians and Wards Act was passed, any one other than the father or the mother who had an absolute right to the custody of a Hindu minor.

Kristo Kissor Neoghy v. Kader Moye Dossee (2) has been cited with approval in two decisions of this Court: *Ranganayaki Ammal v. Ramanuja Iyengar* (4) and *Thayammal v. Kuppanna Kaundan* (5). In

(3) 2 O W N 191.
(4) 35 M 728; 11 Ind. Cas. 570; 21 M L J 600; 10 M L T 57, (1911) 2 M W N 285.

(5) 38 M 1126; 26 Ind. Cas. 179; A I R 1915 Mad. 459; 27 M L J 285.

the latter case Sadasiva Iyer, J., following *Kristo Kissor Neoghy v. Kader Moye Dossee* (2) and *Bhikus Koer v. Chamela Koer* (3), held that under Hindu Law nobody else than the father and mother of a minor "with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor" is entitled as a matter of natural right to be, and to act as, guardian of a minor's person and properties. Recourse must, he said, be had to the Court (representing the rights of the king which are paramount to even the rights of the parents) where there is no natural guardian alive. It was not indicated how exceptions might arise in favour of the elder brother or the direct male and female ancestors of a minor and the decision cannot be taken as going really beyond what was decided in the two Calcutta cases. In *Seetharamanna v. Appiah* (6) Viswanatha Sastriar, J. expressed the opinion that there is nothing in Hindu Law "which limits guardianship only to the father, the mother, and, failing them the king." This statement cannot be accepted as correctly stating the position. As I have already pointed out the Hindu Law, in so far as it is to be gathered from the ancient texts, only provides for the king having charge of a minor's property. There is nothing to be found in the ancient writings which can be interpreted as giving the father or the mother any right to guardianship. Their present rights in this respect are based merely on custom.

In *Kola Surayya v. Kola Subbamma* (7) Devadoss and Jackson, J.J. went very far and it is this decision which has caused this appeal to be placed before a Full Bench. They decided that under the Hindu Law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grandchildren. They said that there was no direct authority for the contention that the paternal grandmother was not the natural guardian of her grandchildren in the absence of their father and mother, but they did not consider the bearing of the two Calcutta cases to which I have referred. The basis of their decision that the paternal grandmother is the natural guardian of her grandchildren is to be gathered from this statement in the judgment:

"Considering the habits and customs of the people
(6) 49 M 765; 92 Ind. Cas. 627; A I R 1928 Mad. 457; 50 M L J 689; 23 L W 285; (1928) M W N 238.

(7) 53 M L J 677 106 Ind. Cas. 863; A I R 1928 Mad. 42; (1927) M W N 911.

of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grandchildren in the absence of their father and their mother."

The short answer to this statement is that neither by Hindu Law nor custom is the grandmother recognized as the lawful guardian of the minor. No member of the family other than the father or the mother has been recognized as having the right of guardianship and this statement receives full support from Mayne, Ed. 10, p. 299, from Mulla's Principles of Hindu Law, Edn. 8, p. 565 and from Trevelyan's "Hindu Law" Edn. 3, p. 231. The Bombay High Court in effect expressed the same opinion in *In re Gulbai and Lilbai* (8). Of course all other things being equal, the nearest relative of the minor should have the position of guardian but if the father and the mother have died, no relative can become the lawful guardian without an order of the Court. I hold that the Courts below were right in refusing to recognize Neelamma as the guardian in law of the minor and in rejecting the claim that her endorsements bound him. It follows that I consider that *Kola Surayya v. Kola Subbamma* (7) was wrongly decided and therefore should not be followed. I would dismiss the appeal with costs.

Mockett, J.—I entirely agree and am only adding a few words in view of the fact that we are differing from a Bench of this High Court. After the very full investigation into this subject which has been made to-day—the learned Counsel for the appellant referred to all the relevant decisions—I think it is clear that at least at some period of time which it is difficult to fix, the only guardian of a minor was "the king," as he is so described in the texts. But to-day undoubtedly it cannot be argued that the father and in his absence the mother are not the legal guardians. They have been so recognized by usage and custom. Indeed the position of the father is impliedly recognized by statute under s. 19, Guardians and Wards Act. How all this came about is attractively put in the latest edition of Mayne on Hindu Law, para. 231, at p. 299. The learned author envisages the natural delegation to the parents by the king of duties so intimately affecting their son, but that idea, as has been pointed out in the authorities to which my Lord has referred, although now having attained the force of law, has never been extended beyond the parents by the Courts with the exception of the decision in *Kola Surayya* (8) 32 B 50; 9 Bom. L R 923.

v. Kola Subbamma (7). In the case of persons other than the parents, an express delegation or appointment is required and this has been done and is to-day done through the machinery of the Court of Wards. With all respect, I think the learned Judges who decided *Kola Surayya v. Kola Subbamma* (7) confused the two positions, namely a consideration as to who was the most desirable person to be appointed as guardian of a minor with a consideration of whether desirability constituted a person a legal guardian automatically. The difference between the two positions is fully recognized by Davar, J. in *In re Gulbai and Lilbai* (8) and it seems to me that if these two distinctions are kept apart, this subject presents very little difficulty. Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else. I agree that the decision of my learned brothers Devadoss and Jackson, JJ. in *Kola Surayya v. Kola Subbamma* (7) is not in conformity with authority, and that this appeal must be dismissed with costs.

Krishnaswami Ayyangar, J.—It is scarcely necessary for me to add anything after, if I may say so with the utmost respect, the full and elaborate consideration that the matter has received at the hands of my Lord. The question, in short, is whether a paternal grandmother can by reason of her relationship alone be held to be a lawful guardian within the meaning of s. 21, Lim. Act. She may in a sense be regarded as a natural guardian as her relationship to the minor is so close that she may be expected naturally to watch over and guard his interests. It is, however better to avoid the use of the expression for the present purpose, as we are not concerned with finding whether in the ordinary course of nature she is or is not a fit and proper person to protect the minor's interest in the absence of a nearer relation. The statute has used the expression lawful guardian and the introduction of the term natural guardian cannot scarcely elucidate discussion, but on the contrary may divert the attention.

The Act does not define the expression 'lawful guardian.' But it is obvious, that we must resort to the personal law of the minor or to other enactments, if any to ascertain its meaning. The only enactment having a bearing is the Guardians and Wards Act, 1890, which does no more

than define the word 'guardian' simpliciter. We have, therefore, to fall back on the personal law of the minor, *i.e.* the Hindu Law, to get at the meaning of the expression with which we are concerned. If a person has been appointed or declared a guardian by Court under the Guardians and Wards Act, he or she is undoubtedly a lawful guardian. The difficulty arises only when no such appointment has been made. A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a *de jure* guardian in contrast to a *de facto* guardian. The law does make a real distinction between a *de jure* guardian and a *de facto* guardian. A *de facto* guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decision of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

There is in the texts of Hindu Law no warrant for regarding a paternal grandmother or indeed even the parents, themselves for that matter, as the lawful guardians of a minor entitled to manage his property as of right. The texts bearing upon the point are few, and do not throw any direct light on the point under consideration. They only seem to establish the proposition that it is the king alone who as *parens patriæ* is the universal and supreme guardian of all the minors and their estates in the kingdom. He of course has the power to delegate his authority and to appoint guardians, and that power is now vested in the Courts established by law by a process of legislative delegation, if I may so call it. As has been pointed out by my Lord, the parents of a minor have been so long and so consistently regarded as lawful guardians by the Courts no less than by the community that an exception in their favour must be held to have been engrafted on the primeval law of the Hindu text writers. The father and in his absence the mother must accordingly be regarded as lawful guardians, not requiring an appointment for acting as such, and this has now to be treated as an integral rule of the law itself. But such a custom is wholly lacking in the

case of other remoter relations not excluding the paternal grandmother, however much they may be interested in the welfare of the minor. In the passages cited from Macnaghten and Strange, there would seem to be at the first look a statement of the order of lawful guardianship which includes other relations besides the father and the mother.

It is, however, clear to my mind that the enumeration was not intended to declare the persons to be recognized as lawful guardians under the Hindu Law without reference to an appointment by Court. It seems to me that it will be more in consonance with the spirit of the law to hold that what was intended by the enumeration was but an indication of the order of preference which the Court should bear in mind in making the choice of a guardian among the available relations, the dominant consideration being the welfare of the minor. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of s. 21, Lim. Act. I have the less hesitation in assenting to this view, as I consider that it will tend to the better protection of the minors' properties than if I were to hold that a series of relations commencing from the elder brother and including the paternal and the maternal relations have the inherent right directly and without an appointment by the Court to assume charge of a minor's estate and proceed to keep alive debts on his behalf. Such an expansion of the rule is, it seems to me, fraught with dangerous consequences, and in the absence of binding authority, should not be upheld. I concur in the judgment just now pronounced by my Lord.

N.D.

Appeal dismissed.

MADRAS HIGH COURT

Criminal Revision Case No. 677

and

Petition No. 645 of 1938

September 9, 1938

LAKSHMANA RAO, J.

In re MADDUKURI SUBBA RAO AND

OTHERS—PETITIONERS

*Criminal Procedure Code (Act V of 1898), s. 106—
Order under, in respect of offence under s. 426, Indian
Penal Code, legality.*

Offence under s. 426, I. P. O. does not involve a breach of the peace and the order under s. 106, Criminal P. O. cannot be sustained.

Cr. R. Case and P. from the judgment of Joint Magistrate, Bezwada, dated May 30, 1938.

Mr. P. Satyanarayana Rao, for the Petitioners.

The Public Prosecutor, for the Crown.

Order.—The evidence justifies the conviction of the petitioners under s. 426, I. P. O. and the fines are not excessive. But the offence under s. 426, I. P. O. does not involve a breach of the peace and the order under s. 106, Criminal P. O. cannot be sustained. The order under s. 106, Criminal P. O. is, therefore, set aside and otherwise this petition is dismissed.

N.-D.

Order set aside.

ODDH CHIEF COURT

Criminal Miscellaneous Application No. 108 of 1939

December 11, 1939

THOMAS, O. J. AND RADHA KRISHNA, J.
DISTRICT MAGISTRATE, SULTANPUR

—COMPLAINANT—APPLICANT

versus

MR. RAMJAS YADAVA AND MR. RAM
NARESH SINGH—OPPOSITE PARTIES

Contempt of Court—During pendency of proceedings under s. 107, Criminal Procedure Code (Act V of 1898), against certain persons, an M. L. A. writing to Magistrate to withdraw proceedings against one of them—Contempt of Court held committed.

No member of the Legislative Assembly has any right to interfere in the course of administration of criminal justice.

While proceedings under s. 107, Criminal P. O., against certain persons were pending in the Court of a Magistrate, a member of the Legislative Assembly wrote a letter to the Magistrate with the intention that the proceedings against one of the persons should be withdrawn:

Held, that the latter grossly offended against the law of contempt of Court.

Cr. Mis. App. for taking action under Contempt of Courts Act.

The Assistant Govt. Advocate, for the Crown.

Mr. M. H. Kidwai, for the Accused.

Order.—This is a case for contempt of Court against Ram Naresh Singh, M. L. A., and Ram Jas Yadava, President of the District Congress Committee of Sultanpur, on the complaint of the District Magistrate of Sultanpur.

As there was fear of communal disturbance, two separate cases were started against 12 Hindus and 12 Muhammadans under s. 107, Criminal P. O., in the Court of the Sub-Divisional Magistrate of Kadi-

Magistrate bound down both the parties on June 5, 1939. On appeal, the learned Sessions Judge of Fyzabad, on July 21, 1939, remanded both the cases for further evidence. The learned Sub-Divisional Magistrate fixed the cases for further evidence on August 31, 1939. It appears that on the same date about two hours before the hearing of the cases Ram Naresh Singh, M. L. A., wrote the following letter to the Sub-Divisional Magistrate and Ram Jas Yadava took it and gave it to the Magistrate. It is as follows:

"My dear Deputy Sahib,

I have nowadays been touring in Kadipur Tahsil in connection with Congress work. In this tour I had the chance of visiting Dostpur also. Then I came to know that proceedings under s. 107, are again going to be started against the same 24 persons. I also fully approve of this proceeding. But I have realised one thing. Certain mischief-mongers have been left from prosecution and some innocent persons have been entrapped. So I thought to suggest to you to amend the list, if possible. The famous Leader Barrister Inayatullah and one Shya Baran may be included, and one Benchu Rai, who is the President of the Mandal Congress Com. and who was not actual at Dostpur on the day of the scuffle and whom I have greatly reprimanded and have taken under promise to do nothing without my permission, may be deleted from the list. I hope you will take it in public service spirit and try to act according to my suggestion. The bearer of the letter is the President of the D. C. C. and a statement in detail can be had with him.

Soliciting a reply,

Yours sincerely,

(Sd.) Ram Naresh Singh."

Benchu Rai, who is mentioned in the letter, was a member of the Dostpur Congress Mandal and was one of the persons against whom proceedings under s. 107 had been taken. The intention of the accused Ram Naresh Singh in writing the letter was that the proceedings under s. 107 should be withdrawn against Benchu Rai and we have no doubt that the accused when he wrote the letter thought that in his position as a member of the Legislative Assembly entitled him to write the letter to the Sub-Divisional Magistrate.

It is not necessary for us to deal with the matter at length because the accused have admitted their guilt, but we may point out that the letter grossly offends

against the law of Contempt of Court. It was written at a time when the proceedings were pending in the Court of the Sub-Divisional Magistrate, and it was clearly an attempt to influence the Magistrate to drop the proceedings against Benchu Rai. No member of the Legislative Assembly has any right to interfere in such a manner in the course of administration of criminal justice.

When the case came up for hearing before us, the accused tendered the following written apology:

"The humble application of Ram Naresh Singh and Ram Jas Yadava respectfully sheweth:

1. That notice has been issued to the applicants to show cause why proceedings should not be taken against them under s. 2 of the Contempt of Courts Act (XII of 1926).

2. That the applicants greatly regret that their action has been an interference with pending judicial proceedings. For this action of theirs, they tender to Your Lordship a full and unqualified apology and undertake never to repeat the offence.

"Wherefore they throw themselves at Your Lordship's mercy."

The question for consideration is whether we should act under the first proviso to s. 3 of the Contempt of Courts Act which provides that "the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court" or whether we should compel Ram Naresh Singh and Ram Jas Yadava to purge their contempt by payment of a fine or the undergoing of a sentence of imprisonment.

The accused were present in Court and we put certain questions to them and have come to the conclusion that the apology is genuine.

We accordingly while convicting Ram Naresh Singh and Ram Jas Yadava of contempt of Court with respect to the Court of the Sub-Divisional Magistrate of Kadiapur consider that the undertaking given by them is sufficient to meet the circumstances of this case, accept the apology of the accused and order that they be discharged. We make no order as to costs.

5.

Order accordingly.

MADRAS HIGH COURT

Appeal No. 114 of 1937

August 17, 1939

WADSWORTH, J.

MAMMILI KUNHIRAMAN KITAVU,
KARNAVAN AND MANAGER OF
THAVAZHI—APPELLANT

versus

VENGILERI THANANCHERI KUNHI
KARNAVAN KITAVU—RESPONDENT

Malabar Law—Family property—Acquisition by manager—Presumption.

In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made, there is no presumption that the property acquired by the manager is family property. The fact that an item, the character of which is in dispute is mortgaged along with another item proved to be family land, will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family. 179 Ind Cas. 344 (I), relied on.

A. against remand order of the District Court, North Malabar, dated July 25, 1936.

Facts.—The suit is to recover possession of two items of property from the defendant held by him under registered *marupat*, Ex. A, dated January 17, 1919, executed by him in favour of one R, the then *karnavan* of the plaintiff's *tavazhi*, on the ground that they belong to the *tavazhi* and was dismissed under Ex. A to the defendant. The defendant set up a gift in his favour by the previous *karnavan*, Ex. B of 1922. The trial Court decreed the suit. In appeal, the lower Appellate Court held on the evidence that item No. 2 was *tavazhi* property and decreed possession. As regards Item No. (1), the evidence was that it was purchased by R in his name, and there was no evidence that when R purchased the property, there was sufficient income from the *tavazhi* out of which he could have made the purchase. The only evidence *contra* was that R clubbed this item with the *tavazhi* property in the transaction Ex. A. On this evidence the lower Appellate Court held that Item No. (1) was the private property of R and the gift in favour of the defendant was valid, and that the plaintiff could not recover it and remanded the suit to the trial Court for disposal. Against this decision the plaintiff preferred this appeal.

Mr. K. Kuttikrishna Menon, for the Appellant.

Judgment.—In the absence of evidence that the family possessed property with the income of which the new acquisition might

have been made, there is no presumption that the property acquired by the manager is family property : *Vythinatha Ayyar v. Varadaraja Ayyar* (1). The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family. On both these points the evidence is lacking. The appeal has, therefore, to be dismissed.

N.D.

Appeal dismissed.

(1) 48 L W 628; 179 Ind. Cas. 344; A I R 1938 Mad. 841; I L R (1938) Mad. 696; (1938) 1 M L J 216; (1938) M W N 13; 11 R M 575.

ODUH CHIEF COURT

Second Civil Appeal No. 72 of 1937

December 20, 1939

RADHA KRISHNA, J.

LACHHMI NARAIN AND ANOTHER—

APPELLANTS

versus

MUSAHAB ALI AND OTHERS

—RESPONDENTS

Oudh Laws Act (XVIII of 1876), s. 9—Pre-emption—Preferential right by drawing of lots, when determined—Ordinary tenant, whether member of under-proprietary village community—Sale of plot also transfers well situated on it.

The last sentence of s. 9, Oudh Laws Act, lays down the procedure of determining the order of preference where several persons having equal right of pre-emption have exercised their right of pre-emption by instituting a suit.

An ordinary tenant in a village cannot be said to be a member of the under-proprietary village community in a village.

The sale of a plot carries with it a transfer of the well situated on the plot when it is not sold as a separate entity.

S. C. A. against the order of the Additional Civil Judge, Lucknow, dated October 3, 1936.

Mr. R. B. Lal, for the Appellant.

Mr. Anwarul Hasan, for Respondent No. 1.

Judgment.—This appeal arises out of a pre-emption suit.

On May 22, 1935, defendants Nos. 1 and 2 who are respondents Nos. 2 and 3 in this Court, executed a sale deed for a sum of Rs. 125 in favour of defendants Nos. 3 and 4 who are appellants here, in respect of plot No. 623 of an area of 1 *bigha* 5 *biswas* in village Saras, Pargana Nigohan, District Lucknow. The suit has been decreed by the two Courts below and the vendees, i. e. defendants Nos. 3 and 4 have

come up in appeal. The following contentions have been raised in support of the appeal:—

(1) That there are other under-proprietors in the village and the plaintiff's preferential right could be determined only after the drawing of lots among all of them and for this purpose the other under-proprietors should have been impleaded in the suit.

(2) That the appellants are also members of the village community because they with one Misri Lal, who is the father of the appellant No. 1 and the uncle of the appellant No. 2, formed a joint Hindu family and are tenants of the plot in suit.

(3) That the plot in dispute was sold along with one well and as the transfer of well is not pre-emptible, so there could be no pre-emption in respect of the plot as the well and the plot have both been transferred by the same sale deed.

As regards point No. 1, it has been contended that the right of pre-emption is available to all persons mentioned in s. 9 of the Oudh Laws Act, but where there are several persons who are equally entitled to that right, the particular person out of them whose right can be given effect to must be determined by lot between all those persons. The argument is that where there are persons in a village of equal status, none of them can pre-empt unless he has had his right determined either out of Court or in the suit by drawing lots. Reliance is placed upon the last sentence of s. 9 of the Oudh Laws Act. The two Courts below have held that the application of this sentence arises only amongst rival claimants to pre-emption and not against those persons who never thought of pre-empting the property at all.

The right of pre-emption is defined in s. 6, as a right to acquire immovable property in preference to all other persons. Section 9 gives a list of persons who in the order of preference are entitled to pre-empt when property sold or foreclosed is a proprietary or under-proprietary tenure. The language of s. 9 would indicate that the order of preference mentioned in that section comes into play only when more than one person mentioned in that section actually exercise that right. The right is there in all the persons mentioned therein but the order of preference is laid down to regulate the exercise thereof. The last sentence shows that where all rival pre-emptors are equally entitled to exercise the right then the Court shall determine the

right by drawing a lot. The words "to exercise" and "the Court" in this sentence exclude any idea of the determination of preference amongst several intending pre-emptors out of Court.

Section 10 also indicates that the question of preference has to be decided in the suit when several persons have exercised the right of pre-emption. Notice of a proposal to sell or foreclosure has to be given to all the persons who have a right of pre-emption irrespective of the order of preference. Section 11 lays down that a person having a right of pre-emption in respect of any property proposed to be sold, shall lose such right, unless within three months from the notice mentioned in s. 10, he tenders the price to the person proposing to sell. If the right of pre-emption is lost on failure to tender the price, it goes without saying that it is equally lost where no suit for pre-emption has been filed. In my opinion, the sentence in dispute of s. 9 lays down the procedure of determining the order of preference where several persons having equal right of pre-emption have exercised their right of pre-emption by instituting a suit and the view taken by the two Courts below in respect of this contention is upheld.

As regards the second point, the lower Appellate Court has held that there is no evidence that the holding of Misri Lal is a joint family holding. Further, an ordinary tenant in a village cannot be said to be a member of the under-proprietary village community in a village. This contention has no force.

The last contention has been raised in this Court by a petition dated August 14, 1939. It was not raised in any of the Courts below. On a perusal of the sale deed it would appear that the well was not sold as a separate entity. It was part of the plot sold. The words *main ek dahan chah pukhta* are words of description or better specification of the plot actually sold. The definition of immovable property in s. 4 (23) of the U. P. General Clauses Act (I of 1904) is as follows:—

"Immovable property" shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything, attached to the earth, but shall not include standing timber, growing crops or grass."

The sale of the plot in dispute carried with it a transfer of the well situated on that plot. It was not sold as I have said above as a separate entity. The argument is an afterthought and has no substance.

In my opinion, there is no force in this appeal and I dismiss it with costs.

As the appeal has been dismissed, I reject Civil Miscellaneous Application No. 535 of 1939.

B.

Application dismissed.

RANGOON HIGH COURT Full Bench

Civil Reference No. 1 of 1939

March 20, 1939

ROBERTS, C. J., BAGULEY AND SHARPE, J.J.

MAUNG AYE MAUNG—APPELLANT

versus

A. SCOTT AND CO AND OTHERS

—RESPONDENTS

Execution sale—Attachment and sale of judgment-debtor's movable property by decree-holder—True owner recovering such property from auction-purchaser—Auction-purchaser, if can recover from decree-holder money paid by him on ground of total failure of consideration—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, s. 60—O. XXI, r. 93, whether creates new right—Non-owner disposing of goods not belonging to him—His action vis-a-vis true owner, nature of—Execution sale—What passes—Sale of Goods Act (III of 1930), s. 30—Scope of.

Per Full Bench.—If a decree-holder attaches and sells in execution of a decree against a judgment-debtor (the sale proclamation saying that the right, title and interest only of the judgment-debtor is being sold) movable property, and such property is subsequently recovered by its true owner from the auction-purchaser, the auction-purchaser is entitled to recover from the decree-holder the money which he has paid on the ground that there has been a total failure of consideration. 6 Ind. Cas. 672 (S), explained.

[Case-law referred to.]

Per Baguley, J.—There is a difference between a sale in which the judgment-debtor has some interest in the property sold and a sale in which he has no interest in the property sold. If the judgment-debtor has some interest in the property sold, there is no guarantee by any party or by the Court as to the extent of that interest, and, if that interest is sold, the sale becomes absolute and no more can be said or done about it in the absence of misrepresentation, fraud, etc. On the other hand, when the judgment-debtor has no attachable interest at all, nothing has been sold, and if nothing is sold, there is no sale. There is, therefore, nothing to become absolute and nothing to be set aside. There is simply a payment of money in return for nothing and the money having thus passed is returnable. [p. 764, col. 1.]

Per Sharpe, J.—The whole basis of a sale of movable property, be it a sale by the Court or not, is that something is sold. That basis is unchanged even in cases where the sale is by the Court in execution of a decree, the sale proclamation saying that only the right, title and interest of the judgment-debtor is being sold. In those cases in which it transpires that nothing whatever is in fact sold, there is, if the purchaser has paid the purchase money, a total failure of consideration. [p. 764, col. 2.]

Per Roberts, C. J.—The Civil P. C., is adjective

law as opposed to substantive law and O. XXI, r. 93 does not create a new right but merely gives a new and summary remedy in respect of immovable property to enforce that right. Order XXI, r. 93, only comes into operation if an order setting aside a sale has been passed under r. 92 and it does not provide the exclusive remedy of the auction-purchaser, and these rules have no application where an auction-purchaser has been deprived of the property purchased by him after the sale has been confirmed and by reason of the intervention of the true owner upon the ground that the judgment-debtor had no saleable interest in the property. [p. 763, col. 1.]

Per *Baguley, J.*, (in order of reference):—If the non-owner does, dispose of goods which do not belong to him, his action *vis-à-vis* the true owner is in the nature of a tort and it is quite incredible that under s. 60, Civil P. O., the law entitles a creditor to attach and sell his judgment-debtor's right to commit a tort and clearly no right to commit a tort can be envisaged. [p. 759, col. 1.]

In the case of all sales in execution of decrees only the right, title and interest of the judgment-debtor passes. [p. 758, col. 2.]

The general principle of law is that only the owner can give a good title to another of his own property and the law has always done its best to protect the rights of the legal owners. The power given by s. 30 (2), Sale of Goods Act, is in a sense of compromise which enables, in certain circumstances, a person, who is not a legal owner, to transfer the title. [p. 759, col. 1.]

O. Ref. arising out of S. A. No. 279 of 1938, from the judgment of the District Court, Amherst, in Civil Appeal No. 4-A of 1938.

Order of Reference to a Full Bench

Baguley, J.—Omitting the unnecessary points, the bare facts of the present case are as follows: Messrs. A. Scott & Co. sold an engine to Saw Yu Hoe on the hire-purchase system and under the agreement, the engine remained the property of Messrs. A. Scott & Co. until the price had been paid in full. Kin Mun, got a decree against Saw Yu Hoe and in execution of that decree, he attached the engine which was in Saw Yu Hoe's possession. The engine was put up for sale and sold to U Aye Maung. Messrs. A. Scott & Co. knew nothing about the attachment until after the sale; so, they brought the present suit against Saw Yu Hoe, Kin Mun and Aye Maung. The suit is headed as a suit for possession of the engine or in the alternative for Rs. 800, its value. The exact nature of the case seems slightly obscure. The suit for possession of the engine can only be brought against the person in whose possession it is. The prayer for a decree for Rs. 800 in the alternative seems to me simply an alternative to getting possession of the engine and also on that basis, it could only be claimed from the persons in whose

possession it originally was. I think, however, that the suit is really in the nature of a combined suit, using the old terms of law, against Aye Maung for trover and against Kin Mun for trespass against property. I cannot suggest that it is also filed against Saw Yu Hoe for balance of purchase-money. That would be misjoinder of too glaring a kind. The trial Court gave a decree against Saw Yu Hoe only for Rs. 354 being the balance of the unpaid purchase-money. Messrs. A. Scott & Co. appealed and the Additional District Judge gave a decree against Aye Maung only for the engine or its value, Rs. 370. The monetary amounts of the decrees given are interesting. Rupees 354 seems to be the balance of the unpaid purchase money and Rs. 370 seems to have been fixed as the unpaid balance of the purchase money after allowing a certain payment of Rs. 16 to be credited towards interest. The present appeal is filed by Aye Maung.

Of the three grounds of appeal argued, the first is that under O. XXI, r. 77, when movable property is sold on payment of the purchase money, the sale becomes absolute and appellant's claim is that, the engine being movable property, as soon as he paid the purchase money, he got a complete title. It is pointed out that rr. 74 to 81 apply to sales of movable property and r. 82 onwards apply only to immovable property and the sale had been made absolute by payment of the money. There is no provision among the rules relating to movable property corresponding to r. 91 which applies to immovable property. The answer to this argument seems to me to be that in the case of all sales in execution of decrees only the right, title and interest of the judgment-debtor passes. This is specifically stated in the sale proclamation and is, I think, common knowledge to all who take part in these sales. The appellant's next line of argument, and, if I may say so, a very ingenious argument it is, is that s. 30 (2), Sale of Goods Act, applies. Although Saw Yu Hoe was regarded merely as the hirer in possession, he had really agreed to buy the engine ultimately and with the consent of the seller he was in possession of the engine. If, therefore, he were to have sold the engine to some person who bought it in good faith and without notice of any right of the original seller to the goods, the buyer will get a clear title. Section 30 (2), Sale of Goods Act, is based upon English Law, s. 9, Factors Act, 1899,

and the leading case on this is *Lee v. Butler* (1). In that case

"L, being in possession of furniture under a hire and purchase agreement made with the plaintiff, sold and delivered the furniture, before the last payment had accrued due or been paid, to the defendant, who received it in good faith and without notice that the plaintiff had any right in respect of it."

And it was held that the sale and delivery were valid. It is argued, therefore, that if Saw Yu Hoe had sold this engine to Aye Maung, Aye Maung would have got the title. Therefore, it is argued, since Saw Yu Hoe's creditor has attached the engine and sold it in execution of the decree, the sale must be good because Saw Yu Hoe's interest in the engine included his power of disposal, and therefore when Kin Mun attached and sold Saw Yu Hoe's interest he got his power of disposal under s. 30, Sale of Goods Act. The argument, as I have said, is ingenious but I cannot accept it. The general principle of law is that only the owner can give a good title to another of his own property and the law has always done its best to protect the rights of the legal owners. The commercial world, however, is more interested in removing restrictions upon trade and it is quite clear that business would be impossible if every time a purchaser wished to buy goods, he had to examine the title of his vendor. So, the power given by s. 30 (2), Sale of Goods Act, is in a sense of compromise which enables, in certain circumstances, a person, who is not a legal owner, to transfer the title.

If the non-owner does, in this way, dispose of goods which do not belong to him, is action *vis-a-vis* the true owner is in the nature of a tort and it is quite incredible that under s. 60, Civil P. O., the law entitles a creditor to attach and sell his judgment-debtor's right to commit a tort and clearly a right to commit a tort can be envisaged. The machine belonged to Messrs. A. Scott & Co. It was in Saw Yu Hoe's possession legally and under a contract which is of a common nature. Being their property and having found its way into the hands of Aye Maung, they are entitled to follow it there and claim to recover it. Equitable considerations, however, require the Court not to allow Messrs. A. Scott & Co. to make a profit out of this transaction, so, fortunately for the other people, although the engine is their property their beneficial interest in it really was no more than to recover Rs. 370 from Saw Yu Hoe. The decree

against Aye Maung in favour of Messrs. A. Scott & Co., therefore, should be not for the return of the engine or its value of Rs. 30, but for the return of the engine. Execution by seizure of the engine is not to be granted if defendant No. 3 pays into Court or to Messrs. A. Scott & Co. the sum of Rs. 370 in lieu of the engine, and their costs.

The appellant, however, also asks that the decree if not set aside against him should direct the payment by Kin Mun's representative to him of the purchase price they received from him. I am aware that in all cases in which property is sold at a Court auction, there is not necessarily a warranty of title and in a Single Judge ruling of this Court *Maung Pa v. Abdul Ganni* (2) this was laid down. In this case a reference was made to *Maung Tun v. Ma Ngan* (3) a decision of a Full Bench of the late Chief Court. This lays down that:

"When movable property is sold in execution of a decree and it is subsequently found that the judgment-debtor had no saleable interest in the property, and the purchaser is thereupon deprived of the property, the purchaser is not, in the absence of fraud, entitled to recover the price paid from the decree-holder."

In the judgment of the Bench, Fox, C. J. at p. 63*, remarked in passing:

"It may seem inequitable that he should not have a right to recover his money from the man who can only have received it wrongly, but in the face of their Lordships' decision in *Dorab Ally Khan v. The Executors of Khajah Moheesooddeen* (4) and in the absence of any legislative provision contemplating such a right, I am constrained to hold that he has none. It cannot be assumed that their Lordships overlooked the rule that the Courts of India are bound to decide according to justice, equity and good conscience, and it must be assumed that in appeals from the Indian Courts, their Lordships themselves follow that rule."

Now without speculating with regard to what their Lordships may or may not have overlooked, it is, I fear, clear that the learned Chief Judge must have overlooked one important point. Towards the end of the judgment there is a passage:

"There is, no doubt, a further question whether the plaintiff has shown a case which, if proved, would entitle him to recover back the purchase money as money had and received to his use as upon a total failure of consideration."

The facts in *Dorab Ally Khan v. The Executors of Khajah Moheesooddeen* (4) were shortly that in execution of a decree obtained in the late Supreme Court of

(2) 4 R 202; 97 Ind. Cas. 1029; A I R 1926 Rang 214.

(3) 5 L B R 58; 3 Ind. Cas. 673

(4) 3 O 806; 5 I A 116; 2 O L R 523; 3 Suth. 519; 3 Sar. 818; 2 Ind. Jur. 426 (P.O.).

Judicature at Fort William a writ of *fiery facias* was issued to the Sheriff of Calcutta in 1866 directing him to recover from the movable and immovable property of the judgment-debtor within Bengal, Bihar and Orissa, and Benares and certain other places, a certain sum of money. The Sheriff, however, proceeded outside the large area in which he was authorized to execute and seized some property in Oudh. The only question before the Judicial Committee was whether the purchaser could sue for damages against the Sheriff and the attaching creditor. They held that on the facts as stated, the suit would lie. The law which had to be administered was the Common Law of England and I fear I know little or nothing about a writ of *fiery facias* and the powers of the Sheriff under English Law. There is a passage in the judgment which indicates that special rules would apply in such cases:

"The rule itself cannot properly be held applicable to sales by the Sheriff which are governed by rules peculiar to such sales."

The facts upon which this case was based date from the year 1861. The learned Chief Judge in *Maung Tun Ma v. Ngan* (3) quotes from *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4).

"Now it is of course perfectly clear that when property has been sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor."

When, however, we see that the Judicial Committee were applying a rule which has no applicability whatsoever to ordinary sales in execution under the Civil P. O., I confess I fail to understand why the rule laid down for Sheriff's sales by the Privy Council should be made the one governing factor upon which to ascertain the rights of the parties who are litigating under another law. Proceeding further on, in the judgment, the learned Chief Judge said:

"By the Civil P. O. of 1877 the Legislature gave a remedy to auction-purchasers of immovable property when the judgment-debtor has no saleable interest in the property sold, and when for that reason the purchaser is deprived of it. Under s 315 the auction-purchaser might get back in execution proceedings his purchase money and possibly interest on it, from the person to whom it had been paid."

He goes on to point out that there was no provision similar to ss. 313 and 315 applying to movable property from which he deduces that the buyer of movable property has no remedy whatsoever. With due respect, this reasoning does not seem to me to be sound. He has used the correct word,

the section of the Civil P. O. gives a summary remedy, but what we are concerned with here is the right of the purchaser and, as I have had occasion to point out in other cases, the Civil P. O. is a Code of civil procedure. It merely gives means whereby a party may proceed to exercise a right which he has *aliunde*; it never gives a substantive right; so where the Civil P. O. gives a remedy, by giving the remedy it seems to me to recognize a pre-existing right. If a purchaser has a remedy to recover his purchase money when the judgment-debtor is shown to have no interest at all, then that recognizes the existence of a right to recover the purchase money under these circumstances, and it seems to me that in principle there can be no difference between the right to recover the purchase money under similar circumstances whether the property sold is movable or immovable. The fact that no provision corresponding to s. 313 exists in regard to movable property simply means, so far as I understand it, that the purchaser of immovable property under these circumstances has a short remedy by way of an application, in addition to his intrinsic remedy of filing a regular suit to enforce his right, whereas the short remedy of an application to the executing Court does not exist for the benefit of the purchaser of movable property; but he also, it seems to me, must be regarded as having the means of enforcing his right by a regular suit and this, I will submit, is what their Lordships of the Privy Council were referring to, in the passage which I have quoted in *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4). As far back as 1877, in *Framji Besenji Dustr v. Hormasji Pestanji Framji* (5), where the property sold in execution of the decree was certain shares, which are movable property, the right to file a suit in consequence of the judgment-debtor having no interest in the shares was recognized, the sale was set aside, and the purchase money was ordered to be repaid to the auction-purchaser. This suit, it may be mentioned, was decided on August 10, 1877, long before the Code of 1882, came into existence. It was therefore decided under the Code of 1859, and the Code of 1859 had no section corresponding even to ss. 313 and 315 of the Code of 1882. There was no corresponding section in the Codes of 1877 or 1859. Returning again to *Maung Tun v. Ma Ngan* (3), Irwin, J. who wrote the

second judgment took the same view of *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4), as I do, namely that as the law applicable to that case was quite different to the law applicable to this country, he did not think "their Lordships would approve of the dictum being held to be binding on Courts which have to administer a different law." Leaving aside therefore this case he said he could find no authority to say that in the mofussil either the bailiff or the decree-holder gives any warranty of title. He seems to be under the impression that because paras. 2, 3 and 4, s. 315 of the 1882 Code did not apply to movable property, therefore the purchaser of movable property had no means of obtaining relief. This, it seems to me, regards the right as having been given by the Civil P. O. and my contention is that rights are not given by the Code of procedure.

Hartnoll, J. who followed took his stand on *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4). Robinson, J. who wrote the next judgment, considered that the dictum in *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4) was a general statement of the law which would apply to the case of a sale by the Court's bailiff. He did accept the argument that s. 109, Contract Act, showed that the Law of England when the Privy Council ruling was passed had not been adopted in India but says that s. 109 was in existence when the Privy Council ruling was passed. It is quite true that the Contract Act came into force on September 1, 1872, and the Privy Council case was decided in 1878, but the facts which gave rise to the case started with an application for a warrant in June, 1866. The last judgment is by Bell, J. He refers to *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4) which notices that it did not refer to the law of India but says that that does not seem to him to detract from its value as guide of the decisions on the Indian law. He first refers to *Sowdamini Chowdrain v. Kishen Kishore Poddar* (6). This, of course, was decided before the Contract Act came into force. He says that the subsequent enactment of s. 109, Contract Act, did not detract from its value because, he says, the argument that s. 109 altered the existing law is in direct opposition to the views expressed by the Privy Council in *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4) but, as I have

said, the facts on which *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4) arose were earlier than 1872. He says that "caveat emptor" applies. Now, s. 109, Contract Act, is a considerable limitation to the principle of "caveat emptor" and since then s. 109 again has been repealed, and now the law is to be found in s. 14, Sale of Goods Act. Even in England the principle of "caveat emptor" has been riddled with exceptions and according to Lord Campbell in *Sims v. Marryatt* (7) at p. 289 "the exception well nigh eat it up."

My own view is that when, as in the present case, in the execution proceedings the sale proclamation states that "intending purchasers are warned that only the right, title and interest of the judgment-debtor is going to be sold" there is an implied warranty that the judgment-debtor has some interest. There are no apt words saying that what is being sold is "the right, title and interest of the judgment-debtor, if any," or "the right, title and interest of the judgment-debtor, if he has one," and I think that as all the parties concerned are before the Court and this appeal has been filed by the auction-purchaser making the decree-holder party, it is only right that all the rights and liabilities of the parties as against others in this matter should be finally decided in this case. See O. XLI, r. 33. If the view that I take of this law is correct, I would give Messrs. Scott & Co. a decree against Maung Aye Maung for the return of the machine with costs, the decree not to be executed if he do pay to them the sum of Rs. 370 and costs, the sum of Rs. 370 representing the unpaid portion of the purchase money. Whatever in the event Maung Aye Maung has to pay to Messrs. Scott & Co. he is entitled to be reimbursed together with his own costs by the attaching creditor, now the legal representatives of the deceased Kin Mun. When these transactions have been carried out, there will remain the question of what alteration must be made with regard to the amount that must be regarded as having been received in part satisfaction of the decree as between the legal representatives of Kin Mun as decree-holder on the one hand, and Saw Yu Hoe, the judgment-debtor on the other hand. This cannot be determined in this suit but will have to be decided under s. 47, Civil P. O., by the executing Court. In this Court no order of any kind will be passed with regard to Saw Yu Hoe, save that he

(7) (1851) 17 Q B 281 at p. 289; 20 L J Q B 454; 85 R R 462.

(6) 4 Beng. L R 11; 12 W R 8 (F B).

do bear his own costs throughout. In view, however, of the five Judge ruling of the late Chief Court, I hardly see how, sitting as a Single Judge, I can overrule it. I therefore refer to a Full Bench of as many Judges as my Lord the Chief Justice may think fit, the question: "If a decree-holder attaches and sells in execution of a decree against a judgment-debtor (the sale proclamation saying that the right, title and interest only of the judgment-debtor is being sold) moveable property, and such property is subsequently recovered by its true owner from the auction-purchaser, is the auction-purchaser entitled to recover from the decree-holder, the money which he has paid on the ground that there has been a total failure of consideration?"

Mr. Aiyangar, for the Appellant.

Messrs. Beecheno and S. C. Chowdhury, for Respondents Nos. 1 and 3a and 3b, respectively.

OPINION

Roberts, C. J.—The question of law referred to this Full Bench is in the following terms:

"If a decree-holder attaches and sells in execution of a decree against a judgment-debtor (the sale proclamation saying that the right, title and interest only of the judgment-debtor is being sold) moveable property, and such property is subsequently recovered by its true owner from the auction-purchaser, is the auction-purchaser entitled to recover from the decree-holder the money which he has paid on the ground that there has been a total failure of consideration?"

The facts of the case which gave rise to it are that the first defendants, Messrs. A. Scott & Co., delivered to Saw Yu Hoe, defendant No. 2, an engine upon a hire-purchase agreement; by the terms of the agreement the engine was to remain the property of the vendors until the purchase price was paid in full. One W. Kin Mun, since deceased (whose heirs are defendants Nos. 3 and 4) obtained a money decree against Saw Yu Hoe and purported in execution thereof to attach this engine which was in the judgment-debtor's possession but was the property of the first defendants, Messrs. Scott & Co. It was then ostensibly put up for sale and purchased by the appellant Maung Aye Maung. When the appellant discovered that the engine which he thought he had bought and for which he had paid the purchase price, belonged to Messrs. A. Scott & Co. and that he was obliged to return it to them, he sought to recover the purchase price from someone or other of the defendants. The learned Judge who made the reference did so by reason of the judgment of five Judges in the

Chief Court of Lower Burma in *Maung Tun v. Ma Ngan* (3). In that case it was held that the purchaser of movable property at a Court sale bought the property put up for sale subject to any existing incumbrances; no more could be sold in execution of the decree than the right, title and interest of the judgment debtor and such purchaser was not entitled to recover the price paid by the decree-holder when deprived of the property by reason of a second sale under a mortgage decree.

The case in *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4) was quoted in their decision. In that case the Sheriff who was entitled to seize property in Bengal, Bihar and Orissa, Benares and certain other districts under a writ of *fieri facias* exceeded his jurisdiction and seized certain property in Oudh. Their Lordships of the Privy Council pointed out (at p. 813*) that sales by the Sheriff were governed by rules peculiar to such sales, but that the plaint directed by the purchaser at the Sheriff's sale, who had subsequently been evicted, against the judgment-creditor had not wholly failed to disclose a cause of action. It was observed that there was the question whether the plaintiff had shown a case which, if proved, would entitle him to recover back the purchase money as money had and received to his use as upon a total failure of consideration. The Chief Court of Lower Burma laid stress upon the following passage in the judgment:

"Now it is of course perfectly clear that when the property has been so sold under a regular execution and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction and to pass the debtor's title to it without warranting that title to be good."

Page, J. in *Rishikesh Laha v. Manik Molla* (5), observed:

"That is the general rule, but in a case where property in which the judgment-debtor has no saleable interest has been purchased in execution of a decree and the circumstances are such that in accordance with the equitable rules obtaining in that behalf it would be against reason and conscience that the person to whom the purchase price has been paid should retain the purchase money as against the auction-purchaser, the auction-purchaser is entitled to recover such money as money had, and received to, his use. If he did not possess such a right, he be exposed to loss resulting from fraud or collusion at the sale between an execution-creditor and the judgment-debtor, and yet remain without redress. But against loss sustained in such circum-

(8) 53 O 758; 96 Ind. Cas. 64; A I R 1926 Cal 971; 43 O L J 418.

*Page of 3 O—[Ed.]

ances the law does not leave him defenceless and the auction-purchaser may recover the purchase price which he has paid if he can bring himself within the equitable principles which justify a suit for money had, and received, upon the ground that it is unconscionable at the defendant should retain the money as against a plaintiff."

Now in England the execution of a decree or money is entrusted to the Sheriff, an officer who is bound to use his own discretion and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor: see *Kissorimohun Roy v. Harsakh Das* (9), at p. 443. But it was pointed out by Jai Lal, J. in *Mehr Chand v. Milkhi Ram* (10), at p. 652 that:

"While it is true that when selling the property of the judgment-debtor the Court does not guarantee any title, it does proclaim and communicate to the intending purchasers that according to the representation of the decree-holder, the judgment-debtor has some interest in the property to be sold; the extent of that interest is not investigated nor is it guaranteed by the Court but the existence of some interest is affirmed by the decree-holder. It is inconceivable that the Court would proceed to sell the property in respect of which the decree-holder has not made a representation, express or implied, that the judgment-debtor has a saleable interest in it."

Although the case cited related to immovable property, it was most carefully explained in the decision of the Full Bench that the Civil P. O. is adjective law as opposed to substantive law and that s. 315 (the provisions of which are now incorporated in O. XXI, r. 93) did not create a new right but merely gave a new and summary remedy in respect of immovable property to enforce that right. Order XXI, r. 93 only comes into operation if an order setting aside a sale has been passed under r. 92 and it does not provide the exclusive remedy of the auction-purchaser, and these rules have no application where an auction-purchaser has been deprived of the property purchased by him after the sale has been confirmed and by reason of the intervention of the true owner upon the ground that the judgment-debtor had no saleable interest in the property.

The question whether the auction purchaser can recover back the purchase price from the decree-holder depends therefore upon whether there has been a total failure of consideration. A suit based upon such failure of consideration for the recovery of money paid is maintainable in this country:

(9) 17 O 438 at p. 443; 17 I A 17; 5 Sar. 472; 13 Ind Jur. 452 (P O).

(10) 13 L 618 at p. 652; 138 Ind. Cas. 47; A I R 1932 Lah. 401; 33 P L R 649; Ind. Rul. (1932) Lah. 396.

Chaitanya Das v. Ranjit Pal Chaudhuri (11), and in my opinion the answer to the question raised in the reference must therefore be given in the affirmative: Advocates' fee 15 gold mohurs.

Baguley, J.—I agree with the answer proposed by my Lord the Chief Justice but as I made the reference myself, I would like to add a few remarks particularly as part of the remarks are in the nature of criticism of the reference actually made. The wording of the reference that I made would have applied perfectly to the case of *Maung Tun v. Ma Ngan* (3), which was mentioned so often in the course of this argument; but the question which really arose in this present reference was not quite the same, and it would have been better had I referred the same question as was referred in that case. The question which was referred in the case in *Maung Tun v. Ma Ngan* (3) did not really apply to the case which was before the late Chief Court of Lower Burma. In that case the judgment-debtor whose boat was sold had got an interest in the boat and the purchaser at the Court auction did get some benefit from the purchase. The boat was sold by the Court in August, 1905, and it was not until the following December that a mortgage decree was passed against the boat and in consequence the purchaser at the Court auction was deprived of it. In that case certainly the judgment-debtor had an attachable interest; so the question which I actually referred would have applied to that case and the question which was referred in that case would apply to the present reference because the question there asked applied to cases in which judgment-debtors had no saleable interest in the property. However, throughout the argument of the present reference it was assumed that the judgment-debtor had no saleable interest in the property.

It was unfortunate that at the time the case was argued before me as a Single Judge, my attention was not drawn to certain cases which were dealt with before this Full Bench. I refer to *Rishikesh Laha v. Manik Molla* (8), *Chaitanya Das v. Ranjit Pal Chaudhuri* (11), and *Mehr Chand v. Milkhi Ram* (10). Had I known of these cases, I would probably have followed them and refused to follow the Bench ruling of the late Chief Court. I would like to refer to one point that was emphasized in the argument, namely that in O. XXI, in

(11) I L R (1938) 1 Cal. 512; 162 Ind. Cas. 241; A I R 1938 Cal. 263; 67 O L J 16; 12 R O 24.

the rules referring to the sale of movable property, there is nothing which corresponds to r. 91 which refers to sales of immovable property, and r. 77 (2) states that

"on payment of the purchase money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute."

It is argued that when the sale becomes absolute there can be no return of the purchase money without a setting aside of the sale. The argument, if I may say so, is quite fair, but for a sale to become absolute, there must have been a sale; for a sale to take place, there must be something sold and a price paid or promised and this, in my opinion, shows the difference between a sale in which the judgment-debtor has some interest in the property sold and a sale in which he has no interest in the property sold. It is conceded that if the judgment-debtor has some interest in the property sold; there is no guarantee by any party or by the Court as to the extent of that interest, and, if that interest is sold, the sale becomes absolute and no more can be said or done about it in the absence of misrepresentation, fraud, etc. On the other hand, when the judgment-debtor has no attachable interest at all, nothing has been sold, and if nothing is sold, there is no sale. There is, therefore, nothing to become absolute and nothing to be set aside. There is simply a payment of money in return for nothing.

It will be noted in *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4), their Lordships (at page 816*) considered the question whether it could be said that in the case before them there had been a total failure of consideration because the purchaser had been for nearly two years in possession of the property in question and might be assumed during that time to have gained some benefit from his purchase, in which case they said that it could not be stated that consideration had wholly failed, but that in view of the fact that if the sale was in fact a complete nullity, he would become liable to the true owner for all the rents and profits which he had received, it would be impossible to say that he had received any substantial benefit, for everything which he might receive by virtue of his irregular position was liable to be taken away from him by the true owner. I am certainly of opinion that when the decree-holder asked the Court to attach property in execution of the decree against his judgment-debtor he must be held to be representing that his judgment-debtor had some interest in that

property. There is not in the ordinary course a representation that he is in full ownership of the property and there is certainly no guarantee that this is the case; but unless the decree-holder has made a representation that the judgment-debtor has some interest, he could not ask the Court to attach it. In the result if the judgment-debtor had any interest in the property that interest went to the purchaser at the Court auction and even if the purchaser finds he has got a much smaller interest than he expected or hoped to get, he has ordinarily no cause of action against any one. If, however, the judgment-debtor has no attachable interest at all, when he had a right to expect that he would get something, he has got absolutely nothing and, as I have suggested, there is no sale; therefore no sale became absolute and there is no sale which need or can be set aside and the money having passed for no consideration is recoverable.

Sharpe, J.—I agree that the question referred, which is one involving a purely abstract proposition of law, must be answered in the affirmative. I propose to state my reason quite shortly. In my judgment, the whole basis of a sale of movable property, be it a sale by the Court or not, is, as my brother Baguley has just pointed out, that something is sold. That basis is unchanged even in cases where the sale is by the Court in execution of a decree, the sale proclamation saying that only the right, title and interest of the judgment-debtor is being sold. In those cases in which it transpires that nothing whatever is in fact sold, there is, if the purchaser has paid the purchase money, a total failure of consideration. It is clear from the judgment of Sir James Colville in *Dorab Ally Khan v. The Executors of Khajah Moheooddeen* (4)—indeed it is almost stated there in express terms—that here, as in England, a plaintiff is entitled to recover back purchase money as money had and received to his use in the case of a total failure of consideration. To my mind that is sufficient to dispose of this reference. A consideration of the terms of O. XXI, Civil P. C., is, in my opinion, unnecessary and only tends to confuse the real point of the case, for, as has been pointed out by my Lord the Chief Justice, and also by Baguley, J. when referring this question, that Code is purely adjective, as opposed to substantive law.

D.

Answer in affirmative.

SIND JUDICIAL COMMISSIONER'S COURT

Revision Application No. 28 of 1938

May 17, 1939

DAVIS, J. C. AND TYABJI, J.

RAMCHAND VIRMAL—APPLICANT

versus

LILARAM AND ANOTHER—OPPONENTS

Civil Procedure Code (Act V of 1908), ss. 10, 115
—Order under s. 10 refusing stay—Revision, if maintainable.

No revision is maintainable against an order of a Judge under s. 10, Civil P. O., refusing to stay proceedings and directing a suit to proceed. 27 Ind. Cas. 917 (5), explained.

(Case-law relied on.)

R. App. from the order of the First Class Sub-Judge, Hyderabad, dated March 19, 1938.

Mr. Fatehchand Assudomal, for the Applicant.

Mr. Dipchand Chandumal, for the Opponents.

Davis, J. C.—This is an application in revision against an order of the learned First Class Subordinate Judge, Hyderabad, dated March 19, 1938, in which he refused to stay Suit No. 103 of 1936 in his Court. It was argued that s. 10, Civil P. O., prevented his proceeding with the trial of the suit before him, there being another suit prior in point of time between the same parties or parties litigating under the same title in which the same matters directly and substantially in issue, filed in the Bombay High Court. The learned Judge dealt with this objection carefully and at length, as he and other Judges have dealt carefully and at length with other objections raised in this Suit No. 103 of 1936, which to this day, May 17, 1939, has made no appreciable progress. But we think the preliminary objection taken that revision application will not lie against an order of the Judge rejecting an objection under s. 10, Civil P. O., and ordering the suit shall proceed before him must succeed, for such an order is not a case decided within the provisions of s. 115, Civil P. O. A Bench of this Court in the judgment reported in *Zenab Sukhio v. Muhammad Haji Allahdino* (1) have pointed out that s. 115, Civil P. O., does not in terms refer to interlocutory orders; it refers to a case decided and it was in *Zenab Sukhio v. Muhammad Haji Allahdion* (1) laid down that the point whether a case is or is not decided within the provisions of s. 115, Civil P. O., must be

determined upon the facts of each case. In the case of an order of a Judge refusing to stay proceedings under s. 10, Civil P. O., there is authority that such an order does not fall within the provisions of s. 115, Civil P. O., in *Bal Krishna v. Ram Kishun* (2) while in *Sultanat Jhan Begam v. Sundar Lal* (3) it was decided that an order staying a suit on an application under s. 10, Civil P. O., was also not a case decided within the meaning of s. 115, Civil P. O.

In *Kalwant Rai v. Fonseca & Co.* (4) it was also held that an order staying a suit under s. 10, Civil P. O., is not a case decided within the meaning of s. 115, Civil P. O. It is true that in *Sivaprasad Ram v. Tricomdas Coverji Bhoja* (5) the Calcutta High Court set aside an order of the Subordinate Judge staying a suit under s. 10, Civil P. O., but in that case the power of the Court to interfere under s. 115, Civil P. O., was not considered at length. It merely stated that the Court had ample power to interfere with an interlocutory order, even if that power only lay under s. 15 of the Charter Act.

The view of the Madras High Court in certain cases in unauthorized law reports is to the effect that revision will lie against an order passed under s. 10, Civil P. O. There is, therefore, on this point conflict of judicial decisions; but our own view is that where a Court refuses to stay proceedings under s. 10, Civil P. O., it cannot be said to be a decided case within the meaning of s. 115, Civil P. O. Rather it might be said it did not decide a case but merely allowed the suit to proceed and to be decided in accordance with law. It is true that a Bench of this Court held in *Zenab Sukhio v. Muhammad Haji Allahdino* (1) that an order setting aside a decree under O. IX, r. 13, was an order deciding a case. So did a Full Bench of the Allahabad High Court in *Radha Mohan Datt v. Abbas Ali* (6) and yet the decision of that same High Court in cases under s. 10, Civil P. O., is that no revision will lie. So that there is, at least, an authority besides our own for the view that there is no necessary conflict between

(2) A I R 1929 All. 957; 121 Ind. Cas. 97; (1930) A L J 235; Ind. Rul. (1930) All. 81.

(3) 42 A 409; 58 Ind. Cas. 90, A I R 1920 All. 197; 18 A L J 431.

(4) A I R 1933 Lah. 191; 141 Ind. Cas. 177; 34 P L R 86; Ind. Rul. (1933) Lah. 71.

(5) 42 O 926; 27 Ind. Cas. 917; A I R 1916 Cal. 318.

(6) A I R 1931 All. 294; 133 Ind. Cas. 129; 53 A 612; (1931) A L J 377; Ind. Rul. (1931) All. 577 (F 15).

(1) 32 S L R 703; 174 Ind. Cas. 572; A I R 1938 Sind 76; 10 R S 264.

a decision that an order under s. 10, Civil P. O., allowing a suit to proceed is not a case decided within the provisions s. 115, Civil P. O., while an order setting aside a decree under O. IX, r. 13, Civil P. O., is. This Court has recently in a Full Bench decision in R. A. No. 12 of 1937 [*Kishinchand Changomal v. Takhitram Tulsidas* (7)] held that no revision under s. 115, Civil P. O., lies against an order of the Court setting aside an award and directing the suit to proceed. That decision seems in accord with our present decision that no application in revision will lie against an order of a Judge under s. 10, Civil P. O., directing a suit to proceed. This revision application must be dismissed with costs accordingly.

D. *Application dismissed.*

(7) A I R 1939 Sind 241; 183 Ind. Cas. 724; 12 R 875 (F B).

ODDH CHIEF COURT

Civil Miscellaneous Application No. 730
of 1939

and

First Civil Appeal No. 43 of 1937
November 27, 1939

ZIA-UL HASAN AND HAMILTON, JJ.
Raja SHANTRANJII—CLAIMANT
—APPELLANT

versus

DEPUTY COMMISSIONER,
MANAGER, COURT OF WARDS,
MAHEWA ESTATE, KHERI—

APPLICANT—RESPONDENT

*Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—
Appeal not relating to amount of decree but to manner
of its execution—Art. 17 (vi), Sch. II applies.*

Where an appeal does not relate to the amount for which the decree has been passed but to the manner in which the decree can be enforced or executed, the appeal falls under Art. 17 (vi) of the Second Schedule of the Court Fees Act. 90 Ind. Cas. 629 (1), 62 Ind. Cas. 979 (2), 154 Ind. Cas. 330 (3) and 171 Ind. Cas. 13 (4), relied on.

O. Misc. App. and F. C. A. dated October 2, 1939, for enhancement of court-fee in the First Civil Appeal No. 43 of 1937, filed on behalf of the respondent, the following order was passed by this Hon'ble Court.

Rai Bahadur H. S. Gupta, for the Applicant-Respondent.

Messrs. M. Wasim and Ali Hasan, for the Appellant-Opposite Party.

Order.—This is an application by the respondent to an appeal filed under s. 45 of the Encumbered Estates Act alleging that there is a deficiency of court-fee on the appeal and praying that the appellant

be ordered to pay the proper court-fee and to amend the valuation of his appeal.

The applicant filed an application under s. 4 of the Encumbered Estates Act, and the appellant brought a claim before the Special Judge amounting to Rs. 2,09,087 the foot of a mortgage of property held by the applicant. The learned Special Judge gave the appellant a decree for the amount claimed, but as the applicant was a transferee from the original mortgagor, the learned Judge added a condition to the decree in the following terms:

"The actual liability of the landlord will, however be limited to the extent of the transfer value of mortgaged property which might be fixed by the Collector".

The claimant was awarded costs Rs. 25,000. Future and *pendente lite* interest was awarded to him, at Rs. 3-12 per cent. per annum.

Against this decree the claimant filed an appeal to this Court. In paras. 1 to 3 of the grounds of appeal he objected to the condition imposed by the Special Judge in para. 4 he claimed full costs in the Court below and in para. 5 he claimed interest from the date of the application at the rate of 4½ per cent. per annum. The entire appeal was valued at Rs. 2,09,087. The office made a report that the appellant had not put any valuation on grounds Nos. 4 and 5 of the memorandum of appeal, and that he might be asked to put proper valuations on the relief claimed by him. Thereupon the learned Counsel for the appellant amended the memorandum of appeal mentioning a sum of Rs. 1,525 as the cost claimed by him in para. 4 and Rs. 1,045 as the difference of interest claimed. He reduced the valuation of the appeal to the total of these amounts, namely Rs. 2,570 and paid a court-fee of Rs. 10 on grounds Nos. 2 to 3 of his appeal. The office reported that the valuation and the court-fee paid were correct, and the appeal was fixed for hearing. It could not, however, be taken up on the date fixed and on that very date the learned Counsel for the respondent filed the application with which we are now dealing.

We have heard the learned Counsel for the parties and are of opinion that there is no deficiency in the court-fee now. The learned Counsel for the applicant argues that as by the decree of the Special Judge it has been ordered that the appellant would be entitled to realise the amount of his decree to the extent of the transfer value of the property, which the respon-

dent says is Rs. 24,164-12-3, it should be assumed that the appeal relates to an amount equivalent to the difference between Rs. 2,09,087 and Rs. 24,164-12-3. We are unable to accept this argument. The Court below has already given the appellant a decree for Rs. 2,09,087 and it is not the amount of the decree given to him that is in any manner in dispute in this appeal. What the appellant objects to is the condition imposed by the learned Special Judge in the decree granted to him. It is, we think, a case which comes under Art. 17 (vi) of the Second Schedule of the Court Fees Act in that it is not possible to estimate the subject-matter of the appeal at a money value.

In *Radha Krishna v. Mehtab Mian*, (90 Ind. Cas. 629, (1), *Harcharan Das v. Sukhraj Das*, (62 Ind. Cas. 979) (2), *Jagannath Ravji Kondkar v. Laxmibai Anant Kondkar* (1. L. R. 59 Bom. 439) (3) and *Sobha Ram Chela Ram v. Bainsiram Janjiram*, (171 Ind. Cas. 13) (4), it was held that where an appeal does not relate to the amount for which the decree has been passed but to the manner in which the decree can be enforced or executed, the appeal falls under Art. 17 (vi) of the Second Schedule of the Court Fees Act.

We, therefore, hold the court-fee paid by the appellant sufficient and dismiss the respondent's application with costs.

s. Application dismissed.

- (1) 90 Ind. Cas. 629; A I R 1925 Lah. 496; 7 Lah. L J 364.
 (2) 62 Ind. Cas. 979.
 (3) 59 B 439; 154 Ind. Cas. 330; A I R 1935 Bom. 111; 36 Bom. L R 1220; 7 B B 324.
 (4) 171 Ind. Cas. 13; A I R 1937 Pesh. 89; 10 R Pesh. 28 (1).

ALLAHABAD HIGH COURT

Miscellaneous Case No. 391 of 1938

May 2, 1939

IQBAL AHMAD AND BAJPAL, JJ.

BHAIRO KUMAR—PLAINTIFF—APPLICANT

versus

MARKANDE GIR AND OTHERS—

DEFENDANTS—OPPOSITE PARTY

Agra Tenancy Act (III of 1928), ss. 44, 242 (3)
 (a)—Suit under s. 44 by person alleging himself to be zamindar—Defendant admitting plaintiff to be proprietor and himself to be thekadar—Question of proprietary rights, whether in issue in suit—Appeal, whether lies to Commissioner or to District Judge.

Under the Agra Tenancy Act, a lease is hardly a transfer of proprietary interest in land, for the Act speaks of leases by landholders to tenants and by tenants to sub-tenants. Even a thekadar

has been defined as a farmer or other lessee of proprietary rights and not as a transferee of proprietary rights in some form or another. Although a thekadar is not expressly included in the definition of tenant, the provisions relating to tenants apply in the majority of cases to thekadar as well. It will, therefore, be inappropriate to say that, when in a suit under s. 44 a defendant admits that the plaintiff is the proprietor of the holding and the defendant is a thekadar, a question of proprietary right is in issue between the plaintiff and the defendant claiming such right. Hence an appeal from the decision in the suit lies to the Commissioner and not to the District Judge.

Misc. Case from the reference submitted by the District Judge, Ghazipur, as per his letter dated May 16, 1938.

Messrs. *Haribans Sahai and Janaki Prasad*, for the Applicant.

Mr. K. L. Misra, for the Opposite Party.

Bajpal, J.—This is a reference by the District Judge of Ghazipur under s. 267 (2), Agra Ten. Act. The reference has been made in connection with an appeal pending in his Court. The suit has been dismissed by a Revenue Court and the appeal had been first filed by the plaintiff in the Commissioner's Court. The defendant there raised a preliminary objection and said that the appeal ought to be returned for presentation to the Civil Court, and the Commissioner upheld the preliminary objection and said that "the proper forum of the appeal was the District Judge's Court." The appeal thus came to the District Judge and curiously enough the defendant again raised a preliminary objection and said that the appeal lay to the Commissioner. This is an inconsistent attitude adopted by the defendant but this has very little bearing on the reference except perhaps on a question of costs, and we have to decide the reference as made by the learned District Judge.

The facts may now be stated. The plaintiff alleging himself to be a landholder of certain plots, sued the defendants under s. 44, Agra Ten. Act. Defendant No. 1 was said to be a trespasser and defendants Nos. 2 to 5 were said to be in possession of the land through defendant No. 1. The case of the defendant No. 1 was that he was the heir of one Mewa Gir who held the land under a perpetual lease from the zamindar of the holding and the case of defendants Nos. 2 to 5 was that they were in possession through defendant No. 1. The learned Assistant Collector held that defendant No. 1 was an heir of Mewa Gir, that Mewa Gir was a permanent lessee of the holding in question and therefore defendant No. 1

could not be treated as a trespasser and the plaintiff's suit was, therefore, dismissed.

The plaintiff in appeal once again raised the question that the defendant was a trespasser and was not a permanent lessee. What we have got to decide is whether the appeal lies to the District Judge or to the Commissioner. The suit was a suit under s. 44, Agra Ten. Act and is mentioned at serial No. 2 in group B of Sch. IV, Agra Ten. Act. It is provided there that the suit is triable by an Assistant Collector of the First Class and an appeal shall ordinarily lie to the Commissioner. Appeals lie to the District Judge under s. 271, Agra Ten. Act, or under s. 242 (1) or 242 (3), Agra Ten. Act. It is conceded that s. 271, Agra Ten. Act, has no application because no issue was referred by the Revenue Court to the Civil Court. Section 242 (1) has also no application and the only relevant provision of law is s. 242 (3) (a). Under that provision an appeal shall lie to the District Judge in all suits except suits under Ch. XI, in which :

"a question of proprietary right has been in issue between the parties claiming such right in the Court of first instance, and is in issue in the appeal"

There can be no doubt that what was in issue between the parties in the Court of first instance was also in issue in the appeal, and the only thing that we have got to decide is whether a question of proprietary right has been in issue between the parties claiming such right. It is of some importance to note that under the former Tenancy Act (Local Act II of 1901) the words used in the corresponding section (s. 177) are :

"a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal."

The words "between the parties claiming such right" did not find a place in s. 177. We have, therefore, got to decide whether any question of proprietary right has been in issue between the plaintiff and the defendant who have been claiming such right in the Court of first instance and are claiming the same right in the appeal. The plaintiff alleges himself to be the *zamindar* and the defendant admits that the plaintiff is a *zamindar*. The defendant further pleads that he is a lessee of proprietary rights or, in other words, a *thekadar* as defined in s. 199, Tenancy Act. The word 'lease' has not been defined in the Tenancy Act except in the interpretation clause s. 3 (13) where it is said that it includes a *qabuliyat*, but it is clear that

under the Tenancy Act a lease is hardly a transfer of proprietary interest in land, for the Act speaks of leases by landholders to tenants and by tenants to sub-tenants. Even a *thekadar* has been defined as a farmer or other lessee of proprietary rights and not as a transferee of proprietary rights in some form or another, and in Ch. XIII, more particularly in s. 220, it is provided that suits between a *thekadar* and his lessor shall be instituted in the Revenue Court. Although a *thekadar* is not expressly included in the definition of tenant, the provisions relating to tenants apply in the majority of cases to *thekadars* as well. It will, therefore, be inappropriate to say that, when a defendant admits that the plaintiff is the proprietor of the holding and the defendant is a *thekadar*, a question of proprietary right is in issue between the plaintiff and the defendant claiming such right. We, therefore, think that the view taken by the learned District Judge is correct and our order is that the appeal be returned for presentation to the Commissioner. As we indicated before, the attitude taken by the defendant was inconsistent, and we direct that the parties will bear their own costs of this reference.

s.

Order accordingly.

MADRAS HIGH COURT

Second Appeal No. 865 of 1934

October 13, 1938

VENKATARAMANA RAO, J.

PERUMAL MOOPPAN AND ANOTHER—

APPELLANTS

versus

SUBRAMANIA MUDALIAR—RESPONDENT

Transfer of Property Act (IV of 1882), s. 41—Consent—Entry in survey register, whether evidence of.

The mere fact that an entry is made in the survey register in favour of transferor is not evidence of consent within meaning of s. 41, T. P. Act.

S. A. against the decree of the Sub-Judge, Sivaganga, in A. S. No. 26 of 1933.

Mr. V. Ramaswamy Iyer, for the Appellants.

Mr. P. N. Appuswamy Iyer, for the Respondent.

Judgment.—The only point urged by Mr. V. Ramaswami Ayyer is that his clients should have been given relief under s. 41, T. P. Act, by non-suiting the plaintiff. I

do not think this contention is tenable. Under s. 41 it must be shown that defendant No. 1 was the ostensible owner with the consent, express or implied, of the person interested in the property. There is no evidence of tacit consent. The mere fact that an entry was made in the survey register cannot be relied on as such consent. I therefore dismiss the second appeal with costs. Leave to appeal refused.

N.-S.

Appeal dismissed.

PATNA HIGH COURT

Miscellaneous Appeal No. 142 of 1937

August 24, 1939

ROWLAND AND CHATTERJI, JJ.

HARBALLAV PRASAD

CHOWDHURY AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

JAGBALLAV PRASAD CHOWDHURY—

DEFENDANT AND ANOTHER—PLAINTIFF—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 4 (1), 7, O. XLIII, r. 1 (w), s. 115—Interpretation of O. XLVII, r. 4 (1), — Appeal under O. XLIII, r. 1 (w), if subject to O. XLVII, r. 7—Revision, when permissible.

Sub-rule (1) of r. 4, O. XLVII, Civil P. O., cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted, the case falls under sub-r. 2.

The right of appeal granted by O. XLIII, r. 1 (w), Civil P. O., is subject to the grounds set out in O. XLVII, r. 7, 94 Ind. Cas. 591 (2) and 116 Ind. Cas. 645 (3), dissented from, 163 Ind. Cas. 992 (4) and 35 Ind. Cas. 15 (5), followed.

Under s. 115, Civil P. O., revision is permissible only where the order complained of is not appealable.

Misc. A. from the original order of the Sub-Judge at Darbhanga, dated March 5, 1937.

Messrs. B. N. Mitter, R. Chowdhury and Ajit K. Mitter, for the Appellants.

Mr. Bhabananda Mukharji, for the Respondents.

Chatterji, J.—This appeal arises out of proceedings in a partition suit instituted so far back as in the year 1917. Without going into the long history of the case, it will be enough to state that in pursuance of the preliminary decree which was passed in 1919, a Commissioner was appointed who eventually submitted his report on April 26, 1925. According to his findings, the plaintiffs were entitled to get various

sums from the defendant who was the *karta* of the joint family. The defendant filed objections to the report and those were disposed of by the Subordinate Judge by his order dated January 17, 1936. Accepting the Commissioner's report in part, he passed a final decree. Before the final decree was actually prepared, the defendant made an application on February 17, 1936, for review of the judgment dated January 17, 1936. In the application certain items in the Commissioner's report were specifically referred to and it was prayed that "those items should be re-considered with a view to rectify the mistakes and inequities that have crept in owing to a misapprehension." This application was presented to and heard by the same Judge who passed the final decree on January 17, 1936. He granted the application by his order dated March 5, 1937, and by the same order he passed a fresh final decree. The present miscellaneous appeal is directed against that order in so far as it granted the application for review. The substantial point urged in this appeal is that there were no sufficient grounds upon which the learned Subordinate Judge could review the final decree which was passed on January 17, 1936. In support of his contention Mr. Mitter has relied upon the decision of the Privy Council in *Chhajju Ram v. Neki* (1) where their Lordships laid down that "any other sufficient reason" in O. XLVII, r. 1, Civil P. O. means a reason sufficient on grounds at least analogous to those specified immediately previously. In the present case, however, the learned Subordinate Judge has held that there was an error apparent on the face of the record or something analogous to it. If that is so, certainly the review was permissible under the express provisions of O. XLVII, r. 1. But let us assume that the Subordinate Judge was wrong in his view of the facts with which he was dealing. The question is whether in this appeal we can examine the propriety of his decision. Indeed under O. XLIII, r. 1, (w) an order granting an application for review is appealable; but O. XLVII, r. 7, specifies certain limits within which such an appeal can be entertained. The relevant portion of O. XLVII, r. 7, runs as follows:

(1) 3 L 127; 72 Ind. Cas. 566; A I R 1922 P O 112; 49 I A 144; 30 M L T 295; 26 O W N 697; 41 P L R (P O) 1922; 3 P L T 435; 16 L W 37; 17 P W R 1922; 43 M L J 332; 24 Bom. L R 1238; 4 U P L R (P O) 99; 36 C L J 459 (P O).

"An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was : (a) in contravention of the provisions of r. 2, (b) in contravention of the provisions of r. 4, or (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit."

Thus it is clear that an order granting an application for review can be objected to only upon the three grounds specified in the above rule and no other. Now in the present case, the first and the third grounds unquestionably do not exist. An attempt was made by Mr. Mitter to support the appeal on the second ground, namely that the application was in contravention of the provisions of r. 4. That rule runs as follows :

"(1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same ; Provided that (a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

Sub-r. (1) does not obviously apply as it refers to a case where the Court rejects the application. It cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted, the case falls under sub-r. 2. Mr. Mitter wanted to rely on proviso (b) of that sub-rule, but the application was not based on the ground of discovery of any new matter or evidence nor was it granted on any such ground. The position therefore is that none of the grounds on which the order granting the application for review could be attacked by way of appeal exists in the present case. Mr. Mitter has referred us to a decision of the Bombay High Court in *Daso Keshav Panchbhavi v. Karbasappa Kariyappa* (2) and to the decision of the Nagpur Court in *Mukundsa v. Motiram*, 116 Ind. Cas. 645 (3). In both these cases

(2) A I R 1926 Bom. 121; 94 Ind. Cas. 591; 27 Bom. L.R. 1446.

(3) 116 Ind. Cas. 645; A I R 1929 Nag. 73; 25 N L R 104; Ind. Rul. (1929) Nag. 165.

it was no doubt held that the right of appeal granted by O. XLIII, r. 1 (w) is not restricted by the grounds set out in O. XLVII, r. 7. But there are decisions of this Court on this point in *Jadunandan Singh v. Shankar Sahu* (4) and *Sundar Lal v. Upendra Nath* (5). In the latter case, though it was a decision of a Single Judge, it was held that an appeal under O. XLIII, r. 1 (w) is subject to the provisions of O. XLVII, r. 7. It was further held that an order granting a review merely for sufficient ground is not appealable. In *Jadunandan Singh v. Shankar Sahu* (4) a Division Bench of this Court held that when a review is granted, an appeal is permissible only on the grounds specified in O. XLVII, r. 7. The High Courts of Calcutta, Rangoon and Lahore have also taken the same view as this Court. This being the state of the authorities on the point, I am afraid we are unable to follow the decisions of the Bombay High Court and the Nagpur Court referred to. It is to be observed that the Bombay High Court subsequent to its aforesaid decision deleted O. XLIII, r. 1 (w) by virtue of its rule-making power.

Mr. Mitter further contends that the order now under appeal being the final judgment in the suit, it may be attacked on grounds other than those specified in O. XLVII, r. 7. The answer to this is that this is not a regular appeal against the final decree but a miscellaneous appeal from the order granting the application for review and it cannot be treated as a regular appeal in view of the fact that the question of court-fee would arise. Mr. Mitter has asked us to treat the appeal as a regular appeal on payment of the deficit court-fee; but it is now too late to accede to that prayer. The appeal was presented on July 19, 1937 and was not properly constituted as a regular appeal being insufficiently stamped. There is no justification for converting it into a regular appeal so long after the expiration of the prescribed period of limitation. Mr. Mitter lastly asked us to treat the memorandum of appeal as an application in revision as was done in *Sikandar Khan v. Baland Khan* (6). Under s. 115, Civi

(4) 17 P L T 766; 162 Ind. Cas. 992; A I R 1936 Pat. 310; 2 B R 531; 8 R P C 02.

(5) 1 P L J 193; 35 Ind. Cas. 15; A I R 1916 Pat. 370.

(6) 8 L 617; 107 Ind. Cas. 596; A I R 1927 Lah. 43 29 P L R 81.

P. O., revision is permissible only where the order complained of is not appealable. In the present case the order sought to be revised amounts to a final decree and as such is appealable. Consequently, s. 115 cannot come in. In the Lahore case, where the facts were quite peculiar, there was no such appealable decree or order. I would dismiss the appeal, but in the circumstances, the parties should bear their own costs.

Rowland, J.—I agree.

s. *Appeal dismissed.*

OUDH CHIEF COURT

Application No. 4 of 1937

December 14, 1939

KADHA KRISHNA, J.

HARDWARI LAL AND ANOTHER—CREDITORS
—APPLICANTS

versus

CHHOTAY LAL AND ANOTHER—
OPPOSITE PARTIES

Provincial Insolvency Act (V of 1920), ss. 6 (b), (c), 9, 53, 54—Partition between brothers, if transfer to defeat or delay creditors—S. 6 (b), applicability—If applies where transfer has effect of preferring one creditor over other—Transfer in good faith and for valuable consideration—If void under s. 53—S. 54, applicability.

The partition between the brothers constituting a joint Hindu family, of the family houses cannot be treated as a transfer with intent to defeat or delay the creditors. When the debts are incurred by some of the brothers only, on account of a new business started by them, the share of the other brothers is not liable for such debts and the partition does not prejudice the creditor, 128 Ind. Cas. 404 (1), distinguished.

Clause (b) of s. 6 would apply only to those cases where transfer is intended to defeat all the creditors as a whole. It has no application to the case where the transfer has the effect of preferring some creditors over others.

Transfer of property to a third person made in good faith and for valuable consideration is not void under s. 53, even if it has the effect of preferring some creditors over others.

Section 54 covers transfers in favour of creditors only.

App. for revision of the order of the District Judge of Lucknow, dated May 1, 1937.

Messrs. Haider Husain and Ali Zaheer, for the Applicants.

Messrs. Makund Behari Lal and Govind Behari Lal, for the Opposite Parties.

Order.—This is the creditors' application in revision under s. 75, proviso (1) against an appellate order of the District Judge of Lucknow.

The applicants made an application pray-

ing that the Opposite-parties Nos. 2 and 3 and their brothers, Opposite-parties Nos. 1 and 4, be adjudged insolvents. This application was made under s. 9 of the Provincial Insolvency Act.

Here it is necessary to state that the family of Opposite-parties Nos. 2 and 3 owned two houses situated in Sarojini Devi Lane, city Lucknow. On December 16, 1936, a voluntary partition of that property was carried into effect by which the two houses were divided in six shares, one each for Opposite-parties Nos. 1 to 4, and one each for the two minor brothers of Opposite-parties not parties to this application. In appeal the application against Opposite-parties Nos. 1 and 4 was withdrawn and pressed only as regards Opposite-parties Nos. 2 and 3.

The two Courts below have dismissed the application.

The grounds of the application were, firstly that a voluntary partition had been carried into effect between the Opposite-parties Nos. 2 and 3 and their brothers within three months before the presentation of the petition with an intention to defraud the creditors, and secondly, that on January 12, 1936, Opposite-parties Nos. 2 and 3 had sold their shares in the two houses to their mother for a consideration of Rs. 1,000. Out of the sale consideration Rs. 600 and Rs. 150 were paid to Lachhman Prasad and Ganga Charan, creditors. The object of this sale was to prefer two creditors over others.

A creditor is entitled to make an application to have a debtor declared insolvent under conditions mentioned in sub-cl. (a) to (c) of cl. (1) of s. 9. It is admitted that the conditions laid down in cl. (a) and (b) have been fulfilled and the only question in controversy was whether any act of insolvency had occurred within three months before the presentation of the petition. The two acts of insolvency alleged were the partition dated December 16, 1936, evidenced by Ex. 1, and the sale deed dated January 12, 1937, evidenced by Ex. 2. Acts of insolvency are defined in s. 6 of the Provincial Insolvency Act. The partition between the brothers of the two family houses on December 16, 1936, cannot be treated as a transfer with intent to defeat or delay the creditors. So far as the debt due to the applicants is concerned, it has been found that it had been incurred by Opposite-parties Nos. 2 and 3 only on account of a new business started by them. The share of other brothers was by no

means liable for the payment of this debt. The share of Opposite parties Nos. 2 and 3 being alone liable, the partition of 1936 did not prejudice the creditors of Opposite parties Nos. 2 and 3 in any way.

Reliance was placed in the Court below, as well as in this Court, on a decision of the Nagpur High Court in *Bajirao v. Daulatrao* reported in 128 Ind. Cas. p 404 (1). This was a case where the father in a joint Hindu family had allowed a partition between himself and his sons. The interests of the sons were liable for the debt of the father's creditors and on that footing it was held that transferring the share by partition from the possession of the father into the possession of the sons amounted to a transfer with an intent to defeat or delay the creditors. That case has obviously no application to the facts of the present case.

As regards the sale deed, dated January 12, 1937, it appears to me that the contention in the two Courts below that the said transfer fell within cl. (b) of s. 6 but that clause is excluded on the admitted case of the creditors, that out of the consideration money Rs. 750 had been paid to two of the creditors. Clause (b) of s. 6 in my opinion would apply only to those cases where transfer is intended to defeat all the creditors as a whole. It has no application to the case where the transfer has the effect of preferring some creditors over others.

The learned Counsel for the applicants has placed reliance upon cl. (c) of s. 6 and has urged that the debtors have in the present case made such a transfer as is liable to be avoided as a fraudulent preference under ss. 53 and 54 of the Provincial Insolvency Act. This argument does not seem to have been pressed before any of the Courts below. After examining ss. 53 and 54, I am of opinion that the contention must fail. The transfer in question would not be void under s. 53 for the simple reason that there is evidence in the case that the transfer was made in good faith and for valuable consideration, the entire amount of which was paid in cash before the Sub-Registrar. As regards s. 54, I am of opinion that it would cover transfers in favour of a creditor only. It has been argued that in effect the transfer is in favour of a creditor because on January 12, 1937, two transactions took place simultaneously, one the sale deed in favour of the mother and the other the mortgage deed by the mother in

favour of Raj Dulari, the wife of Lachhman Prasad, the creditor, and that as a result of these two transactions, Lachhman Prasad became the transferee of the shares of Opposite parties Nos. 2 and 3 by a mortgage and gained to the extent of Rs. 600. The argument could only be considered if this case had been properly put in the Courts below and attempt had been made to prove that the mother of the Opposite parties Nos. 2 and 3 and the wife of Lachhman Prasad were mentioned in the transactions fictitiously and that the real transferors were Opposite parties Nos. 2 and 3 and the real transferee was Lachhman Prasad. In the absence of any evidence to that effect, it is not possible to give effect to this contention.

It is not possible, therefore, to hold on the facts found by the two Courts below that the act of insolvency complained of falls within s. 6 (c). The result is that no act of insolvency as required by sub-cl. (c) of s. 9 (1) of the Provincial Insolvency Act has been established in the present case.

The appeal fails and is dismissed with costs.

s.

Appeal dismissed.

LAHORE HIGH COURT

Second Appeal No. 1279 of 1938

February 9, 1939

DALIP SINGH, J.

Musammam NOOR BIBI—PLAINTIFF—

APPELLANT

versus

MUNICIPAL COMMITTEE, AMBALA

CITY—DEFENDANT—RESPONDENT

Corporation—Extraneous structure brought on to highway—Negligence of Municipality in maintaining it in good repairs—Person suffering injury, if can sue for damages.

An extraneous structure brought on to a highway must be maintained in good repair by the authority bringing that structure on to the highway, and where a Municipality is negligent in doing so and owing to it, a person suffers injury, he is entitled to sue the Municipality for damages. *White v. Hindley Local Board of Health* (2), followed.

S. A. from the decree of the Senior Sub-Judge, Ambala, dated May 9, 1938.

Facts.—The plaintiff owned a *tonga* and a horse and pined it for hire, Abdul Gani being the driver. On November 13, 1936, while the *tonga* was passing over the culvert near the water reservoir and opposite the grain market, Ambala City, the hind leg of the horse got entangled in the broken grating and thus sustained injuries which incapacitated the horse for

(1) 128 Ind. Cas. 404; A I R 1930 Nag. 215; Ind. Rul. (1931) Nag. 4.

a period of 13 days and permanently reduced its value by one-half. The total loss claimed including the medical expenses and loss of hire and depreciation in the value of horse was Rs. 100. Notice was served on the Municipal Committee on January 18, 1937, but the Committee refused to pay any damages.

Mr. Mahmud Ali, for the Appellant.

Mr. Qabul Chand Mittal, for the Respondent.

Judgment.—The only question arising for decision in this case is whether the case falls within the purview of *Achraailal Harilal v. Ahmedabad Municipality* (1), which itself follows a certain class of cases where it has been held that omission to repair a highway does not entitle a person to sue the Corporation or other authority responsible for the maintenance of the highway, or whether the case falls within the purview of the other class of cases wherein it was held that an extraneous structure brought on to a highway must be maintained in good repair by the authority bringing that structure on to the highway and, therefore, the plaintiff could in the present case sue the Municipality for damages. The distinction between the cases is often difficult, but the general principle appears to me to be clear. On this particular point there is a case, *White v. Hindly Local Board of Health* (2), which is exactly in point and on all fours with the present case. Nothing has been pointed out on either side as to why this case should not be followed or why it does not apply. Following therefore this case, I would accept the appeal and hold that the plaintiff is entitled to sue for damages. The amount of damages has been fixed at Rs. 40 by the learned Senior Subordinate Judge and this is a finding of fact which I see no reason to disturb. The plaintiff's suit is, therefore, decreed for Rs. 40 with proportionate costs throughout.

Appeal accepted.

D.
(1) 28 B 340; 6 Bom. L R 75.
(2) (1875) 10 Q B 219; 44 L J Q B 114; 32 L T 460;
23 W R 651.

PATNA HIGH COURT

Criminal Revision No. 369 of 1939

August 15, 1939

AGARWALA, J.

RAMSAGAR YADAV AND ANOTHER—

PETITIONERS

versus

M. YUNUS AND ANOTHER—OPPOSITE PARTY
Criminal Procedure Code (Act V of 1898), ss. 523,
144—Magistrate refusing to take proceedings under

s. 144—He must exercise discretion conferred by s. 523 in respect of property seized by Police—Proper order to be made—Discretion not judicially exercised—Interference by High Court.

Where a Magistrate after having refused to take proceedings under s. 144, Criminal P. C., thinking that he was not competent to investigate the question as to who was in possession of the property seized, directs the Police to retain it in their custody: and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court, he has not judicially exercised the discretion which s. 523 confers on him and the High Court can, therefore, interfere with his order. In such a case he must exercise the discretion conferred by s. 523 and if he decides that one or other of the parties was in possession at the time the Police seized the property, the proper order to be passed will be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it will be his duty to issue a proclamation under sub-s. (2) of s. 523 and proceed in accordance with the provision of that sub-section.

Cr. R. form an order of the Sub-Divisional Officer, Patna City, dated May 22, 1938, January 20 and March 15, 1939.

Messrs. Harishwar Prasad Sinha, D. P. Sinha and R. P. Jaruhar, for the Petitioners.

Messrs. K. Sahay and J. Rahman, for the Opposite Party.

Order.—In 1933 a certain plot of land was settled with the petitioners by the landlord for one year. Although the settlement was for this limited period, it appears that the petitioner did not give up possession on the expiry of the period. In 1938, the landlord purported to settle the land with the opposite party. The present proceedings date from a letter which the landlord wrote to the Police informing them that the petitioners were cutting the unripe paddy growing on the plot. On receipt of this information, the Sub-Inspector went to the plot in question and found both parties there and that the crop had been cut. In view of the allegations in the landlord's letter to the Police it would appear that the crop had been cut by the petitioners.

The Police reported the matter to the Magistrate apprehending that there might be a breach of the peace and suggesting that proceedings should be taken under s. 144, Criminal P. C. As the crop had already been cut, the Magistrate disagreed with the Police suggestion that there might be a breach of the peace. He ordered that the paddy should be returned to the person from whom it had been recovered. The Police thereupon reported that they had not recovered the paddy from any of the parties, meaning that they had merely taken it from the land on which it had

been lying after having been cut. They therefore asked for the Magistrate's direction. The Magistrate then observed that it was not possible to pass an order about the disposal of the property without coming to a definite conclusion about its possession. He considered that, having refused to take proceedings under s. 144, Criminal P. O. he was not competent to investigate the question as to who was in possession of the paddy. He therefore directed the Police to retain it in their custody; and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court. It is against that order that the petitioners have moved this Court. The sections of the Criminal P. O. empowering a Police Officer to seize property are ss. 51, 54, 165, 166 and 520. The last mentioned section is in these terms:

"Any Police Officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence."

It is clear that neither s. 51 nor s. 54 nor s. 165 nor s. 166 applied to the facts of this case. On the other hand the landlord had written to the Police, informing them that the petitioners were cutting unripe paddy on land which did not belong to them. This allegation, if true, was an allegation that the petitioners were committing mischief and therefore would have entitled the officer to seize the paddy under s. 520, Criminal P. O. As there appears to be no other authority for the seizure of the paddy in this case, it must be presumed that it was in the exercise of the powers under this section that the Police acted. The question now is as to how the money which represents the paddy that was seized is to be disposed of. The only section of the Code which appears to have any application is s. 523. The material portion of the first sub-section of that section is as follows:

"The seizure by any Police Officer of property taken under s. 51 or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, if such person cannot be ascertained, respecting the custody and production of such property."

The second sub-section is in this language:

"If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property con-

sists, and requiring any person who may have a claim thereto to appear before him and establish his claim within six months from the date of such proclamation."

Had the Magistrate in this case purported to act under the powers conferred by this section, this Court would not have interfered with his order. But as the Magistrate has taken the view that he has no power at all to deal with the matter, it is clear that he has not judicially exercised the discretion which the section confers on him. The case must therefore go back to the Magistrate to enable him to exercise the discretion conferred on him by s. 523, Criminal P. O. In considering the matter, the Magistrate will bear in mind s. 110, Evi. Act, which provides:

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

If the Magistrate decides that one or other of the parties was in possession at the time the Police seized the property, the proper order to be passed will be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it will be his duty to issue a proclamation under sub-s. (2) of s. 523 and proceed in accordance with the provision of that sub-section. The order of the Magistrate complained against is set aside and the case will be sent back to be disposed of in accordance with the directions given in this judgment.

s.

Case sent back.

ODUH CHIEF COURT

First Civil Appeal No. 8 of 1938

November 29, 1939

ZIA-UL HASAN AND YORKE, JJ.

[HAR GOVIND PRASAD—OL IMANT—

APPELLANT

versus

Mst. MAHRAJ KUNWAR AND OTHERS

—CREDITORS—RESPONDENTS

U. P. Regulation of Sales Act (XXVI of 1934), ss. 5, 3, 4—Ss. 3, 4 and 5, whether repugnant to s. 20, Oudh Laws Act (XVIII of 1876)—S. 5, if excludes application of s. 20, Oudh Laws Act.

There is no repugnancy between the provision of s. 20, Oudh Laws Act requiring permission of the Local Govt to a sale of ancestral property and the provisions whereby the Deputy Commissioner executes a decree under the U. P. Regulation of Sales Act. It is true that it does not appear at what stage the permission of the Local Govt. is to be obtained, but it seems obvious that permission must be taken after the valuation has been

carried out. The provisions of the earlier Act are capable of being combined with the provisions of the latter Act, and the mere fact that the provisions of s. 5 of the Regulation of Sales Act have a mandatory tone, does not exclude the application of s. 20 of the Oudh Laws Act. *Rajdei v. Chhama-Nath* (1) and *Raghoraj Singh v. Sheo Shankar Lal* (2), referred to. [p. 777, cols. 1 & 2]

F. O. A. against the order of the Additional Special Judge, First Grade, Bara Banki, dated December 15, 1937.

Messrs. *M. Wasim, Durga Dyal and Ali Hasan*, for the Appellant.

Messrs. *Mazzam Ali and Hyder Husain*, for Respondent No. 1.

Judgment.—This is a first civil appeal from the decree of the Additional Special Judge, first grade, Bara Banki, dismissing the claim of the claimant appellant under the provisions of s. 11 of the Encumbered Estates Act. This is a claim with reference to a 16-annas *zamindari* share of *mahal* Gur Bakhsh Singh, village Baddupur, Pargana Fatehpur, district Bara Banki. This property was mortgaged in favour of one Jagannath on February 10, 1919. On May 1, 1921, it was again mortgaged to Hargobind Prasad, the present claimant. It appears that both Hargobind Prasad and Jagannath filed suits on foot of their mortgages, the latter making Hargobind Prasad a party to his suit. Hargobind Prasad got a preliminary decree on July 19, 1929, and a final decree for Rs. 31,125 on October 25, 1930. Jagannath got a decree on August 27, 1932. The final decree of Hargobind Prasad was transferred to the Deputy Commissioner under the provisions of s. 68 of the Civil P. O., on November 17, 1933. Proceedings were still pending in the Deputy Commissioner's Court when *Mst. Mahraj Kuar* as owner of the property filed an application under s. 4 of the Encumbered Estates Act. In due course Hargobind Prasad in whose favour the Deputy Commissioner had made an order of transfer of this very property on August 22, 1935, under the provisions of s. 5 read with ss. 3 and 4 of the U. P. Regulation of Sales Act (Act XXVI of 1934), filed a petition under s. 11 of the Encumbered Estates Act, because *Mst. Mahraj Kuar* had in her written statement under s. 8 (1) (b) of the latter Act, included this property in the statement of the nature and extent of her proprietary rights in land. This transfer to Hargobind Prasad had been made at the figure of Rs. 40,093-2-11. Under s. 3 of the Regulation of Sales Act, an appeal is provided to the Board of Revenue from the decision of

the Collector fixing the net profits or the multiple of such net profits under sub-s. (2). *Mst. Mahraj Kuar* filed a review application which was dismissed on October 24, 1935. She either subsequently or contemporaneously filed an appeal which was dismissed by the Board of Revenue on August 24, 1936. Meanwhile on November 2, 1935, Hargobind Prasad got a sale certificate, and on February 28, 1936, he got this sale certificate registered. The procedure in regard to these matters has since been altered and a regular sale-deed is now executed by the Collector or Deputy Commissioner when an order of transfer is made under s. 5 of the Regulation of Sales Act. That procedure, however, was not in force at this time.

Mst. Mahraj Kuar had also on September 3, 1935, applied for amendment of the final decree for sale in favour of Hargobind Prasad under the provisions of the U. P. Agriculturists' Relief Act, but that application was dismissed by the Subordinate Judge, on November 18, 1935, and an appeal from this order was dismissed by the District Judge on September 26, 1936. The Subordinate Judge held that the sale was complete with the passing of the order of transfer under s. 5 of the Regulation of Sales Act, and that in consequence the decree had been satisfied and could not be amended. The District Judge did not agree with the Subordinate Judge being of opinion that the transfer order of August 22, 1935, did not effect a transfer of the property which was only affected by the issue of the sale certificate on November 2, 1935, but he was of opinion that the decree could not be amended unless and until the transfer made on November 2, 1935, was set aside. As the Civil Court had no jurisdiction to interfere and set aside the sale made by the Collector, he was of opinion that even if he set aside the order of the Subordinate Judge, it would not help the appellant unless and until the sale was set aside.

The contention of the claimant Hargobind Prasad under s. 11 of the Encumbered Estates Act was that by virtue of the transfer of August 22, 1935, he had become sole proprietor of the property in question, that *Mst. Mahraj Kuar* applicant under the Encumbered Estates Act had no title to the property, and was therefore not entitled to show it as her property in the statement filed under s. 8. He further contended that *Mst. Mahraj Kuar* was estopped from denying his title in view of the decisions of

the Revenue Courts and that she could not in the Special Judge's Court challenge the transfer made by the Deputy Commissioner. The defence put forward was that the title of the claimant objector had never been perfected, that before he obtained his sale certificate the application under the Encumbered Estates Act had been made, and therefore the proceedings of the Revenue Court came within the mischief of s. 7 of the Encumbered Estates Act, and were *ultra vires*. It was also contended that the transfer under s. 4 of the Regulation of Sales Act conferred no title on Hargobind Prasad because the provisions of s. 20 of the Oudh Laws Act had not been complied with. That section provides as follows :

"So much of s. 60 of the Civil P. O., 1908, as renders land liable to sale in execution of a decree shall be subject to the following restrictions :—

"No ancestral land shall be sold in satisfaction of a decree without the permission of the Lieutenant-Governor" For Lieutenant-Governor we may now read the Local Govt."

A number of issues were framed. On Issue No. 4 (a) "Was the permission of the Local Govt. necessary to complete the transfer under the Regulation of Sales Act," the learned Additional Special Judge held that the permission of the Local Govt. was necessary to complete the sale or transfer in favour of the decree-holder Hargobind Prasad as required by s. 20 of the Oudh Laws Act. On Issue No. 4 (b), "if so, can the transfer be questioned by the applicant-debtor in this Court", he held that the applicant-debtor could question and challenge the sale or transfer, and he held that the order of August 22, 1935, was *ultra vires* and a mere nullity. On Issue No. 3 he held that the principle of *res judicata* did not apply so as to bar the applicant-debtor from denying Hargobind Prasad's title. On Issue No. 2 he held that the order of August 22, 1935, being *ultra vires*, the transfer thereby and the subsequent grant of the sale certificate on November 2, 1935, did not confer any title on Hargobind Prasad. He accordingly held on Issue No. 1 that the property in question was liable to attachment, mortgage, or sale in satisfaction of the debts of *Mst. Maharaj Kuar* applicant under the Encumbered Estates Act.

A number of points have been raised in the grounds of appeal, but only two questions have been argued before us. It is contended in the first place that s. 20 of the Oudh Laws Act cannot be held to be applicable to sales or transfers of land effected under the provisions of s. 5 of the Regulation of Sales Act. The second point is in

answer to a contention put forward on behalf of the respondent that there was in any case no effective sale resulting from the order of the Deputy Commissioner of August 22, 1935, and that the transfer having really been effected only by the issue of sale certificate on November 2, 1935, was null and void, as falling within the mischief of s. 7 of the Encumbered Estates Act, because that sale or transfer was effected subsequent to the application under the Act.

The gist of the contention of the learned Counsel in regard to s. 20 of the Oudh Laws Act is that the procedure prescribed in ss. 3, 4 and 5 of the U. P. Regulation of Sales Act leaves no scope whatsoever for the permission of the Local Govt. and it must, therefore, be held that this Act by implication repeals s. 20 of the Oudh Laws Act. He observes that the object of s. 20 was to protect owners of ancestral land from sales of their property by public auction for grossly inadequate prices, and that the Regulation of Sales Act has the same object in view, but substitutes a new procedure. He further observes that the provisions of this Act are clearly mandatory and must be presumed to be all embracing. Learned Counsel has referred us to Halsbury's Laws of England, Second Edition, Vol. 31, para. 684 at p. 524 and para. 759 at p. 561. Stated shortly, he contends that the provisions of the U. P. Regulation of Sales Act are so inconsistent with the provisions of s. 20 of the Oudh Laws Act that they must be regarded as by implication repealing that section. For this proposition he has to contend that the provisions of the Oudh Laws Act are plainly repugnant to those of the U. P. Regulation of Sales Act. It will be useful to quote some passages from Halsbury's Laws of England. In para. 684, p. 524, we find it stated :

"The common law gives place to statute law, and an older statute to one more recent, where the language and the objects of the latter are inconsistent with those of the former. Even though the words of a later statute taken strictly and grammatically repeal a former statute, they ought not to be so construed where it is clear that the intention of Parliament is that they should not be so construed; no statute operates to repeal or modify the existing law whether common or statutory, or to take away rights which existed before the statute was passed, especially if it involves a drastic departure from the principles of law existing when it was passed, unless the intention is clearly expressed or necessarily implied *Prima facie* a later statute, which is supplementary to and intended to be read with an earlier statute dealing with the same matter, is not of wider application than the earlier statute."

Paragraph 685 runs as follows :

"Affirmative statutes do not repeal precedent affirmatives statutes unless they are contrary or repugnant to them; for without negative or repealing words, expressed or implied, the intention of Parliament to alter what already existed is not apparent, and it is always to be presumed that there was no such intention."

In para. 759 at p. 561 in the Chapter dealing with "Repeals" it is stated:

"A statute is repealed by implication in the following cases, namely:

(1) If its provisions are plainly repugnant to those of a subsequent statute;

(2) If the two standing together would lead to wholly absurd consequences;

(3) If the entire subject-matter of the first is taken away by the second.

Repeal by implication, which, whenever it occurs, is the consequence of inconsistent legislation, is never to be favoured, and should not be imputed to Parliament. It is not to be implied from a mere recital, or schedule, or from non-user, and the mere omission in a later statute of an exception in an earlier one cannot by itself have the result of a substantive affirmation. It is necessary to see how the law would have stood without the original exception and the terms in which the repealed sections are re-enacted."

Applying the principles set forth in these paragraphs we find ourselves unable to hold that there is any repugnancy between the provision requiring permission of the Local Govt. to a sale of ancestral property and the provisions whereby the Deputy Commissioner executes a decree under the U. P. Regulation of Sales Act. It is true that it does not appear at what stage the permission of the Local Govt. is to be obtained, but it would seem to be obvious that permission must be taken after the valuation has been carried out. That is the view which has been taken by the learned Members of the Board of Revenue of this province in *Mst. Rajdei v. Chhama Nath* (1937 R. D. 269) (1), and again in *Raghoraj Singh v. Sheo Shankar Lal* (1937 O. W. N. 1167) (2). Learned Counsel urges that the view of the learned Members of the Board of Revenue, which is of course not binding on this Court, is also unsound, but we are not prepared to accept that view. It was contended in the second of these two cases that s. 20 of the Oudh Laws Act was passed in order to prevent properties from being sold in the public auction at an absurdly low price, and this consideration could not apply to the transfer of the land at an inflated rate fixed by the Govt. but, as the learned Junior Member remarked:

"Government are entitled to be assured that the valuation has been properly carried out and their sanction has to be applied for before the land can be sold."

(1) 1937 R D 269.

(2) (1937) O. W. N. 1167.

We could not hold that his view is unsound unless we were first prepared to hold that the provisions of the Regulation of Sales Act are repugnant to those of the Oudh Laws Act. The provisions of the earlier Act are capable of being combined with the provisions of the latter Act, and the mere fact that the provisions of s. 5 of the Regulation of Sales Act have a mandatory tone does not seem to us to exclude the application of s. 20 of the Oudh Laws Act. We are clearly of opinion that the permission of the Local Govt. was necessary to complete the sale or transfer in favour of Hargobind Prasad, and it was rightly held by the learned Additional Special Judge that as that permission had not obtained, the transfer of August 22, 1935, was without effect and did not confer a title on Hargobind Prasad claimant-objector.

As regards the second point raised on behalf of the respondent, namely that the transfer was only effected by the issue of sale certificate on November 2, 1935, and that that transfer was subsequent to the application under the Encumbered Estates Act made on October 12, 1935, and the order under s. 6 of that Act was passed on the same day, and was therefore to be treated as null and void, the learned Counsel has referred us to a case reported in 1938 A. L. J. R 541 [*Sheo Baran Singh v. Ranbir Prasad*] (3), in which it was held that the order of transfer preceding the application under the Encumbered Estates Act did not constitute a transfer, and a sale deed and *dakhl* which took place after the application under the Encumbered Estates Act were to be set aside in view of the provisions of s. 7 of the Encumbered Estates Act, and therefore the decree and the debt which were intended to be satisfied by that transfer continued to subsist. In that particular case the order of transfer was differently worded from the present case and something might have been founded on that fact. We are, however, of opinion that this is a point which does not arise for decision in the present case in view of our finding on the first point argued before us, and we, therefore, make no pronouncement upon it.

In view of our finding on the first point argued, we hold that the claim of Hargobind Prasad under s. 11 of the Encumbered Estates Act was rightly dismissed. There is no force in the present appeal which

(3) (1938) A L J 541; 177 Ind. Cas. 215; A I R 1938 All. 477; 11 RA 183; 1938 A L R 724.

accordingly fails and is dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Miscellaneous No. 393 of 1938

July 28, 1939

O. SULLIVAN, J.

OFFICIAL ASSIGNEE, KARACHI—

APPLICANT

versus

DHANOMAL MOHANLAL—

OPPONENT

Presidency Towns Insolvency Act (III of 1909), ss. 31, 57—Official Assignee establishing that transaction within contemplation of s. 57 took place after commencement of insolvency—Onus to prove that it took before adjudication.

Under the doctrine of "relation back" the property of an insolvent on the making of the order of adjudication vests in the Official Assignee as from the commencement of the insolvency, that is to say, from the date of the act of insolvency upon which the adjudication is made. As from that date the insolvent ceases to be owner of the property and cannot deal with it. He cannot make payments to creditors or give good and valid discharges. Section 57 of the Presi. Towns Insol. Act, however, provides an exception to the doctrine by affording protection to *bona fide* transactions taking place between the commencement of the insolvency and the date of the order of adjudication in those cases where the person with whom such transaction takes place had no notice of the presentation of the petition by or against the debtor. When the Official Assignee has established that a transaction within the contemplation of s. 57 took place after the commencement of the insolvency, the onus lies on the person seeking to uphold the transaction to prove that it took place before adjudication and that he had no notice of the presentation of the petition. A denial in the objections filed by him is insufficient to discharge the onus. The objections are mere pleadings. 143 Ind. Cas. 628 (2), 138 Ind. Cas. 622 (3), 158 Ind. Cas. 361 (4), *In re Matanle, Ex parte Schulte* (5) and *In re Tolle Mache, Ex parte Revell* (6), relied on.

Mr. Kundanmal Dayaram, for the Applicant.

Mr. Khanchand Gopaldas, for the Opponent.

Order.—This is an application by the Official Assignee under s. 7, Presi. Towns Insol. Act, to adjudge a payment of Rs. 500 by the Insolvent Santram Bhagwandas to the opponent firm of Dhanomal Mohanlal, null and void and to direct the latter to refund to the Official Assignee the said sum with interest. The firm of Issardas Srigopal and one of its partners Santram Bhagwandas were adjudged insolvent on August 25, 1937, on a petition by certain creditors filed on

October 14, 1936. The date of the act of insolvency on which the adjudication was based was October 8, 1936. It is stated in the Official Assignee's application that on July 1, 1937, the insolvent Santram Bhagwandas made the payment of Rs. 500 to the opponents in full satisfaction of two decrees for Rs. 437 and Rs. 403, respectively obtained against the insolvent firm at Amritsar. The dates of these decrees have not been mentioned. The opponents have not appeared in person. They have contended themselves with filing certain objections to the application of the Official Assignee and these objections are not supported by affidavit.

It is not disputed by the opponents, *vide* para. 2 of the objections filed by them, that the said payment to them of Rs. 500 was made on July 1, 1937, that is to say, considerably after the filing of the insolvency petition though before the order of adjudication. The learned Advocate for the opponents contended that his clients had at the time of the payment no notice of the presentation of the petition and that the transaction was a *bona fide* one. He, therefore, relied on s. 57, Presi. Towns Insol. Act, as affording him protection. The proviso to this section reads:

"Provided that any such transaction takes place before the date of the order of adjudication, and that the person with whom such transaction takes place has not at the time notice of the presentation of any insolvency petition by or against the debtor."

The learned Advocate argued that the onus lay on the Official Assignee to establish that the opponents had notice of the presentation of the petition and that the transaction was not *bona fide* and unless that onus was discharged, his clients were entitled to succeed. In developing this line of argument, the learned Advocate said that it was unreasonable, generally speaking, to expect any creditor to establish a negative, that is to say, that he had not received notice. At first sight there may appear some logical basis for this contention, but the flaw in the argument becomes apparent on a consideration of the relevant principles of bankruptcy law. It is elementary that under the doctrine of "relation back" the property of an insolvent on the making of the order of adjudication vests in the Official Assignee as from the commencement of the insolvency, that is to say, from the date of the act of insolvency upon which the adjudication is made. As from that date the insolvent ceases to be owner of the pro-

party and cannot deal with it. He cannot make payments to creditors or give good and valid discharges. As was stated by Fletcher Moulton, L. J. in *Ponsford Baker & Co. v. Union of London and Smiths Bank, Ltd.* (1).

"Nothing is more firmly established in bankruptcy law than that a man who has committed an act of bankruptcy is not entitled to deal with his estate. He has no right to gather it in if it is not already in his hands or to make payments to his creditors out of that which he has actually at his command."

Under the Presi. Towns Insol. Act, the doctrine of "relation back" is set forth in s. 51. Section 57 of the Act, however, provides an exception to the doctrine by affording protection to *bona fide* transactions taking place between the commencement of the insolvency and the date of the order of adjudication in those cases where the person with whom such transaction takes place had no notice of the presentation of the petition by or against the debtor. Section 57 is of course subject always to the provisions of the Act with respect to the effect of insolvency on an execution and with respect to the avoidance of certain transfers and preferences. Under the principles laid down in the *Evli. Act* the burden of proving those facts, proof of which is necessary to bring a transaction within the protection afforded by s. 57 would clearly lie on the person who relied upon the protection, because in the absence of such proof the transaction would be void by reason of the doctrine of "relation back." I would say therefore that when the Official Assignee has established that a transaction within the contemplation of s. 57 took place after the commencement of the insolvency, the onus lies on the person seeking to uphold the transaction to prove that it took place before adjudication and that he had no notice of the presentation of the petition. In *Nanackchand Ramanand v. Official Receiver* (2) under the *Pro. Insol. Act* it was held that 'persons claiming the benefit of the proviso must show that they had no notice of the presentation of the insolvency petition.' The decision in *Dharamdas Thawardas v. F. O. Hukamchand Mirimal* (3) also under the *Pro. Insol. Act* was to the same effect. This latter case was followed by the Rangoon

High Court in *Secretary of State v. S. C. Niyogi* (4) where the Crown relied upon the proviso to s. 57 to protect a mortgage in its favour. In the course of the judgment, Dunklev, J., said:

"The learned District Judge has rightly held that if the Crown wished to rely upon the protection given by s. 55, *Pro. Insol. Act*, for *bona fide* transactions prior to the date of the order of adjudication, it was the duty of the Crown to have pleaded the protection of that section and further the burden was upon the Crown to show that at the time of the transaction in question, it had no notice of the presentation of an insolvency petition."

The English cases in *In re Matanle, Ex parte Schulte* (5) and *In re Tolle Mache, Ex parte Revell* (6) establish the same principle. In this particular case it is admitted that the payment in question was prior to adjudication and the only point that remains is as to whether the opponents have discharged the onus of proving that they had no notice of the presentation of the insolvency petition. I am prepared to agree with the learned Advocate for the opponents that sometimes it would only be possible to prove that no notice had been received by a bare denial on the point and in the absence of circumstances indicating that the denial is false, it should prevail. In this case, however, the opponents are not present in Court to say that they did not receive notice of the presentation of the petition and they have filed no affidavit on the point. A denial in the objections filed by them is insufficient to discharge the onus. The objections are mere pleadings. I hold, therefore, that the opponents have failed to establish that they had no notice of the presentation of the petition.

In view of this conclusion, it is not strictly necessary to consider the matter further, but having heard arguments in full, I would add that taking all the circumstances into consideration, I consider the opponents must have had notice of the filing of the petition and that the transaction was not *bona fide*. Both parties reside and carry on business as merchants at Amritsar and although the adjudication was at Karachi, it is in the highest degree unlikely that the opponents would not learn of the adjudication. The news of an insolvency rapidly circulates and there is considerable business connection between Amritsar and Karachi. The opponents

(4) A I R 1935 Rang. 273; 158 Ind. Cas. 361; 8 R Rang. 166.

(5) (1874) 9 Ch. App. 409.

(6) (1884) 13 Q B 727; 54 L J Q B 92; 51 L T 379; 33 W R 289.

(1) (1906) 2 Ch. 444; 75 L J Ch. 724; 95 L T 333; 22 T L R 812; 13 Mans 321.

(2) A I R 1933 Sind 85; 143 Ind. Cas. 626; Ind. Rul. (1933) Sind 136.

(3) A I R 1932 Sind 62; 136 Ind. Cas. 628; Ind. Rul. (1932) Sind 86.

have given no details as to the nature of the claim when the suits were filed or why claims aggregating over Rs. 800 were settled for Rs. 500. The insolvents were served with notice of the petition for adjudication on January 22, 1937, and the payment was made on July 1, over six months later. I hold that the payment of Rs. 500 to the opponents is void as against the Official Assignee, and I order the opponents, to refund the said sum to the Official Assignee together with interest at 6 per cent. from July 1, 1937, till date of payment, and I further direct the opponents to pay the costs of the application.

Order accordingly.

NAGPUR HIGH COURT

Second Civil Appeal No. 387 of 1936

April 12, 1939

STONE, C. J. AND BOSE, J.

ZALLIRAM—APPELLANT

versus

MANGALSINGH—RESPONDENT

O. P. Land Revenue Act (II of 1917), s. 157 (3)—Sadar-lambardar paying land revenue due of mortgagor's land, whether gets priority over mortgagee—Sale by him, effect of.

When the land revenue in respect of mortgagor's land has been paid by the *sadar-lambardar*, he gets priority over the mortgagee, standing in the shoes of the Govt. to the extent of the land revenue paid by him. He can accordingly sell the land giving to the purchaser a like priority unless the mortgagee redeems this charge by payment. But the sale is not free from incumbrance. [p. 783, col. 1.]

S. O. A. from the appellate decree of the Court of the Additional District Judge, Damoh, dated February 29, 1936.

Mr. R. S. Dabir with Mr. R. G. Pande, for the Appellant.

Mr. M. Adhikari, for the Respondent.

Judgment.—This second appeal raises an interesting point of law under the Land Revenue Act. The appellant is the mortgagee of a part of the village Nimarmunda which is divided up into a number of *pattis*. The *sadar lambardar* of the village was called upon to pay land revenue in respect of the village including the *patti* belonging to the mortgagor. At all material times the mortgagor had ceased to be interested in the land because he had been sued by his mortgagee and a preliminary and later a final decree had been passed against him. In that state of affairs the *sadar-lambardar* paid the land revenue due in respect of the mortgagor's *patti*.

Next the *sadar-lambardar* sold the mortgagor's *patti* under the powers conferred upon him by s. 157 of the Land Revenue Act.

Section 157 provides *inter alia* as follows:—

"(1) Any *sadar-lambardar*.....who has paid any land revenue due by any proprietor... may, within six months from the date of such payment, apply in writing to the Deputy Commissioner to recover the amount on his behalf ...

(3) The Deputy Commissioner... may proceed to recover, as if it were an arrear of land revenue, such amount, with costs and interest, from the person held by him to be liable for the same."

Thus it will be seen that a *sadar-lambardar* can ask the Deputy Commissioner to proceed to recover the amount that he has paid on behalf of the *patti* in a particular mode.

Where land revenue is unpaid to Govt., Govt. may sell the defaulter's land in order to recover the land revenue due... If it does so sell the land, (there are many other ways indicated in s. 128 of realizing land revenue), the purchaser acquires that land free from incumbrances as a consequence of the provisions of s. 138 (1).

Before we come to that section, we observe that under s. 122 the land revenue is made a first charge. The provision is as follows:

"122 (1). The land revenue assessed on an estate, *mahal* or land, and any sum payable under a sub-settlement shall, notwithstanding any partition, be a first charge on the estate, *mahal* or land to which it relates, and on the rents or profits thereof."

Returning now to s. 138 it is provided that

"unless the Deputy Commissioner in ordering the sale otherwise directs the purchaser of any estate, *mahal*, share or land sold for arrears of land revenue due in respect thereof, shall acquire it free of all incumbrances imposed on it, and all grants and contracts made in respect of it, by any person other than the purchaser."

We now turn to s. 128 which details the various modes in which the arrears payable to Govt. may be recovered. The ones that have been referred to in the arguments are:

"(f) by selling such estate, *mahal* or land, or the share or land of any co-sharer who has not paid the portion of the land revenue which, as between him and the other co-sharers, is payable by him,"

and

"(g) by attaching and selling immovable property belonging to the defaulter other than the land in respect of which the arrear has accrued."

It will thus be seen that Govt. may sell the land for arrears of land revenue, and if the arrears of land revenue are due in respect of the land that is sold,

that land is sold free from incumbrances unless the Deputy Commissioner otherwise directs.

The Act also provides that if the *sadar-lambardar* pays the land revenue due in respect of land belonging to a co-sharer, he may, through the Deputy Commissioner recover the sum that he has paid on behalf of the co-sharer as if it were an arrear of land revenue. The question is: Does that relate to a mode or does it also relate to incidents? In other words: Does s. 157 (3) merely describe the machinery whereby the *sadar-lambardar* can recover the amount of revenue that he has paid on behalf of another or does it also provide that if the machinery is put into operation and the sale of land takes place, the land sold (the land of the mortgagor in this case), that is to say, the land in respect of which the land revenue was paid, is sold free from incumbrances?

The effect of provisions of this kind in other Acts has been considered in a number of cases. In *Liquidator, Yedha Society v. Pragdas* (1) the question turned on the wording of s. 225 (d) of the Land Revenue Act, which provides that

"any sum ordered by a liquidator appointed under sub-s. (1) of s. 42 of the Co-operative Societies Act, 1912, to be recovered as a contribution to the assets of a society or as the cost of liquidation.... may be recovered under this Act in the same manner as an arrear of land revenue."

It was held that this provision related to the mode in which the amount due could be recovered. The sale was not free from incumbrance.

This kind of case is distinguishable from the present one because it may well be said that the expression "in the same manner" is not the same as the words "as if", the former phrase relating more clearly to the mode in which the money may be recovered. It was indicated in *Chinnasami Mudali v. Tirumalai Pillai* (2), however, that such difference in phrase is not important.

In *Ramchandra v. Pitchaikanni* (3) the question arose under the Abkari Act and it was held that where land is sold under the provisions of s. 10 of the Madras Abkari Act, 1864, for arrears due by an Abkari renter, the purchaser at the sale does not take the land free from incumbrances as in the case of a sale for arrears of land revenue under the provisions of the Revenue Recovery Act. Their Lord-

(1) 30 N L R 240; 148 Ind. Cas. 714; 6 R N 196; 17 N L J 47; A I R 1934 Nag. 201.

(2) 25 M 572 at p. 575.

(3) 7 M 434.

ships observe at p. 435*, after having considered the provisions of the Revenue Recovery Act, as follows:

"Taking these sections together, the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security; by statutory declaration. By s. 10 of the Abkari Act, it is enacted that Collectors may proceed against Abkari renters or other persons licensed under that Act for the recovery of arrears due by them in like manner as for the recovery of arrears of land revenue.... The expression 'In like manner as for the recovery of arrears of land revenue' indicates only that the same procedure is to be followed.... Arrear of Abkari revenue is not due upon any specific land owned by the Abkari renter...."

It was accordingly held that the land, when sold, would not be free from incumbrances.

Chinnasami Mudali v. Tirumalai Pillai (2) was a case under the Land Improvement Loans Act, s. 7 (1) (a). As will be seen below there has been made a distinction between cases under s. 7 (1) (a) and s. 7 (1) (c). It is desirable to set out these two clauses. They are as follows:

"7. (1) Subject to such rules as may be made under s. 10, all loans granted under this Act, all interest (if any) chargeable thereon and costs (if any) incurred in making the same, shall, when they become due, be recoverable by the Collector in all or any of the following modes, namely:—

(a) from the borrower as if they were arrears of land revenue due by him;

(c) out of the land for the benefit of which the loan has been granted—as if they were arrears of land revenue due in respect of that land;...

It will be seen that there is a broad distinction between (a) and (c) though both give power to recover (as if they were arrears of land revenue). But (a) is "as if they were arrears of land revenue due by him", and (c) is "as if they were arrears of land revenue due in respect of that land".

In *Chinnasami Mudali v. Tirumalai Pillai* (2), it was held that when the land was sold under the provisions of cl. 1 (a), it was sold subject to incumbrances. In *Sankaran Nambudripad v. Ramaswami Ayyar* (4) on the other hand, it was held that when the land was sold under the provisions of s. 7, cl. 1 (c), it was sold free from incumbrances. Ayling, J. observes at p. 693†:

"A comparison of the various cls. (a), (b), (c) and (d) shows that the framers of the Land Improvement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and

(4) 41 M 691; 47 Ind. Cas. 301; A I R 1919 Mad. 590, 34 M L J 446; 8 L W 12; 23 M L T 346.

*Page of 7 M.—[Ed.]

†Page of 41 M.—[Ed.]

a sale for the same purpose of other lands whether belonging to the defaulter or some one else."

Sunkaran Nambudripad v. Ramaswami Aiyar (4) was followed in *Secretary of State for India v. Narinath* (5) which was another case under the Land Improvement Loans Act, s. 7 (1) (c).

In *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* (6) the sale was under the powers conferred by the Income Tax Act II of 1886. By s. 30 of that Act the Collector is empowered, in default of payment of the tax, to recover the amount as if it were an arrear of land revenue. In that case the Collector proceeded to recover the amount as if it were an arrear of land revenue. It was held that s. 30 of the Income Tax Act had not the effect of converting income-tax into an arrear of land revenue due in respect of the land which may be brought to sale for realisation of the income-tax but that its effect was to extend the procedure prescribed by (Madras) Act II of 1864 and (India) Act I of 1890, to the recovery of arrears of income-tax. In other words, the land was sold subject to incumbrances.

In *Ibrahim Khan Sahib v. Rangaswami Naicken* (7) the case was one of sale for arrears of Abkari revenue. The words were "as if they were arrears of land revenue" and it was held that they had the same meaning as the words "in like manner as for the recovery of arrears of land revenue" and accordingly only the mode and not the incidents was applied and the sale was subject to incumbrance. In *R. M. V. V. M. Chettyar Firm v. M. Subramaniam* (8) the Madras cases were reviewed. That case arose under the City of Rangoon Municipal Act where the relevant provision uses the words "as if they were arrears of land revenue". It was decided that the question whether the sale had the same consequence as a sale for arrears of land revenue due in respect of the land sold depended on the nature of the tax for which the sale was effected. At p. 464* the learned Judge relying on *Sankaran Nambudripad v. Ramaswami Ayyar* (4) observes as follows:

"This ruling shows that the words 'as if they were arrears of land revenue' do not by itself (sic) show that the intention of the Legislature was merely to regulate the procedure to be followed in such cases and that whether it was intended to attract also the provision relating to the substantive right of a

(5) 26 N L R 340; 122 Ind. Cas. 376; A I R 1930 Nag. 195; Ind. Rul. (1930) Nag. 152; 13 N L J 23.

(6) 26 M 220; 12 M L J 368.

(7) 28 M 420.

(8) 5 R 458; 105-Ind. Cas. 256; A I R 1927 Rang. 269.

*Page of 5 R.—[Ed.]

purchaser depends upon a consideration of the wording of the Act and the nature of the tax. This is made clear in the judgment of Mr Justice Seshagiri Aiyar at p. 698* where, after referring to the passage in Ramachandra's case, I have already cited, the learned Judge says that to his mind the passage is the key-note to the construction of similar provisions in other Acts, i. e., that the fact whether the tax is payable out of any particular or specified land must have a material bearing on the construction of the words."

It was held that the sale was free from incumbrances. The same conclusion was arrived at in *Abdur Rauf Chowdhury v. N. P. L. S. P. Chettyar Firm* (9) which was also a case under the same Act.

It will be seen that in all the above cases one is concerned with sales by Govt or some public body to recover taxes or public loans. They are cases of Abkari tax (excise revenue), or Income-tax, or Municipal tax or a public loan. The present case is a case of recovery of a private debt by a private person the *sadar-lambardar*. Under the scheme of the O. P. Land Revenue Act the Govt. looks primarily to the *sadar-lambardar* for the payment of land revenue due in respect of the area for which the *sadar lambardar* is responsible (usually a village). If the *sadar-lambardar* fails to get in and pay over such revenue, he is liable to have his land sold. But on such sale, the land is sold subject to incumbrances because, as will be seen from the above quotation from s. 138, it is only when land is sold for arrears of land revenue "due in respect thereof" that it is sold free from incumbrances.

The *sadar-lambardar* having been made liable he is given a right over against the co-sharer whose revenue is in arrear. To recoup himself, he may sell the co-sharer's land, through the appropriate officer, or he may take any of the other steps available as if what was owed to him were land revenue owed to Govt. We are of the opinion that, having paid Govt. the first charge given by the statute to Govt. passed to him. We see no reason, however, to sweep away the mortgagee's rights in order to enable another private person, the *sadar lambardar*, to recoup himself. We conceive that were this so, it would open wide the gates to fraud of a type that could hardly be proved. Section 133 contains provisions which in certain circumstances compel mortgagees to pay land revenue at the risk of losing their security if they do not. But the person who pay

(9) 7 R 113; 117 Ind. Cas. 575; A I R 1929 Rang. 176; Ind. Rul. (1929) Rang. 207.

*Page of 41 M.—[Ed.]

is the *sadar-lambardar*. We take the case, of frequent occurrence, of due payment by the *sadar-lambardar*. There is no delay. In such a case the mortgagee cannot possibly know that although the land revenue has been duly paid without any delay, there is, in point of fact, a default on the part of his mortgagor because the mortgagor has not put the *sadar-lambardar* in funds as regards the share of land revenue due in respect of the mortgagor's holding. Yet, were we to hold that the *sadar-lambardar* can recoup himself as if he were Govt. selling the mortgagor's land in respect of an arrear of land revenue due in respect of that land, the mortgagee would find his security gone without any chance being given to him to pay.

This is not, in our opinion, the intention of the Act. We are of the opinion that the *sadar-lambardar* has priority over the mortgagee standing in Govt.'s shoes to the extent of the land revenue, due in respect of the mortgagor's land, paid by him. He can accordingly sell the land giving to the purchaser like priority unless the mortgagee redeems this charge by payment.

This case is a perfect example of the mischief that would arise if it were held that in such circumstances the sale was free from incumbrances. The plaintiff obtained a foreclosure decree on the basis of his mortgage of 0-2-0 share of *Mouza* (village) *Nimarmunda*. When, the preliminary decree having been made final, the decree-holder came to take possession, the defendant took objection in execution on the ground that he (the defendant) had purchased the share when it was sold for arrears of land revenue. That sale was not at the instance of Govt. for Govt. had been paid, but at the instance of the defendant who was *sadar-lambardar* of *Mouza* *Nimarmunda*. The defendant applied to the *Tahsildar* to sell the land. The land was put up for sale and bought by the defendant for Rs. 90. The value of the mortgage-decree was something over Rs. 700. This was wiped away if the decisions of the lower Courts are sound and wiped away because a private person, the *sadar-lambardar*, is given the same powers to recover the money he has paid as if the debt due to him from the revenue defaulter were due to Govt. as an arrear of land revenue.

In addition to the Rs. 90 the *sadar-lambardar* incurred costs amounting to Rs. 50 in the objection matter.

The plaintiff has not paid anything into

Court though in the alternative he prayed only for a conditional order for possession, the condition being that he paid the defendant Rs. 90.

In our opinion, the true position is that until the defendant is paid what is due to him, i.e. until his charge has been cleared, he is entitled to resist. This affects the position so far as costs are concerned.

The appeal will be allowed. There will be an order for possession conditional upon the plaintiff paying to the defendant Rs. 90 together with Rs. 50 together with the costs of these proceedings. The plaintiff would have been entitled to possession and to the costs of these proceedings had he tendered to the defendant the Rs. 90 but that he did not do at the time of the objection application which was accordingly properly allowed. As the defendant was in the right in resisting, he is entitled to receive the Rs. 90 as well as the Rs. 90 before he can be compelled to deliver up possession.

D.

Appeal allowed.

ALLAHABAD HIGH COURT

Letters Patent Appeal No. 68 of 1937

April 12, 1939

BENNET AND COLLISTER, JJ.

RAM SARUP SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

MOHAN SINGH AND OTHERS—PLAINTIFFS—

RESPONDENTS

Hindu Law—Widow—Adverse possession—Adverse possession by widow over property not inherited from husband—She acquires absolute title to it—Civil Procedure Code (Act V of 1908), O. XXII, r. 3—Suit by joint Hindu brothers as reversioners—One dying—Steps to bring his legal representative on record not necessary—Second appeal—Inference from document.

On the death of a Hindu his widow entered into possession of his property and also of property which neither belonged to nor was held by him. There were separate mutations in respect of both the properties in the name of the widow. The *Tahsildar* had effected the mutations on the report of the *patwari* that the name of the widow should be entered by inheritance as there was no contest. There was no indication on the part of the widow that she had inherited the property from her husband. There was no evidence as to what claim was put forward by the widow at the time she took possession of the second property:

Held, that the widow had acquired absolute title by adverse possession to the property other than one inherited by her from her husband wherein she had only the widow's estate. The fact that the *patwari* reported the nature of transfer as by 'inheritance' did not amount to an admission by the widow.

Where a suit has been instituted by joint Hindu brothers as next reversioners and one of them dies

the other brothers being nearer reversioners than the sons of the deceased, are his legal representatives and being already on record, no steps are necessary to bring them on record.

In a matter of legal inference from the documents, it is open to the High Court in second appeal to form its own opinion.

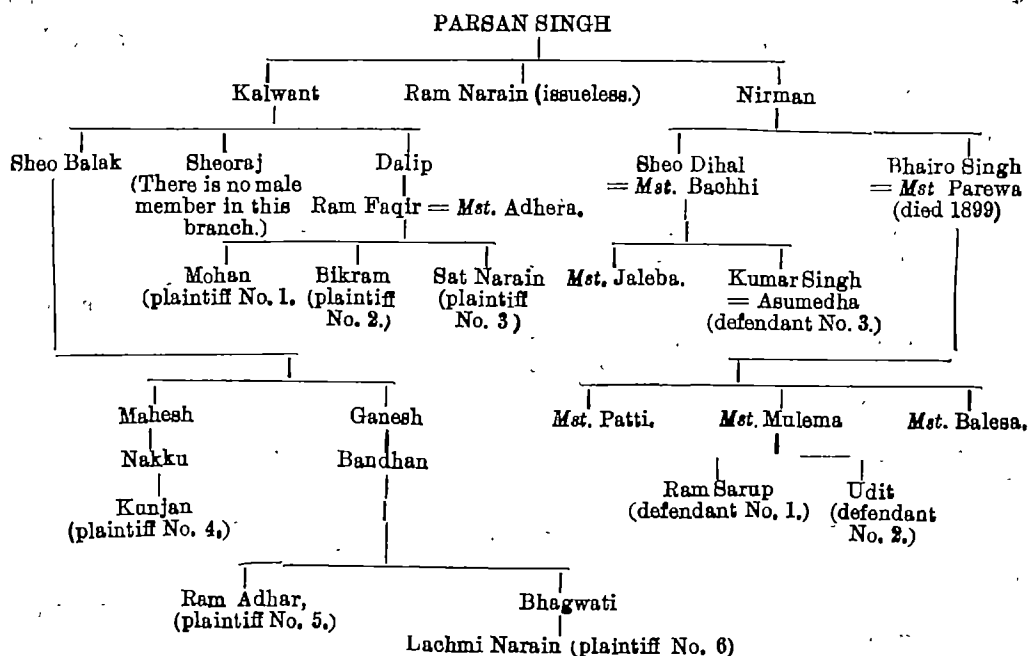
L. P. A. against an order of Mr. Justice Thom, in Second Appeal No. 273 of 1934, dated August 26, 1937.

Messrs. A. Sanyal and Shiva Prasad Sinha, for the Appellants.

Mr. A. P. Pandey, for the Respondents.

Bennet, J.—This is a Letters Patent Appeal by defendant No. 1, Ram Sarup Singh, and defendant No. 2, Udit Singh, against the decree of a learned Single Judge of this Court allowing the appeal of the plaintiffs. At the conclusion of the argument in this case, learned Counsel for the plaintiffs-respondents orally stated that plaintiff No. 2, Bikaram Singh had died after the decree of the learned Single Judge,

the date of death being November 7, 1938, and complained that his legal representatives had not been brought on the record. We think that the matter should have been the subject of an application in writing if the learned Counsel desired to bring it to our notice, but it appears to be sufficient to observe that the legal representatives of Bikaram Singh are apparently, his two brothers, plaintiff No. 1, Mohan Singh, and plaintiff No. 3, Sat Narain Singh, and as they are already on the record, no further steps appear to be required. It is not asserted that these Hindu brothers were separate. The plaintiffs sued as the nearest reversioners of one Kumar Singh and if Bikaram Singh had any sons, they would not be his legal representatives as there are the two uncles, plaintiffs Nos. 1 and 3, who are nearer reversioners, so they did not require to be brought on the record. The family pedigree is as follows:—



The facts which gave rise to the present suit are as follows: Bhairo Singh died and left a widow Mst. Parewa who held a *zamindari* share of 1 anna 6 pies and this widow died in 1899. Bhairo Singh was separated from his nephew Kumar Singh and Kumar Singh died as is the finding of the lower Appellate Court about three weeks after the death of Mst. Parewa. Mst. Asumedha, defendant No. 3, was then entered for the property of Bhairo Singh, 1 anna 6 pies, and she was also entered for a 6 pies *zamin-*

dari share of her husband Kumar Singh. The immediate cause of the present suit is a deed of gift dated October 6, 1931, executed by Mst. Asumedha in favour of Ram Sarup and Udit, defendants Nos. 1 and 2, by which she made a gift of the two shares amounting altogether to 2 annas *zamindari* share. The plaintiffs sued claiming in para. 3 of the plaint that the 2 annas *zamindari* share was the property left by Kumar Singh and that on the death of Kumar Singh, defendant No. 3, Mst. Asumedha

Kunwar entered into possession of the property as a Hindu widow with a life-interest. The plaintiffs therefore asked for a declaratory decree that defendants Nos. 1 and 2 are not the sons of the sister of Kumar Singh, deceased, but are the sons of the daughter of Bhairo Singh. This portion of the decree was granted by the trial Court although the defence was that defendants Nos. 1 and 2 were sons of the sister of Kumar Singh and therefore the nearest reversioners under the Hindu Law of Inheritance Amendment Act. The finding of fact is not now in contest. The other portion of the relief was that there should be a declaration that the deed of relinquishment which purported to be a deed of gift dated October 6, 1931, was null and void against the reversionary rights of the plaintiffs after the death of *Mst. Asumedha Kunwar*. In regard to this relief the trial Court granted a declaration so far as it concerns the 6 pies *zamindari* share which has been held by Kumar Singh and no appeal was taken by the defendants against that decree. The trial Court held that Kumar Singh had not entered into possession at all of the 1 anna 6 pies *zamindari* share held by *Mst. Parewa*, widow Bhairo Singh, and the Court further held that *Mst. Asumedha* had been entered for this share by mutation in 1899 and that she had held it by adverse possession against the three daughters of Bhairo Singh who were entitled to hold by succession after their mother, and further that she had held it for the period of 18 years after the death of the last surviving daughter of Bhairo Singh and had therefore acquired a title by adverse possession against defendants Nos. 1 and 2. The trial Court further held that this adverse possession by *Mst. Asumedha* acquired for her an absolute title as full owner of the 1 anna 6 pies share of Bhairo Singh and not merely the limited estate of a Hindu widow. The suit was, therefore, dismissed in regard to this 1 anna 6 pies share.

The plaintiff filed an appeal in the lower Appellate Court claiming that the adverse possession of *Mst. Asumedha Kunwar* was that of a Hindu widow and therefore that she had acquired an estate merely of a Hindu widow in the 1 anna 6 pies share originally of Bhairo Singh and that having acquired that estate she was unable to divest herself of it by a deed of gift or relinquish in favour of defendants Nos. 1 and 2 although they were the rightful heirs entitled to possess that share. The plaintiffs brought a second appeal in this Court and

the learned Single Judge of this Court has held that the title acquired by *Mst. Asumedha Kunwar* in the 1 anna 6 pies share was only that of a Hindu widow and that she had also acquired the full title by adverse possession to the estate of her husband and that her deed of gift to defendants Nos. 1 and 2 was, therefore, invalid and the claim of the plaintiffs was allowed. Against that decree of the learned Single Judge, this Letters Patent Appeal has been brought and the question before us is whether under the circumstances of this case *Mst. Asumedha Kunwar* acquired adverse possession as a Hindu widow for herself and the full title for the estate of her husband or whether she acquired the full title for herself. No case has been shown to us in which a person acquiring title by adverse possession as a Hindu widow attempted to make a gift of her rights to the rightful heirs and the Courts have never held that she could not divest herself of the rights which she had acquired by adverse possession. The case is, therefore, somewhat unique in this feature.

As regards the law on the point, we are referred in the first instance to a ruling of their Lordships of the Privy Council of the year 1894 in *Lachhan Kunwar v. Manorath Ram* (1), in that case a Hindu proprietor died leaving a widow and a son who died leaving the widow of his father. The father's widow either during the son's lifetime or on his death took possession of the property left by the father and remained in possession for 17 years until she died. The son's widow who was really entitled to succeed brought a suit against the father's widow for the property, but this was dismissed on the ground of limitation in 1875. Before her death the father's widow transferred part of the property by gift. It was found that she had not made any assertion that she was taking possession of the estate as a Hindu widow. It was held therefore that by taking possession, she had taken possession of an absolute estate and that she was entitled to make a gift of that estate. On p. 450* their Lordships observed :

"The contention that although it might be barred as against the son and all persons claiming under him, the effect was only to extinguish those rights, and to let in the rights of any persons who would claim as reversionary heirs of Mangal does not appear to their Lordships to be supported by authority, nor is it tenable, unless it were clearly shown that when Jit Kunwar took possession she pro-

(1) 22 O 445 at p 450; 22 I A 25; 6 Sar. 523; 5 M L J 1 (P O).

*Page of 22 O — [Ed.]

fessed to do it as claiming only limited estate of a widow."

The next ruling is *Shama Koer v. Dah Koer* (2), a ruling of 1902. In that case there was a member of an undivided Hindu family whose widow and son's widow obtained possession of a portion of his property which was assigned by a *hitbanama* to a third person. The reversionary heirs then brought a suit against the survivor of the widows and her assignee to set aside the gift and for possession. This suit was brought after the period of limitation had expired from the time when the widows took possession. On p. 671* their Lordships stated:

"The only question therefore is: have the appellants given satisfactory proof of an arrangement with the two widows, which would be an answer to the plea of limitation?"

In this connection on p. 672* it is mentioned that reliance was placed on argument on certain documents such as a *mukhtarnama* which stated that the villagers were in possession of the widows as "life-interest." This *mukhtarnama* was executed by one of the widows:

"Their Lordships, however, think that, having regard to the position of the widows, who were *pardanashin* ladies, and considering that the *mukhtar* appointed by them was the *mukhtar* of the reversionary heirs, it would be dangerous to rely on such an admission, unless it were proved that the attention of the widows was directly called to it."

The ruling shows that some words in a document executed by widows cannot be taken to be an admission by the widows. The next ruling in point of time is *Lajwanti v. Safa Chand* (3) a ruling of 1924. In that case one Jawahara Mal was the owner of the property in dispute and he died in 1852 leaving three widows who took possession as widows. The eldest widow gave birth to a posthumous son who lived for a few months. This son, therefore, became the last male holder. Certain litigation arose between a nephew who claimed to be the adopted son and two of the surviving widows, the one who gave birth to the posthumous son having died. It was held that the two widows were entitled to the estate for their lives. This was of course incorrect. Many years later, the question then arose of the title to these two widows when they had been holding

(2) 29 O 664; 29 I A 132; 6 O W N 657; 8 Sar. 280; 4 Bom. L R 547 (P O).

(3) 22 A L J 304; 80 Ind. Cas. 788; AIR 1924 P O 121; 51 I A 171; 5 L 192; (1924) M W N 442; 20 L W 10; 2 Pat. L R 245; 28 O W N 960; 26 Bom. L R 117; 47 M L J 935; 6 P L T 1; L R 5 A (P O) 94 (P O).

*Pages of 29 O.—[Ed.]

the estate, and it was held that as they were not heirs under the Hindu Law, their possession from 1869 to 1910 was adverse, but it was held that the property did not become their *stridhan*; on the other hand, they had acquired by adverse possession owning the title of Hindu widows. On p. 306* it was stated:

"The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. The result is the *mousahs* are Jawahara Mal's estate, the respondents having no title to attack them, and as such, the plaintiff is entitled as heir to her father to take them."

In this case the property was the property originally of the husband of the widows and there was no question apparently but that they had taken as his widows. They did not apparently during their life-time make any attempt to dispose of these *mousahs*. The circumstances of this particular ruling are different therefore from those of the rulings where the question has arisen in what capacity the widows took possession where the widows have attempted to make a disposal of the property afterwards. The scope of this ruling in *Lajwanti v. Safa Chand* (3) has been considered in a ruling of the Oudh Chief Court in *Raj Bahadur Singh v. Kanhaiya Bakhsh Singh*, 99 Ind. Cas. 890 (4) where it was held that there is no rule that whenever a Hindu widow is found in adverse possession of property, she must be treated as being in adverse possession of a widow's estate only. In *Uman Shankar v. Aisha Khatun* (5) it was laid down that admissions by a Hindu widow that she had acquired the property as heir to her husband does not necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right. The scope of the ruling in *Lajwanti v. Safa Chand* (3) was further considered in *Rikhdeo Tewari v. Sukhdeo Tewari* (6). At p. 46 the ruling observed:

"We would distinguish this decision as it has previously been distinguished on the ground that in the Privy Council case at the time when she entered into possession, she was entitled to the property as a widow and it was only subsequently that the birth of a posthumous son made her liable

(4) 99 Ind. Cas. 890; A I R 1927 Oudh 138; 4 O W N 350.

(5) A I R 1924 All. 88; 74 Ind. Cas. 869; 45 A 729.

(6) A I R 1928 All. 45 at p 46; 102 Ind. Cas. 175; 49 A 713; 25 A L J 580.

*Page of 22 A L J.—[Ed.]

to dispossession. In the present case, *Mst. Naulasi* was not entitled in any view to a Hindu widow's possession at the time when she obtained entry. The Privy Council decision has been distinguished in the same way in other cases. We would refer to *Varada Pillai v. Jeevarathnammal* (7) and *Kali Charan v. Peare* (8)."

In *Dungar Singh v. Maid Kunwar* (9) there was a ruling by a Bench of which one of us was a member with Mukherji, J., and in that case it was laid down that where a Hindu widow takes a property to which she is not entitled to succeed under the Hindu Law, the question whether she acquires a limited estate or an absolute estate, depends on the question of fact whether she claimed to take the property through her husband, or not. If she has taken through her husband she acquires by prescription only a limited estate of a Hindu widow and does not obtain an absolute estate, but if there is no evidence that she has so limited her claim, she takes an absolute estate as *stri-dhana*. Learned Counsel for the plaintiffs-respondents relied on the way in which the facts had been treated in that ruling which was a first appeal, but we do not think that the method of treatment of the facts has any bearing on the present case, as the evidence in that case was different. The widow in that case gave evidence and the statement in her deposition partly formed the basis of the decision. We have not had any statement by defendant No. 3 in the present case. For the respondents reliance is also placed on *Shankar Lal v. Omodar Das* (10), a ruling by the same Bench. On p. 451*, col. 1, it was held:

"The mere fact that a Hindu woman holds property need not necessarily imply that she holds it for her own benefit. She may hold it on behalf of her husband's estate or on behalf of her son's state as the case may be."

In that case the widow, *Mst. Basanti* made a clear statement that she was holding as heir to her husband." This statement was in her will. We now have to examine the evidence in the present case in the light of these rulings. There is firstly the fact that mutation was effected separately for 1 anna 6 pies share and the 6 pies share. Learned Counsel for the respondents claimed that the two documents produced are admissions by the widow (7) A I R 1919 P O 44; 53 Ind. Cas. 901; 46 I A 285; 3 M 244; (1919) M W N 724; 10 L W 679; 24 C W N 46; 38 M L J 313; 18 A L J 274 (P O).

(8) A I R 1924 All. 740; 83 Ind. Cas. 754; 46 A 769; 22 A L J 725.

(9) A I R 1933 All. 822; 147 Ind. Cas. 220; 6 R A 432.

(10) A I R 1931 All. 450 at p 451; 133 Ind. Cas. 790; nd. Rul. (1931) All. 742.

*Page of A I R 1931 All. [84.]

that she took by inheritance. It is true that in col. 9 the nature of transfer is stated to be "inheritance," but these documents are not statements by the widow. They are signed only by the *patwari* Achaibar Lal. There is no reason to suppose that the widow made any report or application for mutation or that there was any contested case. All that is produced is a copy of the mutation register and it is not headed with the heading of any contested case. Under the U. P. Land Revenue Court Act III of 1901, s. 35, when a report is made to the *Tahsildar* in an undisputed case, he records a succession and it is only if there is a dispute that he refers the matter to the Collector for decision under s. 40. The *Tahsildar* therefore was acting in this manner as an executive officer and not as a Court. The mere fact that the *patwari* reported (under department VII Board of Revenue Circulars) that the name of *Mst. Asumedha* should be entered by inheritance does not in any way amount to an admission by her. The next document was a usufructuary mortgage by *Mst. Asumedha*, dated July 31, 1901. This usufructuary mortgage was in favour of the grandmother of the plaintiffs and the plaintiffs are at present in possession of the property. The usufructuary mortgage does not anywhere set out that *Mst. Asumedha* was holding the property as the widow of her husband. She could not have done so in view of the fact that her husband was not the person legally entitled to the property and he had never held it.

The next document is a deed of gift in the suit dated October 6, 1931. In this document also *Mst. Asumedha* does not state that she holds as the widow of her husband. She states merely that the property

"is owned and possessed by me, the executant, over which the mortgagees are in possession now. I, the executant, have no male or female issue."

Learned Counsel place some reliance on an expression which is in vernacular *aur apne warasat se ham moqir ilahda hogae*; and which has been somewhat vaguely rendered in the translation as "I, the executant, have severed my connection from the inheritance." The lower Appellate Court has observed that this reference to inheritance may be taken to apply to the 6 pies share which *Mst. Asumedha* had and to which she had succeeded from her husband. We do not think that any connection can be claimed to exist between the 1 anna 6 pies share and a right of in-

heritance. Nor it is clear that *Mst. Asumedha* intended to put forward such a statement. In this deed of gift, there is a certain amount of confusion and in one place she refers to defendants Nos. 1 and 2 as sons of her sister, and in another place she refers to them as sons of her husband's sister. Learned Counsel has pointed out that the deed of gift is of 1931 and the Hindu Law of Inheritance Amendment Act came into force two years previously in 1929. The document states that legal opinion was taken and apparently the legal opinion was that defendants Nos. 1 and 2 would have a claim as sons of a sister of Kumar Singh to inherit from him as reversioners. Very possibly, this was introduced into the document to support their claim to the 6 pies share which had belonged to Kumar Singh. The Courts below have found that that claim is false and that they are not the sons of the sister of Kumar Singh. But the Courts have found that they are sons of the daughter of Bhairo Singh and are, therefore, entitled as their legal heirs to the estate of Bhairo Singh on the death of all his daughters which took place 18 years before the suit. We think that the language in the deed of gift is intended to bolster up this false claim of inheritance as heirs of Kumar Singh and we do not think that the language is intended to set out that *Mst. Asumedha* claimed to take as a Hindu widow.

Moreover, the rulings which we have quoted indicate that the important question is what claim did *Mst. Asumedha* put forward at the time that she took possession of the property in question. This is a matter to be established by evidence. Apparently she made no claim at the time to inherit as a Hindu widow in regard to this 1 anna 6 pies share. The mere fact that the *patwari* thought she was entitled to inherit as a Hindu widow has no bearing on the point. We think, therefore, that the burden of proof lay on the plaintiffs to establish that *Mst. Asumedha* had taken possession of the 1 anna 6 pies share as a Hindu widow claiming only the rights of a Hindu widow and the plaintiffs have failed to show that according to the finding of the two Courts below. No doubt, it is open to this Court to form its own opinion in second appeal because this is a matter of legal inference from the documents. We have examined the documents and we do not consider that this legal inference has been established by the learned Counsel for the plaintiffs. We consider

that on this view of the case, the decree of the lower Appellate Court was correct.

Accordingly we allow this Letters Patent Appeal and we set aside the decree of the learned Single Judge in favour of the plaintiffs and we restore the decree of the lower Appellate Court with costs of both the proceedings in this Court to defendants Nos. 1 and 2.

s.

Appeal allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 619 of 1938.

November 30, 1939

FAZL ALI AND MURDITH, JJ.

RAM KUMAR RAM SARAFF—DEFENDANT
—APPELLANT

versus

MOHAN LAL MAHARAJ—PLAINTIFF AND
FIRM KANHAYA LAL DURGA PRASAD

AND OTHERS—DEFENDANTS—RESPONDENTS

Assignment—Decree—Assignment of, after its passing but before it is drawn up—Validity—Whether carries with it right to decree passed in appeal—Hindu Law—Alienation—Karta—One of two kartas assigning decree—Assignment, if can be challenged by person not member of family.

The assignment of a decree is nothing more than an assignment of the rights conferred by the decree. These rights are acquired as soon as the decree is passed or pronounced and cannot be made dependent on the preparation of the decree which is more or less a ministerial act. As the Civil P. C. provides in O. XX, r. 7, that the decree shall bear the date on which the judgment is pronounced, the decree must, in the eye of law, be presumed to have come into existence on the date on which the judgment was pronounced. The assignment of a decree after the judgment is pronounced but before the decree is drawn up is, therefore, valid. 54 Ind. Cas., 913 (1), distinguished.

When a decree is assigned, what is transferred, is not the decree itself but the interest of the decree-holder in the decree as may be finally determined and therefore the assignment of a decree carries with it the right to the decree passed in appeal. 44 Ind. Cas. 819 (2), relied on.

Where a joint Hindu family has two kartas, an assignment of a decree made by one of them alone cannot be challenged by a person who is not a member of the joint family. Such an alienation is not unlawful or void *ab initio* but is voidable only at the option of the other co-parceners, who alone are affected by unauthorised act. 159 Ind. Cas. 474 (3) and *Hanuman Kamat v. Hanuman Mandar* (4), relied on.

A. from a decision of the Subordinate Judge of Bhagalpur, dated May 26, 1938.

Messrs. Mahabir Prasad and S. C. Muzamdar, for the Appellant.

Messrs. Khurshaid Husnain, K. Dayal and K. P. Sukul, for the Respondents.

Fazl Ali, J.—This is an appeal by the

defendant No. 1 (one of the defendants first party) in a suit under O. XXI, r. 63 of the Civil P. C. which has been decreed in favour of the plaintiff.

It appears that defendants Nos. 15 to 19 (defendants third party) owed money to the plaintiff as well as to defendants first party. On April 2, 1930, defendant No. 15 and one Meghraj, who held a power-of-attorney from defendant No. 16, executed a deed purporting to assign in favour of the plaintiff a decree for Rs. 2,506 obtained by defendants third party against defendants second party. This decree was subsequently appealed against by defendants second party, but their appeal was dismissed and the decree was upheld by the Appellate Court on September 7, 1934. In 1934 defendants first party executed a decree which they had obtained against defendants third party and on October 5, 1934, they attached the appellate decree passed on September 7, 1934, in favour of defendants third party against defendants second party. On January 23, 1935, the defendants second party paid a sum of Rs. 3,369 which was the total amount due on that date under the decree attached by them and the defendants first party filed a petition of satisfaction. The plaintiff thereupon applied under O. XXI, r. 58, and claimed that the decree in question having been assigned to him in 1930, the defendants first party could not attach it afterwards in execution of their decree and that he was entitled to the sum which had been realised by defendants first party from the judgment-debtors (defendants second party). This claim was disallowed and so on July 22, 1935, the plaintiff instituted the present suit. The suit having been decreed in the Courts below, one of the defendants first party has preferred this second appeal impleading defendants Nos. 2 to 4 as respondents in the appeal.

It may be stated here that in the suit which defendants third party, had brought against defendants second party, the judgment was pronounced on March 31, 1930, that is to say, two days before the deed of assignment, but the decree was not prepared and signed until April 7, 1930. The first point raised on behalf of the appellant is that the plaintiff did not acquire a valid title to the decree inasmuch as it was not in existence on the date of the assignment. In support of this argument it has been pointed out that the Code itself draws a distinction between a judgment and a decree and that no decree can

be enforced until it has been prepared and signed. I think, however, that a complete answer to this contention is provided by O. XX, r. 7, which provides that the decree shall bear the date on which the judgment was pronounced. The assignment of a decree is nothing more than an assignment of the rights conferred by the decree. These rights are acquired as soon as the decree is passed or pronounced and cannot be made dependent on the preparation of the decree, which is more or less a ministerial act. As the Code provides that the decree shall bear the date on which the judgment is pronounced, the decree must in the eye of law be presumed to have come into existence on the date on which the judgment was pronounced. The mere fact that the decree cannot be executed until it has been prepared and signed cannot avail the appellant, because the law makes it necessary that a petition for execution must contain certain particulars embodied in the decree. The learned Advocate for the appellant has placed some reliance upon *Gela Ram v. Ganga Ram*, 54 Ind. Cas. 913 (1) in which the Court refused to entertain an appeal on the ground that no decree had been prepared in the case in which the appeal had been preferred. The facts of the case were, however, peculiar and the case is hardly in point.

The next question raised on behalf of the appellant was that because the plaintiff was the assignee of the decree of the trial Court only, the assignment in his favour did not carry with it the right in the decree of the Appellate Court which was passed on September 7, 1934, and was attached by the defendants first party on October 5, 1934. A similar point appears to have been raised in *M. Ponnusami Pillai v. Chidambaram Chettiar* (2) wherein it was pointed out by the learned Judges who decided that case that when a decree is assigned what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined and therefore the assignment of a decree carries with it the right to the decree passed in appeal.

The next point urged on behalf of the appellant was that the assignment in favour of the plaintiff was not valid inasmuch as in the power-of-attorney held by Meghraj from Minnoo Lal no authority was given

(1) 54 Ind. Cas. 913; A.I.R. 1920 Lah 395.

(2) A.I.R. 1918 Mad 279; 44 Ind. Cas. 819; 35 M.L.J. 294; 23 M.L.T. 213; 7 L.W. 568; (1918) M.W.N. 194.

to him to execute a deed of assignment relating to a decree. It appears from the judgments of the Courts below that there were two *kartas* in the joint family of which defendants Nos. 15 to 19 were members, these being Kanhaiya Lal and Minnoo Lal. From a genealogy which forms part of the written statement of defendant No. 1, it appears that both Minnoo Lal and Sita Ram on whose behalf Meghraj executed the assignment deed are sons of Kanhaiya Lal, one of the executants of the deed. Minnoo Lal was adopted by one Dilsukh Rai, the only son of Tormal, and Kanhaiya Lal was adopted by Balkishun Das, a brother of Tormal. It appears that Sitaram has been adopted by his brother Minnoo Lal. The judgment of the trial Court further shows that the descendants of Balkishun Das and Tormal were joint. Assuming then that Meghraj was not empowered by the power-of-attorney to execute a deed of assignment relating to a decree, the point which is still to be decided is whether the assignment, which was admittedly executed by one of the two *kartas* of a joint family can be challenged by a person who is not a member of the joint family. In my opinion this point is fully covered by the decision of the Lahore High Court in the *Imperial Bank of India, Jullundur v. Maya Devi* (3) which is based upon the observation made by the Judicial Committee in *Hanuman Kamat v. Hanuman Mandur* (4). In that case it was held that under the Mitakshara Law though the manager of a joint Hindu family cannot alienate joint family property except for family necessity or with the consent of the co-parceners if they are adults, yet an alienation by him which cannot be supported on those grounds, is not unlawful or void *ab initio*, but is voidable at the option of the other co-parceners, who alone are affected by his unauthorised act, and no person who is a stranger to the family and does not possess a right to have the transaction defeated on other grounds (e. g. under s. 53 of the T. P. Act) has a *locus standi* to intervene and impugn such an alienation, merely because it is in excess of his authority to deal with the property for family purposes. In the present case the assignment was never challenged by Minnoo Lal or Sitaram. Thus the question as to whether Meghraj was empowered to assign the decree under the power-of-

attorney does not arise. I should also state that the document, though it is somewhat obscurely worded, may well bear the construction which has been put upon it by the Courts below—that is to say, it expressly authorises Meghraj to execute such documents as are signed by Kanhaiya Lal (who was after all the father of Minnoo Lal and Sitaram) without reference to Minnoo Lal and Sitaram.

It was contended on behalf of the respondents that this appeal is incompetent inasmuch as it has not been preferred on behalf of all the members of the defendants first party. But as the other members have been impleaded as respondents, there was nothing to prevent us from passing a decree in favour of all the defendants first party under O. XLI, r. 33 of the Civil P. C. if we thought that the appeal should be allowed. The question, however, is merely academic because the appeal fails on its merits.

I would, therefore, dismiss the appeal with costs and the cross-objections not being pressed by the respondents, must also be dismissed but without costs.

Meredith, J—I agree with my learned brother. I do not think the findings of fact are vitiated by any misplacement of onus. On the contrary, the lower Appellate Court has correctly stated the position in observing that the onus was primarily on the plaintiff because his claim was rejected in a proceeding under O. XXI, r. 5, Civil P. C., but when evidence had been gone into on both sides, the question of onus was of secondary importance.

Order XX, r. 7, Civil P. C., seems to me a complete answer to the contention that when the assignment was made, there was no decree in existence which could be assigned. Judgment had been pronounced, although the formal decree had not been prepared, and though the decree was not signed until some days after the assignment, still under O. XX, r. 7 the date of the decree is the date of the judgment, and the decree must, therefore in law, be deemed to have come into existence on the date when the judgment was delivered.

The argument that it was the decree of the Appellate Court which the defendants first party attached and that that decree was never assigned is, in my view, completely met by *M. Ponnusami Pillai v. Chidambaram Chettiar* (2) wherein it was laid down that the assignment of a decree under appeal gives the assignee the right to execute the appellate decree, as what

(3) 16 L 417; 159 Ind. Cas. 474; A. I. R. 1935 Lah 867; 8 R. L. 399; 37 P. L. R. 831.

(4) 19 O 123; 18 I A 158; 6 Sar 91 (P. O.).

is assigned is not only the decree selfit but the interest of the decree-holder therein as finally determined.

Lastly, the argument, that there was no valid assignment as Meghraj's power-of-attorney did not give him any authority to execute a sale deed relating to a decree, finds answer in *Imperial Bank of India, Jullundur v. Maya Devi* (3). If the execution be held to be by one *karta* only out of the two, then the document would be merely voidable at the option of the other co-parceners and not wholly void. The assignment would, therefore, be valid in law unless and until avoided by any of the co-parceners, or, any one deriving through them. In the present case the other members of the family of the defendants third-party were impleaded in the suit and did not appear to challenge the assignment. The finding, moreover, was that the assignment was for consideration and for benefit of the joint family.

Apart from that both the lower Courts have interpreted the power-of-attorney (Ex. 6) as authorizing Meghraj to sign *kevalas* of all sorts if they bear the signature of the other *karta* Kanhaiya Lal. The power-of-attorney may be badly worded, but there is nothing in it, in my opinion, which would justify us in holding that the interpretation put upon it by both the Courts below is wrong.

Appeal dismissed.

ALLAHABAD HIGH COURT

Civil Revision No. 285 of 1937

April 27, 1939

THOM, O. J. AND GANGA NATH, J.

GOVIND RAM AND ANOTHER —DEBITORS
—APPLICANTS

versus

MAJOR A. U. JOHN—JUDGMENT-DEBTOR
OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 151, 115—Jurisdiction of Court under s. 151—Interference by High Court under s. 115 with order under s. 151.

Section 151, Civil P. O., does not confer upon the Courts any powers with which they were not vested before the passing of the Civil P. O. There are certain well-recognized principles which guide the Courts in the exercise of their jurisdiction under s. 151. The Courts must proceed according to the principles of equity, justice and good conscience. Under s. 115 the High Court has jurisdiction to interfere where the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity. [p. 792, col. 2.]

The parties entered into a contract which took the form of a mortgage-deed and a finance agreement both of which were executed on the same day at Bombay. The deed recited that "no suit or proceeding arising out of and in relation to this indenture shall be instituted in any Court other than the High Court of Judicature at Bombay." On default of the mortgagors to pay an instalment due under the mortgage, the mortgagees filed a suit at Bombay. Subsequently the mortgagors made an application under the U. P. Encumbered Estates Act and obtained an injunction restraining the mortgagees from proceeding with their suit in the Bombay High Court:

Held, that judged even by the lowest standards of commercial morality, the conduct of the mortgagors was utterly inexcusable. There was nothing whatever illegal in the contract and such a provision was quite usual and was in the circumstances eminently reasonable. In granting the injunction, the Court had not acted consonantly with the spirit of s. 151, Civil P. O. In restraining, the mortgagees from doing something which the mortgagors agreed that they should be permitted to do in a solemn contract, the Court had not acted in accordance with the principles of equity, justice and good conscience. It was not in accordance with these principles to permit a party to repudiate his contractual obligations. In failing to take into consideration the legal rights of the mortgagees the Court acted with material irregularity.

O. R. against the order of the Special Judge, Second Grade, Agra, dated March 18, 1937.

Sir Tej Bahadur Sapru, Messrs. P. L. Banerji, C. B. Agarwala and S. P. Kumar, for the Applicants.

Messrs. B. Malik, J. Swarup and Kali Nath, for the Opposite Party.

Thom, C. J.—This is an application in civil revision under s. 115, Civil P. O. The applicants Govind Ram Gordhandass and Ramnath Gordhandass are the proprietors of Messrs. Govindram Ramnath & Co. On July 5, 1934, the applicants entered into a contract with Major A. U. John and Mr. G. A. John who are owners of certain mills at Agra. This contract took the form of a mortgage deed and a finance agreement both of which were executed on the same day. Under the mortgage deed, the mortgagees agreed to advance the sum of seven lakhs upon the mills belonging to Major A. U. John and Mr. G. A. John (now deceased). The applicants, under the finance agreement undertook to finance the mills up to a figure of four lakhs. The negotiations which culminated in the execution of the mortgage deed and the finance agreement were conducted in Bombay and the mortgagors, under the terms of the mortgage-deed, were taken bound to re-pay the amount due under the

mortgage at Bombay. The mortgage deed included the following provision :

"And it is hereby further agreed and declared that no suit or proceeding arising out of and in relation to this indenture shall be instituted in any Court other than the High Court of Judicature at Bombay."

It is alleged on behalf of the applicants that the mortgagors defaulted in regard to the payment of an instalment due under the aforesaid mortgage. Following upon this default a suit was instituted in the High Court of Judicature at Bombay. Subsequent to the institution of this suit the mortgagors made an application under the U. P. Encumbered Estates Act. The matter was referred to the Special Judge who has passed an order of injunction restraining the applicants from proceeding with their suit in the Bombay High Court. This order of the Special Judge has been upheld by the learned District Judge of Agra in his order of May 17, 1937. Against this order the applicants have preferred this application in civil revision. The learned District Judge appears to have taken the view that the contract entered into between the applicants on the one hand and Major A. U. John and Mr. G. A. John on the other was an illegal contract and mainly upon that ground he has declined to interfere with the order of the Special Judge restraining the applicants from prosecuting their suit in the High Court at Bombay.

When the mortgage was executed in 1934, the parties to the contract had in view the impending debt legislation of the Govt. of the U. P. It was with the object of avoiding the restrictions which were likely to be imposed by that legislation that the aforementioned clause to the effect that no suit or proceeding arising out of and in relation to the indenture should be instituted in any Court other than the High Court of Judicature at Bombay was inserted. We may take it that the applicants would never have agreed to the terms of the hypothecation bond and the finance agreement had not this clause been inserted. When the mortgagors had defaulted and when thereupon the mortgagees filed a suit in the Bombay High Court, the mortgagors proceeded to do what they in effect had solemnly undertaken not to do under the mortgage deed; they applied for the benefits of the Encumbered Estates Act and secured an order of injunction against the applicants. They broke their contract. They refuse to honour their signatures. Judged even by the lowest standards of commercial morality, their conduct appears

to us to be utterly inexcusable. We do not consider it necessary in disposing of this application to say anything as to what the rights of the mortgagors are under the Encumbered Estates Act in the special circumstances of this case. We are only concerned with the question as to whether the order restraining the applicants from prosecuting their suit in the Bombay High Court is an order which should be allowed to stand.

It was contended by the learned Counsel for the mortgagors that inasmuch as this was an application in civil revision, this Court could not interfere unless it was held that the order against which the application in revision is preferred was passed without jurisdiction. The terms of s. 115 do not warrant this contention. Under s. 115 this Court has jurisdiction to interfere where the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity. The Courts below purported to have acted under s. 151, Civil P. C. Section 151, Civil P. C., it is well established, does not confer upon the Courts any powers with which they were not vested before the passing of the Civil P. C. There are certain well-recognized principles which guide the Courts in the exercise of their jurisdiction under s. 151, Civil P. C.

It was contended for the opposite parties that the High Court should not interfere in revision where the order challenged purports to be passed under s. 151. We have no hesitation in repelling this contention. No Court has unrestricted jurisdiction to pass orders under s. 151. The Courts must proceed according to the principles of equity, justice and good conscience. Now there is nothing whatever illegal in the contract which was entered into by the John Brothers on the one hand and the applicants upon the other. The former took certain benefits under the contract which they would not have obtained had they not agreed to the provision that no suit arising out of the agreement should be instituted in any Court other than the High Court of Judicature at Bombay. Such a provision is quite usual and was in the circumstances eminently reasonable. It was suggested that there are other creditors of Messrs. John and that their rights would be jeopardized if the case in the Bombay High Court were allowed to proceed. These creditors, however, are not parties to this application. They are not represented in these proceedings. Their interests do not fall to

be considered in the disposal of this application. They have no *locus* to oppose the application. It was further suggested that if the applicants obtained a decree in the Bombay High Court, they might proceed to sell the property mortgaged at a price much lower than its real value. This is a difficulty which, in our judgment, does not appear to be insurmountable. Sir Tej Bahadur Sapru who appears for the applicants has given an undertaking that if a decree is passed in favour of his clients by the Bombay High Court before there is any attempt to put that decree into execution by sale of the mortgaged property, three months' notice will be given to Major A. U. John, the heirs of G. A. John, the Special Judge charged with the proceedings under the Encumbered Estates Act and to the Collector at Agra. Counsel appearing for the heirs of Mr. G. A. John in the lower Court has undertaken to-day to furnish Sir Tej Bahadur Sapru with the names and addresses of the heirs of Mr. G. A. John.

We are satisfied that in granting the injunction the learned Special Judge has not acted consonantly with the spirit of s. 151, Civil P. C. In restraining, in the circumstances, the plaintiffs from doing something which the mortgagors Major A. U. John and Mr. G. A. John agreed that they should be permitted to do in a solemn contract, the Courts below have not acted in accordance with the principles of equity, justice and good conscience. It is not in accordance with these principles to permit a party to repudiate his contractual obligations, as the opposite parties have done in the present instance. Their obligations are not illegal. There is nothing in the Encumbered Estates Act which forbids parties to a contract agreeing on a forum for the decision of their disputes. Further the learned Special Judge and the learned District Judge have not taken into consideration the legitimate legal rights of the applicants. In failing to take into consideration these rights, the Courts below have acted with material irregularity. In the result, we allow this application, we set aside the order of the learned District Judge and recall the order of injunction. The applicants are entitled to their costs.

s.

*Application allowed.***OUDEH CHIEF COURT**

Second Civil Appeal No. 30 of 1937

ZIA-UL HASAN AND HAMILTON, J.J.

December 12, 1939

THE ASIAN ASSURANCE CO., LTD.,

—DEFENDANT—APPELLANT

versus

ASA RAM—PLAINTIFF—RESPONDENT

Insurance—Life insurance—Policy, interpretation of—Proposal and declaration by assured forming basis of contract—Assured declaring that contract would become void if declaration or proposal contained untrue statements—Some statements found untrue but fraud not proved—Liability of company held ceased.

According to the terms of a life policy the representations, statements and agreements in the application for the policy were made part of the contract between the assured and the Insurance Co. The following declaration was made by the assured: "I do hereby declare that the above answers and statements are true and that I have not withheld or concealed any information and I do hereby agree that this declaration together with the proposal shall be the basis of the contract to be made and that if any untrue averment is contained in this declaration or in the said proposal or if it shall hereafter appear that any information has been withheld, then the said contract shall be void and all moneys which shall have been paid on account of the assurance shall be forfeited." Some of the statements made by the assured were found to be untrue. No fraud was, however, proved:

Held, that by the terms of the policy in question, the liability of the company ceased when it was found that any of the statements contained in the declaration or the proposal were untrue. 129 Ind. Cas. 746 (1), 140 Ind. Cas. 575 (2) and *Condogianis v. Guardian Assurance Company, Ltd.* (3), relied on.

S. C. A. against the order of the District Judge, Lucknow, dated November 13, 1936.

Messrs. J. Jackson and Shyam Manohar, for the Appellant.

Messrs. Bhaurani Snankar and Bijai Shankar, for the Respondent.

Judgment.—This is a second appeal against a decree of the learned District Judge of Lucknow.

On July 18, 1933, *Mst.* Sundara Devi, wife of the plaintiff-respondent Asa Ram, got her life insured with the defendant company, namely, the Asian Assurance Co., Ltd. She died on September 11, 1934. On her death the plaintiff, to whom the policy had been assigned applied to the company for the money but the company refused to pay. Thereupon the suit which has given rise to this appeal was brought by the plaintiff for recovery of Rs. 2,700 with future interest. Defendant No. 2 impleaded in the suit is the agent in Lucknow of the first defendant company. He supported the

plaintiff's claim and claimed exemption from costs. The defendant company admitted that Sundara Devi was insured for Rs. 2,500 under a policy dated August 30, 1933, but contended that under the terms of the policy in question, it became void on account of certain untrue statements made in the declaration of the assured. It was also contended that the assured practised fraud on the company by various statements made by her. Five issues were framed by the trial Court on the pleas raised by the defendant No. 1 but subsequently owing to a statement made by the defendants' Pleader, only the following two issues were retained and the others were struck off—

1. Did the policy become void on account of fraud practised by the plaintiff-defendant No. 2 and the assured?

2. To what relief and against which of the defendants is the plaintiff entitled?

Finding on issue No. 1 that no fraud had been proved, the learned Civil Judge decreed the plaintiff's suit and on appeal by the defendant company, the decree was upheld by the learned District Judge.

It appears that on February 18, 1936, the Pleader for the defendant company made the following statement :

"I rely on the elements of fraud as alleged in para. 15 of my written statement cls. (a), (b), (d), (e), (h) and paras. 16 and 18. I give up all other elements alleged before".

Paragraph 15 of the written statement referred to in the Pleader's statement is as follows:—

"The policy in suit was obtained from the answering defendant by making to it in form of proposal form D, a declaration and also otherwise the following misrepresentations and by concealing from it many material facts.

(a) That the age of the assured was only 25 years.

(b) That the assured consulted a physician six months before the date of her proposal and that, too, for fever only.

(c) That the assured was the married wife of the plaintiff and had been married for seven years.

(d) That on no occasion and for no diseases or injuries the assured ever received any medical advice.

(e) That the assured never suffered from any serious disease.

(f) That the assured never had any abortions and that she was not pregnant at the time of the proposal.

(g) That the assured was literate.

(h) That the assured had only one sister aged 18 years."

It will thus appear that the Pleader for the defendant company gave up the pleas contained in cls. (c), (f) and (g) of para. 15 of the written statement and relied only on

cls. (a), (b), (d), (e) and (h) as constituting fraud. The learned Counsel for the appellant company, however, relies on para. 14 of the written statement, which is as follows:—

"According to the terms of the policy in suit, no liability can attach to the answering defendant and the policy is to become void, if any untrue statement is found to be contained in the declaration (form D) of the assured or in her proposal or if it should appear that any information has been withheld."

and argues that the defence contained in this paragraph, which is totally independent of fraud, was never given up and that though the learned trial Court held that where according to the terms of the policy the representations, statements and agreements in the application for the policy are made part of the contract, the company is liable only if those representations and statements are true, and though some of the statements made by the deceased lady have been found to be untrue, the learned Judge wrongly held that as no fraud was proved, the plaintiff was entitled to the money claimed. The learned Counsel has drawn our attention to the following declaration contained in Ex. A-32 :

"I do hereby declare that the above answers and statements are true and that I have not withheld or concealed any information and I do hereby agree that this declaration together with the proposal shall be the basis of the contract to be made.... and that if any untrue averment is contained in this declaration or in the said proposal or if it shall hereafter appear that any information has been withheld then the said contract shall be void and all moneys which shall have been paid on account of the assurance shall be forfeited".

We are of opinion that the defendant company is entitled to put up this agreement in defence even though no fraud has been found to be proved. The learned Counsel for the plaintiff-respondent argues that no issue having been framed by the trial Court on the allegations contained in para. 14 of the written statement, those allegations must be deemed to have been withdrawn. We are not prepared to accept this contention. It is true that no issue was framed on the plea raised in para. 14 but the judgments of both the Courts below show that the matter was argued on behalf of the defendant company and the mere omission of the Court below to frame an issue on the point cannot be taken to mean that the plea was withdrawn. The learned Judge of the trial Court himself remarked:—

"I think having regard to the above terms, it is not necessary to prove in the case before me that the false statement was fraudulent. Law Journal Vol. 32

Queen's Bench* does not apply to the facts of this case because there is no such condition here that there should be *fraudulent concealment or designedly untrue statements*. In the 2 King's Bench Division† the declaration was not to the effect as it is in this case. So these rulings do not fully apply and the rulings cited by defendant No. 1's learned Counsel are more applicable to the facts of this case. Thus we have to see if the statements made are true or false and the point of materiality does not arise"; still he decreed the plaintiff's suit on the ground that no fraud or wilful misrepresentation was proved. We are clearly of opinion that by the terms of the policy in question the liability of the company ceased when it was found that any of the statements contained in the declaration or the proposal were untrue. In Ex. A-32 it was stated in answer to question No. 3 that no medical advice was sought but Ex. A-34, the Outpatient Register of Mulchand Rastogi Aushdhalaya, shows that the lady was under medical treatment off and on from November 22, 1932, upto April 23, 1933. Then, a statement was made in Ex. A-32 that the proposer had only one sister while the evidence of the plaintiff himself and that of D. W. No. 3 and D. W. No. 4 prove that she had three sisters living at the time. Similarly the number of brothers given in Ex. A-32 is one but the plaintiff's own evidence shows that the lady had three brothers. We do not also agree with the remarks of the Courts below that the evidence of Dr. Curtis, who put the questions contained in Ex. A-32 to the lady, was necessary to prove that the lady who was practically illiterate, correctly understood the questions put to her. Her husband, the plaintiff, admits in his examination not only that he was present when the questions were put to the deceased by Miss Curtis and answered some of the questions himself but also that the entries as contained in Ex. A-32 were correct. In these circumstances, it cannot be argued with reason that the lady did not understand the questions put to her which were simple enough or that the medical examiner did not correctly record the answers.

We are of opinion that in view of the law as laid down in *Great Eastern Life Assurance Co., Ltd. v. Bai Hira*, (A. I. R. 1931 Bom., 146) (1), *Lakshmishankar Kanji Rawal v.* (1) A I R 1931 Bom. 146; 129 Ind. Cas. 744 32 Bom. L R 1871; Ind. Rul. (1931) Bom, 216; 55 B 124.

* † The learned Judge of the trial Court probably referred the *Fowkes v. Manchester and London Assurance Association* (1863) 32 L J Q B 153; 3 B & S 917; 8 L T (N.S.) 309; 11 W R 822; 129 R R 607.

† *Joel v. Law Union and Crown Insurance Co.*, (1908) 2 K B 863; 77 L J K B 1108; 24 T L R 898 in his judgment.—[Ed.]

The Gresham Life Assurance Society, Ltd. (A. I. R. 1932 Bom., 582) (2) and *Condogianis v. Guardian Assurance Company, Ltd.* (A. I. R. 1921 P. C. 195) (3) and having regard to the terms of the policy in question, the plaintiff is not entitled to sue upon the policy.

The appeal is, therefore, allowed and the plaintiff-respondent's suit dismissed. In view however of the special circumstances of the case and of the fact that no wilful fraud or misrepresentation on the part of the assured has been proved, we order parties to bear their own costs in all the Courts.

Appeal allowed.

(2) A I R 1932 Bom. 582; 140 Ind. Cas. 575; 34 Bom. L R 1295; Ind. Rul. (1933) Bom. 21.
(3) A I R 1921 P C 195.

BOMBAY HIGH COURT

Criminal Reference No. 55 of 1939

August 24, 1939

BEAUMONT, C. J. AND SEN, J.

PRAGJI BHULABHAI—COMPLAINANT

versus

BHAGWANJI BAWABHAI—ACCUSED

Criminal trial—Practice—Appeal from conviction on private prosecution—Complainant, if entitled to be heard by an Advocate.

The strict rule is that in an appeal against a conviction, only the Crown is entitled to be served with notice, and heard. Nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction. But the true rule, which should be followed in all Courts, is that in private prosecutions, the Court in its discretion may allow the complainant to appear by an Advocate, but it is not in any case bound to do so.

Cr. Ref. made by the District Magistrate, Surat.

Mr. A. S. Navalkar, for the Complainant.

Mr. J. C. Shah, for the Accused.

Mr. R. A. Jahagirdar, Government Pleader, for the Crown.

Beaumont, C. J.—This is a reference made by the District Magistrate of Surat which raises a short point of practice. The accused was prosecuted on a private prosecution, and was convicted, and he appealed to the City Magistrate of Surat. The learned Magistrate held that the complainant's Advocate was not entitled to be heard on the appeal, but only the Public Prosecutor could be heard. The District Magistrate was then moved in revision and he has referred the matter to us, because in his opinion the complainant was entitled to be heard by an Advocate, and he says that it is the practice obtaining in the District of

Surat, as in other districts, that in appeals in private cases, opponents' Pleaders are heard.

I think the strict rule is that in an appeal against a conviction, only the Crown is entitled to be served with notice, and heard. Notice is served on an officer on behalf of the Local Govt. under s. 422, Criminal P. O., and in my opinion, nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction. The practice in the High Court is for the Advocate for the complainant to be heard if the Court thinks fit to hear him. In some appeals the Govt. Pleader does not appear, for instance, an appeal against conviction for defamation in a private prosecution where Govt. may feel that they are not really interested in upholding the conviction. In my opinion, the true rule, which should be followed in all Courts, is that in private prosecution the Court in its discretion may allow the complainant to appear by an Advocate, but it is not in any case bound to do so. I think, therefore, we can only send the case back to the City Magistrate with an intimation that he is entitled, if he thinks fit, to hear an Advocate for the complainant.

Sen, J.—I agree.

s.

Reference answered.

PATNA HIGH COURT

Appeal from Original Decree No. 33 of 1937
November 30, 1939

HARRIES, C. J. AND MANOHAR LALL, J.
FIRM HAROHANDRAI ANANDRAM
—PLAINTIFF—APPELLANT

versus

FIRM KEDARNATH NIRMAL CHANDRA
GUHA—DEFENDANTS—RESPONDENTS

Hindu Law—Family business—Joint family of brothers governed by Dayabhag School starting business—Son of one of them taking very active part in firm affairs from commencement—Whether personally liable for debts of firm contracted during lifetime of his father.

Where a joint family of brothers governed by the Dayabhag School of Hindu Law start a business and a son of one of them takes such an active part in the business from its commencement as to infer that he was one of the partners, he is personally liable for the debts of the firm contracted even in the lifetime of his father. That personal liability would not cease on the death of his father and on his acquiring an interest in the family property.

A. from a decision of the Subordinate Judge of Bhagalpur, dated September 30, 1936.

Sir M. N. Mukharji and Messrs. G. N. Mukharji, S. N. Sahay, Prem Lall and K. P. Sukul for the Appellant.

Messrs. S. M. Mullick, Nitai Chandra Ghosh, Sudhir Chandra Ghosh and Girindra Banarji, for the Respondents.

HARRIES, C. J. — This is a plaintiff's appeal from a decree of the learned Subordinate Judge of Bhagalpur passed in Money Suit No. 191 of 1934. The suit was decreed by the learned Subordinate Judge against all the defendants. As regards defendants Nos. 3 and 7, the decree was not only against their share in the family property but also a personal decree. The decree against the other defendants was a decree to the extent of their interest in the family property.

In this appeal the plaintiff contends that he should have been granted a personal decree not only against defendants Nos. 3 and 7 but also against defendants Nos. 2, 4 and 6.

The facts of the case can be shortly stated as follows:—In the year 1920, three brothers Ashu, Kedarnath and Gangadas commenced to carry on business, and in that business Oharu and Nirmal, the sons of Kedarnath, played an important part. This family was governed by the Dayabhag School of Hindu Law. In the year 1921, this business began to borrow money from the plaintiff. On April 13, 1931, Kedar, the father of defendants Oharu, Nirmal and Bimal, died, and the business continued to be carried on under the old name of Kedarnath Nirmal Chandra Guha. On July 3, 1931, Nirmal, as managing partner, settled the accounts of the firm up to May 30, 1931, and agreed to pay interest at the rate of 12 per cent. per annum on the balance due. The account ran on and in due course the plaintiff filed this suit claiming a balance of Rs. 5,116-11-0 against the eight defendants: Oharu, defendant No. 2, Nirmal, defendant No. 3 and Bimal, defendant No. 4, are the sons of Kedar deceased; Kshitish, defendant No. 5, Jyotish, defendant No. 6 and Susil, defendant No. 7 are the sons of Gangadas, deceased, and Sudhir, defendant No. 8 is the son of Suresh deceased, who was the son of Gangadas deceased.

According to the plaintiff, the business Kedarnath Nirmal Chandra was a business of this family which was actively conducted by Nirmal and Susil at Bhagalpur. The plaintiff also contended that Oharu, Bimal and Jyotish were also actively interested.

in the firm, and they claimed that these defendants were not only liable to the extent of the family property but were also personally liable.

The main defence was that this business was not a family business at all but was the business of Nirmal, who had been described as an idler and partially educated man. It is said that the business was created by Kedar to find employment for this somewhat useless son.

The suit out of which this appeal arises, was tried with a large number of other suits, and the evidence led was treated as evidence in all the cases. The learned Subordinate Judge held that the firm Kedarnath Nirmal Chandra was the joint family firm of the defendants and not the personal business of Nirmal. His findings upon this question, however, are somewhat contradictory. At p. 80, Parts I and II of the paper-book, he sums up the position in these words:—

"For these reasons I hold that the firm Kedarnath Nirmal Chandra Guha was the joint family firm of the defendants and was opened by the three brothers Gangadas, Kedar and Ashu, and after the deaths of the former two of their sons became partners of the firm in place of their fathers, and as such, all the defendants are liable for plaintiff's dues."

In this finding the learned Judge seems to suggest that the only persons interested in the business at the commencement were the three brothers, Gangadas, Kedar and Ashu, and that the sons of Kedar and Gangadas only became interested in the business on the death of their fathers. It is, however, clear from an earlier finding that Charu at least was actively interested in the business from its very commencement. At p. 79 the learned Subordinate Judge deals with the evidence concerning Charu's participation in the affairs of this firm. Counsel for the respondents does not challenge the accuracy of the statement of the learned Subordinate Judge. It appears that as early as April 7, 1921, Charu was borrowing money from the Benares Bank to assist the firm. Charu and his father Kedar also raised money to discharge the debts of the firm in 1925. In 1930 Charu transferred Rs. 1,900 from his private account to the firm's account. Again on June 28, 1932, Charu borrowed Rs. 5,000 from the Bank and this amount was credited to the account of the firm. Summing up these transactions, the learned Subordinate Judge says: "These papers go to show that Charu had an important hand in the business of the defendant firm". In fact,

these various transactions show that Charu took a very active part in the activities of the firm from its commencement, and there can be no doubt, in my view, that Charu was in the position of a partner in this business from its commencement. He was advancing money to the firm and providing for the payment of its debts. In fact, he appears to have been one of the most important members of the firm. There is also abundant evidence to show that later, when this firm got into difficulties, Charu was taking an active interest in its affairs. The Benares Bank was a creditor of this firm for a very substantial amount, and at pp. 15, 16 and 17 (Part III of the paper-book) are printed letters passing between the Benares Bank and the defendant Charu. These letters make it clear that at a time, namely, 1931, Charu was taking an active interest in the financial affairs of the firm and was endeavouring to make arrangements for payment to the Bank. At p. 30 (Part III of the paper-book) there is printed a most important letter from Charu to *Rai Bahadur* Bansidhar Dhandhanian, the proprietor of the plaintiff firm. This letter undoubtedly refers to the debt which is the subject-matter of this suit. In this letter he makes it clear that he was actively interested in the affairs of the firm, and he refers to the debtors of the firm as "our debtors" and to the creditors of the firm as "our creditors". In this letter Charu clearly admitted his interest in the firm.

There can be no doubt that Charu was interested in this firm; but it has been contended by Mr. Sushil Madhab Mullick on behalf of the respondents that he can only be made liable to the extent of his share of the family property. According to Mr. Mullick, the only persons who could be made liable personally were the two persons Nirmal and Sushil, who have been held to be the only two members of the family living at Bhagalpur and who were attending to the daily affairs of the business. Sir Manmatha Nath Mukharji on behalf of the appellant has, however, argued that Charu can be made personally liable for this debt, because he was throughout an active member of the firm. He has relied upon a number of cases; but it is unnecessary to refer to them in detail. Sir Manmatha Nath Mukharji agrees that the law is correctly stated at p. 259, Mulla's *Principles of Hindu Law*, 8th Edn. There the learned Author says:

"In the case of an ordinary partnership, it is not only the share of each partner in the partnership property which is liable for the payment of that partnership debts, but the separate property of each partner is also liable. In the case of debts contracted by a manager, in pursuance of his implied authority in the ordinary course of the family business, there is a distinction between the liability of a manager and the liability of his co-partners. The manager is liable not only to the extent of his share in the joint family property, but being a party to the contract, he is liable personally, that is to say, his separate property is also liable. But as regards the other co-partners, they are liable only to the extent of their interest in the family property, unless, in the case of adult co-partners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified...."

According to the appellant, the managing partner contracts not only on behalf of himself but on behalf of all the members of the firm who are taking an active part in the conduct of its affairs. The first loan in this case was taken by Kedar and Nirmal, and later payments made from time to time by Nirmal. Nirmal settled the accounts; but can it be said that Nirmal throughout was merely acting for himself or was he acting as agent for the other members of the firm who were actively interested in it? As I have stated, Charu was certainly very active in this firm from its very commencement, and in my view, it can well be said that he must be treated as one of the contracting parties to this loan.

Mr. Sushil Madhav Mullick, however, argued that Charu can never be liable in respect of this transaction, no matter how active an interest he took in the affairs of the firm after the death of his father. It is contended that during his lifetime Charu had no interest in the property as the family was governed by the Dayabhag School of Hindu Law. Accordingly it is urged that on his father's death Charu could not be personally liable for any debt contracted by the family firm before he acquired an interest in it. That argument in general may well be sound; but the position is different in the present case. As I have already pointed out, Charu took a very active interest in the affairs of this firm from the very outset, and he was advancing money and helping to finance the firm certainly as early as 1921. It appears to me upon the Judge's findings that the only inference that can be drawn from the facts is that Charu was a partner in this

business with his father Kedar and his brother Nirmal and his uncles Gangadas and Ashu. If he was a partner, and an actual partner in the business when this loan was taken, then clearly he was personally liable in respect of it. That personal liability would not cease on the death of his father Kedar and on his acquiring an interest in the family property. In my view, upon the facts of this case, Charu was personally liable for this loan throughout. He had taken an active part in the business from its commencement, and though he was not resident in Bhaga'pur, he still continued to take an active part after the death of Kedar. As I have stated, when creditors were finding difficulty in obtaining payment, letters were written by them to Charu, and in reply to those letters he clearly admits his active interest in the firm. If the facts are regarded from this point of view, the difficult questions of Hindu Law do not arise. This is not a case where Charu first became interested in the firm on his father's death. He was interested along with his father, and on the death of his father, he also acquired an interest in the family property. His personal liability remained, in my view, throughout, and that being so, the decree passed against Charu should have been not only a decree to the extent of his interest in the family property but should also have been a decree against him personally.

Sir Manmatha Nath Mukherji also contended that a personal decree should also have been passed against Bimal, defendant No. 4, and Jyotish, defendant No. 6. He, however, admits that there is no evidence that these two persons ever took an active part in the affairs of this firm, Bimal was the son of Kedar, and there is nothing to show that he took an active interest either during Kedar's lifetime or after his death. Similarly Jyotish who is the son of Gangadas, does not appear to have interested himself actively in the affairs of this firm either during his father's lifetime or after his death. The only possible evidence against these two persons are powers-of-attorney executed by them in favour of Nirmal giving the latter a right to execute a mortgage on their behalf. In my view, these two documents cannot possibly establish that either Bimal or Jyotish was ever actively interested in this firm, and in my judgment, the limited form of the decree passed against them must be sustained.

For the reasons which I have given, I am satisfied that a personal decree should also have been passed against Charu, but in other respects the decree of the Court below cannot be successfully assailed. I would, therefore, allow this appeal in part and direct that a personal decree also should be passed against Charu. As this appeal has partially succeeded and partially failed, I would make no order as to costs in this Court. The order for costs in the Court below will remain unaffected.

Manohar Lal, J.—I agree.

s. *Appeal partly allowed.*

ALLAHABAD HIGH COURT

Criminal Reference No. 476 of 1939

September 2nd, 1939

MULLA, J.

MURARI LAL AND ANOTHER—APPLICANTS
versus

EMPEROR—OPPOSITE PARTY

U. P. Prevention of Adulteration Act (VI of 1912), ss. 17, 18—Rules framed under s. 16, r. 8—Breach of—Servant or agent of licence-holder if can be charged for breach of r. 8—Offence committed by servant or agent, under s. 17—Master, if liable.

It is only the licence-holder who can be penalized under s. 17, U. P. Prevention of Adulteration Act, if he commits a breach of r. 8 framed under s. 16 of the Act. Any other person, whatever his relation to the licence-holder may be, cannot be rightfully charged with an offence under s. 17 for committing a breach of r. 8 for that rule does not cast any duty upon him.

In view of the fact that there is no specific provision either in the U. P. Prevention of Adulteration Act or in the rules framed under s. 16 making a master liable for any act done by his servant or agent, a master cannot be held liable for an offence committed by his servant or agent under s. 17.

Or. Ref. made by the Sessions Judge, Muzaffarnagar, dated May 20, 1939.

Messrs. A. P. Pandey and Jaganandan Lal, for the Applicants.

Mr. Nanak Chand, for the Opposite Party.
The Deputy Govt. Advocate, for the Crown.

Order.—This is a reference by the learned Sessions Judge of Muzaffarnagar, recommending that the conviction and sentence passed upon two persons Murari Lal and Meher Chand for having committed an offence under s. 17, U. P. Prevention of Adulteration Act (Act VI of 1912) should be set aside. The material facts of the case can briefly be stated as follows: Meher Chand is the *munim* and general manager of a firm styled Sarup Lal Mutsuddi Lal which carries on business at Muzaffarnagar. The firm is owned by Murari Lal

who has a son named Bul Chand who was also prosecuted for the same offence but was acquitted by the learned trying Magistrate. It appears that Meher Chand obtained a licence for selling ghee on behalf of the firm. It is not contested that the licence which he so obtained related to a shop No. 94 and had nothing to do with any other building or shop No. 93. On May 24, 1938, the Health Officer of the Muzaffarnagar Municipal Board visited shop No. 94 and asked Meher Chand to let him inspect shop No. 93 which he suspected was being used for storing ghee. Meher Chand said that he did not have the key of shop No. 93 and went away to inform his master Murari Lal. After some time Meher Chand returned with Bul Chand, the son of Murari Lal, who had a bunch of keys with him. Bul Chand told the Health Officer that shop No. 93 was not being used as a godown for storing ghee and the Health Officer had therefore no right to inspect it. Being thus denied access to shop No. 93, the Health Officer left the place and on May 27, 1938, a Sanitary Inspector named D. H. Jafri, who accompanied the Health Officer, made a written complaint to the Sub-Divisional Magistrate charging Bul Chand with an offence under s. 17, U. P. Prevention of Adulteration Act, for having committed a breach of r. 8 framed under s. 16 of the Act. Now s. 16 runs as follows:—

"The Local Govt. may by Notification prescribe that no person shall sell or offer or expose for sale or manufacture or store for sale any specific article of food or drug except under a licence containing such conditions and given by such authority as the Govt. may by the said Notification prescribe."

In the exercise of this power the Local Govt. has issued a Notification No. 912-XVI (P. H.)-332-1927. By this notification the Local Government has framed certain rules which are called, "Butter, Ghee and Fat Licencing Rules, 1930." Rule 8 of these rules runs as follows:—

"A licence-holder shall render all possible facilities for the inspection of his shops, godowns or any other place used for storage, manufacture or sale of articles for which he holds a licence and also for the taking of samples for analysis at all reasonable times to the Medical Officer of Health or to any other officer authorized by a local authority or Govt. for the purpose."

It has been stated above that Bul Chand was the only person charged under s. 17, U. P. Prevention of Adulteration Act in the complaint made by D. H. Jafri on May 27, 1938, but it appears that on July 2, 1938, the Health Officer of the Muzaffarnagar Municipal Board addressed a letter to the

Sub-Divisional Magistrate suggesting that Murari Lal and Meher Chand were equally guilty under s. 17 and praying that they should also be summoned to stand their trial for that offence. Acting upon this letter, the learned trying Magistrate summoned these two persons, with the result that they were tried jointly with Bul Chand. In the end, however, the learned trying Magistrate acquitted Bul Chand but found Murari Lal and Meher Chand guilty. Meher Chand and Murari Lal went up in revision to the learned Sessions Judge of Muzaffarnagar who has made this reference with the recommendation that their conviction and sentence should be set aside.

The point taken by the learned Judge as the sole basis for his recommendation is that in summoning Meher Chand and Murari Lal to stand their trial in consequence of the letter addressed by the Health Officer to him in the circumstances stated above, the learned trying Magistrate must be deemed to have taken cognizance of the offence so far as these two persons were concerned, under s. 190 (1) (c), Criminal P. O., and it was consequently incumbent upon him under s. 191, Criminal P. O. to inform the accused persons that they had a right to have the case transferred for trial to some other Court and there being nothing to show that this duty was really performed by the learned trying Magistrate, the trial must be held to be invalid. The question whether the letter written by the Health Officer to the Sub-Divisional Magistrate must be deemed to be 'information received from any person other than a Police Officer' and not merely a continuation of the complaint originally made to the Sub-Divisional Magistrate by D. H. Jafri is not quite free from doubt. If the former alternative is accepted, the learned Judge is obviously right in holding that the trying Magistrate took cognizance of the offence under s. 190 (1) (c), Criminal P. O. If the other alternative is correct, then that objection cannot validly be taken. I do not, however, propose to discuss this question at all because I find that the recommendation made by the learned Judge can be supported on another and a much stronger ground. The ground is a very simple one. The prosecution rests entirely upon the allegation that a breach of r. 8 framed under s. 16 of the Act was committed by Meher Chand. The evidence on the record also points to the same conclusion except that it also involves Bul Chand, the son of Murari Lal. Now r. 8 is concerned

only with a licence-holder and the question which arises for consideration is whether in the present case Meher Chand can be rightly described as the licence-holder within the meaning of r. 8. It is true that Meher Chand made the application for the licence but it was on behalf of the firm of Sarup Lal Mutsuddi Lal. He made the application only in his capacity as the servant of the firm. It is admitted that the proprietor of the firm is Murari Lal. The licence itself contains a description of the licensee, and from that description, it would appear that the licence had been given to the firm of Sarup Lal Mutsuddi Lal situate at No. 94, Sabzi Mandi. This description does not apply at all to Meher Chand. The fact that he was in the service of the firm as a *munim* or agent cannot, in my judgment, alter the legal position. Upon the fact mentioned above, the licence-holder could be nobody else than Murari Lal, the proprietor of the firm Sarup Lal Mutsuddi Lal to which licence had been issued. It is evident therefore that the breach of r. 8 upon which the prosecution rests was committed by Meher Chand and not by the licence-holder. Under the rule the duty of rendering all possible facilities for inspection has been laid specifically upon the licence-holder and nobody else. It is only the licence-holder who can be penalized under s. 17 of the Act, if he commits a breach of r. 8 framed under s. 16 of the Act. Any other person, whatever his relation to the licence-holder may be, cannot be rightfully charged with an offence under s. 17 of the Act for committing a breach of r. 8 for the simple reason that the rule in question does not cast any duty upon him.

The next question which arises for consideration is whether Murari Lal himself can be deemed to have failed to render all possible facilities for inspection within the meaning of r. 8 because his servant and *munim* Meher Chand acted as alleged and proved by the prosecution. In view of the fact that there is no specific provision either in the Act or in the rules framed under s. 16 making a matter liable for any act done by his servant or agent, I think the answer must be in the negative. Such specific provisions are to be found, e. g. in the Excise Act, and it is upon the basis of those provisions that a master is punishable for an excise offence even though the offence itself may have been committed by his clerk, servant or agent. It is not suggested by the prosecu-

tion in this case that Murari Lal himself was present at the shop and that he did anything to prevent the Health Officer from inspecting shop No. 93. In fact it was specifically pleaded by Murari Lal that he was away from Muzaffarnagar when incident in question took place and returned home some time in the evening. That evidence does not appear to have been believed by the learned trying Magistrate, but the point remains that there is no evidence on the side of the prosecution to rebut that case. In these circumstances I think Murari also could not be rightfully prosecuted under s. 17 of the Act. For these reasons I accept the reference made by the learned Sessions Judge and set aside the conviction and sentence passed upon Murari Lal and Meher Chand. The fine, if any, paid by them shall be refunded,

s.

Conviction set aside.

FEDERAL COURT

Appeal from the Lahore High Court
November 6, 1939

GWYER, C. J., SULAIMAN AND
VAKACHARIAR, J.J.

KISHORI LAL—APPELLANT

versus

GOVERNOR-IN-COUNCIL, PUNJAB

—RESPONDENT

Government of India Act, 1935 (25 & 26 Geo. V, Ch. 42), s. 205—Refusal of High Court to grant certificate—No appeal lies to Federal Court.

A certificate under s. 205, Govt. of India Act, 1935, is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate, it is not for the Federal Court to enquire into the reasons for the refusal, against which no appeal lies to the Federal Court. 180 Ind. Cas. 550 (1), referred to.

[Their Lordships warned the litigants and the legal profession that there will be no excuse in future for any ignorance of the law; and if the refusal of a High Court to grant a certificate is made hereafter, the ground of any further applications or appeals, the Federal Court shall regard them as frivolous and vexatious and an abuse of the process of the Court, and deal with them accordingly.]

The appellant in person.

Judgment.—The appellant in this case appears to have begun proceedings against the Governor-General-in-Council in 1937 claiming damages for breach of contract. His application for permission to sue *in forma pauperis* was rejected by the learned Subordinate Judge who held that the

plaint disclosed no cause of action. There were three applications for revision of that decision and all three were rejected by the High Court. The appellant then began new proceedings against a different party, namely, the Governor of the Punjab in Council, claiming damages for the alleged failure of the defendant to see that the law had been enforced, that being the way in which he put his case. In these second proceedings also there was an application for permission to sue *in forma pauperis* which came up before the learned Subordinate Judge in June of last year, and was dismissed, firstly, because the allegations in the plaint did not disclose any cause of action, and secondly, because the provisions of s. 20 of the Civil P. C. had not been complied with. The appellant applied to the High Court for the revision of this decision, but his application was dismissed. It appears from his formal claim for revision and from what he told us that he had sought to go into the facts and merits of his original action against the Governor-General-in-Council, but was not allowed to do so by the learned Judge of the High Court who rightly observed that it was not competent for him (the Judge) to revise the decision of the High Court in the previous case. The appellant seems to have misunderstood these observations of the learned Judge and to have thought, without justification, that he was being prevented from putting before the Court what he conceived to be his case.

The appellant then appealed to the Federal Court, and it was pointed out to him by the Officials of the Court that the Court could not entertain any appeal from a High Court unless the High Court had first given a certificate under s. 205 of the Constitution Act. On receiving that information, he returned to the High Court and asked for a certificate, which the High Court refused to grant, holding, we must assume, that the case did not involve any question as to the interpretation of the Constitution Act. These being the facts of the case, this Court has no jurisdiction to entertain the appeal.

A certificate under s. 205 is a necessary condition precedent to all appeals to this Court and if the High Court refuses to grant a certificate, it is not for us to enquire into the reasons for the refusal, against which no appeal lies to this Court. This was decided some months ago in

Lakhpatt Ram v. Behari Lal Misir, (1). The application must, therefore, be dismissed, but we desire to add this. We have heard this application at some length not only because the appellant was appearing before us in person, but also because litigants, and possibly lawyers also, may not yet be aware of the previous decision of this Court, to which we have just referred. There will be no excuse in future for any such ignorance of the law; and if the refusal of a High Court to grant a certificate is made hereafter the ground of any further applications or appeals, we shall regard them as frivolous and vexatious and an abuse of the process of the Court, and deal with them accordingly.

s.

Order accordingly.

(1) (1939) F C R 121; 180 Ind. Cas. 1550; 20 P L T 263; 5 B R 529; 1939 O L R 210; 11 R F C 44 (1); (1939) M W N 359; 49 L W 570; A I R 1939 F C 42 (F C).

RANGOON HIGH COURT

Special Second Civil Appeal No. 208
of 1938

January 27, 1939

BAGULEY, J.

AH LI—APPELLANT

versus

U SAN BAW—RESPONDENT

Basement—Right of water—Right to surplus water flowing from another's land through artificial channel, proof of—Riparian rights—Owner of upper holding—Use by, of water for irrigation—Rights of owner of lower holding.

For the plaintiff to prove that he is entitled to the surplus water flowing from the defendant's land to his own land through an artificial channel, he would have to prove that he was entitled to this water by some right of prescription. [p. 803, col. 1.]

The proprietor of an upper tenement who claims the right to dam up a stream and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below, can take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what should be allowed to descend. If the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose, it cannot be said that the amount that goes down is materially diminished. Diminished it may be, but not materially diminished, if the owner of the lower holding has enough for his needs. The owner of the lower holding is not entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared for the future. *Debi Pershad Singh v. Joy Nath Singh* (2), explained, dictum in 35 Ind. Cas. 356 (1), dissented from.

Sp. S. C. A. from the judgment of the Assistant District Court, Sandoway, in Civil Appeal No. 1 of 1938.

Mr. R. M. Sen, for the Appellant.

Mr. Tun Aung, for the Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff asks that the defendant be directed to remove a bund which he has placed across the bed of a stream. This is the main cause of contention. The plaint also refers to some other bund which the defendant is said to have made. There is, however, no mention of this second bund in the prayer and really I do not quite understand the position with regard to it. In view, however, of the fact that there is no mention of this second bund in the prayer, it is difficult to see what order could be passed with regard to it. Fortunately a proper survey of the plaintiff's land has been made by a *patta* surveyor in which the various points of interest are noted, and it is, I think, not difficult to see exactly what has happened. The stream runs roughly from north-east to south-west and the plaintiff's and defendant's holdings are on the south-east side of the stream. The stream passes the defendant's holding before it reaches the plaintiff's holding. At a point about half way down the defendant's holding, the bund complained of has been erected. The stream, I gather, is a permanent stream coming down from the hills but there is little or no appreciable water in it during the dry weather. The surveyor was called as a witness by the plaintiff. His evidence shows that the bund has been put across the river so as to block the water course entirely. Just above the bund, however, he has cut what I would describe as a by-pass; so, when the water banked up by the bund rises to a certain level, the surplus water flows down that by-pass and rejoins the bed of the main stream just below the highest point of the plaintiff's holding.

The second obstruction complained of by the plaintiff is somewhere about the middle of the boundary between the holdings of the two parties; but the map shows no regular stream there and the suggestion seems to be that spare water from the defendant's holding was at some time allowed to flow from there into the plaintiff's holding, but it is clearly not by any natural stream. For the water to get from point F—the point where the obstruction is said to have been—to the plaintiff's paddy land,

it would have to be conducted across a portion of the plaintiff's holding which is called a garden land. (It is the customary practice to classify all land that is too high or too uneven to be used for paddy cultivation as garden land.) It seems to me therefore that if there is a channel then it must be an artificial one and for the plaintiff to prove that he is entitled to the surplus water flowing from the defendant's land to his own land, he would have to prove that he was entitled to this water by some right of prescription and this he has not attempted to do. It looks to me as though perhaps at some time the defendant used to allow his surplus water to discharge into the plaintiff's land and that now he prefers to let it go in a different direction into the holding of Ma The The. This he would be entitled to do unless the plaintiff had become entitled to the use of this water by prescription. I return now to consideration of the bund which the plaintiff asks may be removed. The lower Appellate Court has quoted a dictum in *Kaw La v. Maung Ke* (1) in which it is said:

"In order to support an action by one riparian owner to restrain another from diverting the water beyond his riparian tenement, it is not necessary that the plaintiff should prove that he has suffered any damage."

This statement is made on the authority of a Privy Council case, *Debi Pershad Singh v. Joynath Singh* (2). I have referred to this ruling and nowhere in it can I find any passage which supports this statement. Referring to the proprietor of an upper tenement who claimed the right to dam up a stream and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below, it is said that his common law right is to take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what should be allowed to descend. It seems to me that if the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose, it cannot be said that the amount that goes down is materially diminished. Diminished it may be, but not materially diminished, if the owner of the lower holding has enough for his needs. The dictum that the owner of the lower holding is entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared for

the future cannot anywhere be found in the Privy Council ruling referred to. A decree may be passed on actual damage incurred or when the remedy sought is by way of an injunction, when damage can reasonably be feared in the future, but manifestly it is impossible for a man to prevent another one from irrigating his land merely in order that he may have the pleasure of seeing a large volume of water passing his holding. This being the case, it is, I think, necessary to see whether there it is true that the plaintiff has suffered, or is likely to suffer from the effect of this dam, taking into consideration the fact that in addition to the dam the defendant has dug a water-course to enable all the surplus water to rejoin the main channel of the river at a spot where it is available for the plaintiff. It must be remembered that when a permanent stream is dammed, it is impossible to block it up completely. As the water continues to come down, it will rise to the top of the bund and then go off in one direction or another. Even in big schemes for water-works, where water is drawn off in pipes for the use of a city, there must be some escape channel in case more water comes down than is necessary for the use of the city. Once the artificial lake or pond is filled, water will continue to pour in at one end, and unless it goes over the top of the bund, it must escape either into the defendant's holding (in which only a limited quantity of water can be used), or down the escape channel, and what goes down the escape channel is available for the use of the plaintiff and the owners of holdings below him.

Now, taking the *patta* surveyor, who may be regarded as an unbiased witness, and who was called by the plaintiff, he says that when he visited the plaintiff's paddy land, there was water in it and the plaintiff had already transplanted his paddy. His visit was some time about August. Ko Aye, the headman, also called by the plaintiff, says that Po Kin who holds the land next below the plaintiff was able to get water from the river. And he could only get the water which came through the escape channel, passed the plaintiff's land and reached his land. The other witnesses called by the plaintiff speak of there having been no water in the river after the bund was made. But it seems to me that they are speaking of the land immediately below the bund and above the point where the escape channel rejoins the old river bed. In this portion there can be no water unless the

(1) 8 L B R 556; 35 Ind. Cas. 356; A I R 1916 B 30.

(2) 21 C 865; 24 I A 60, 1 C W N 401 (P O)

water overflows the defendant's bunds because the plaintiff has put a bund in the old river bed also, at the point marked E, immediately above where the escape channel rejoins the river bed, and in the place between these two bunds, the plaintiff is now growing tobacco. The necessity for the bund at the lower point can only be the fact that were it not for this bund water coming through the escape channel might flow backwards of a distance up the old bed of the stream and this would interfere with the tobacco plantation. Po Kin, the cultivator of the land below the plaintiff's, is called as a witness for the defendant and he says that he gets water on his land not only from the river but also the overflow from the upper paddy land and there is evidence that in the middle of October when the case was tried, there was water in the plaintiff's fields. I cannot see that the plaintiff has made out a case that the supply of water to his paddy land is materially diminished. I think, therefore, that the trial Court was right in dismissing the suit. I allow the appeal, set aside the order of the lower Appellate Court directing that the bund be opened and restore that of the trial Court dismissing the suit. The respondent will bear the appellant's costs throughout.

D.

Appeal allowed.

FEDERAL COURT

Appeal from the Patna High Court

November 6, 1939

GWYER, O. J. SULAIMAN AND

VARADACHARIAR, J.J.

Rani BRIJ RAJ KUMARI

—APPELLANT

versus

SUBH KARAN DAS—RESPONDENT

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), ss. 13, 14—Act is retrospective—Federal Court has power in appeal to order matter to be disposed of under ss. 13 and 14—No formal application by judgment-debtor is necessary before obtaining relief under new Act.

The Bihar Money-lenders (Regulation of Transactions) Act, 1939, is retrospective and the Federal Court has power to make such an order on an appeal as the Court below could have made if the case had been heard by them at the date of the appeal, i. e., to order the matter to be disposed of under the provisions of ss. 13 and 14 of the new Act of 1939, the sections which have replaced ss. 16 and 17 of the earlier Act.

No formal application by the judgment-debtor to the Court is necessary before he could obtain relief under the provisions of the new Act, 182 Ind. Cas. 161 (1), followed and explained,

Sardar Raghubir Singh, for the Appellant instructed by Mr T. K. Prasad, Agent.

Judgment.—This appeal does not differ in essence from other appeals of the same kind which have been recently before this Court from Bihar. A mortgage decree had been obtained against the appellant's predecessor-in-title for a sum of nearly Rs. 1,50,000, and when execution proceedings were threatened, she sought the protection afforded by ss. 16 and 17 of the Bihar Money-lenders Act, 1938 (Act III of 1938). Her application was rejected by the lower Court and, on appeal, by the High Court, on the ground that by a previous decision of the High Court these provisions had been held to be void. Those provisions have now been repealed and re-enacted by the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (Act VII of 1939) and cannot now be challenged since the later Act was reserved for the consideration of the Governor-General and subsequently received his assent. This Court has already held in *Shyamkant Lal v. Rambhajan Singh* (1) that the Act is retrospective and that the Court has power to make such an order on an appeal as the Court below could have made if the case had been heard by them at the date of the appeal. This case is indistinguishable from the case cited and we, therefore, allow the appeal and remit the case to the High Court with a direction to discharge their order of January 30, 1939, and the order of the lower Court dated January 23, 1939, leaving the matter to be disposed of under the provisions of ss. 13 and 14 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (Act VII of 1939), the sections which have replaced ss. 16 and 17 of the earlier Act.

Our attention has been drawn to a slight ambiguity in the order passed in *Shyamkant Lal's case* (1) which might be thought to imply that a formal application by the judgment-debtor to the Court was necessary before he could obtain relief under the provisions of the new Act. We did not intend to imply anything of that kind; and we have modified our order in the present case in order to remove any possible misunderstanding.

There will be no order as to costs.

s. *Order accordingly*

(1) 1939 F. C. R. 193; 182 Ind. Cas. 161; A. I. 1939 F. C. 74; 1939 O. L. R. 399; 12 R. F. C. 1; 51 750; 20 P. L. T. 473; (1939) M. W. N. 674; 43 O. W. F. C. 68 (F. C.).

LAHORE HIGH COURT

Civil Revision No. 990 of 1938

February 20, 1939

TEK CHAND, J.

FIRM RULDU RAM-DAULAT RAM

THROUGH DAULAT RAM, PROPRIETOR—

PLAINTIFF—PETITIONER

versus

BASANT RAM—DEFENDANT—

RESPONDENT

Limitation Act (IX of 1908), Art. 85—Parties having dual contractual relationship and having reciprocal demands against each other in different capacities—Account containing items relating to all dealings, whether mutual, open and current—Shifting balance, if necessary.

Where between the parties there is a dual contractual relationship: (i) that of borrower and creditor, and (ii) that of principal and agent and in these dealings, the plaintiff as creditor has demands against the defendant, while the defendant as the principal has independent demands against the plaintiff as his agent, and the items relating to all the dealings are entered in one account, such an account is clearly a mutual, current and open account and under Art. 85, Lim. Act, a suit for recovery of the amount due on it may be brought within three years from the close of the year in which the last item admitted or proved is entered in the account. 59 Ind. Cas. 669 (1), 92 Ind. Cas. 674 (2) and 63 Ind. Cas. 950 (3), relied on.

[Case-law distinguished.]

An absence of a shifting balance is not decisive in case of mutual, open and current accounts, 59 Ind. Cas. 669 (1), relied on.

C. R. from the decree of the Sub-Judge, Jullundur, dated August 22, 1938.

Mr. Prem Nath Bhardwaj, for the Petitioner.

Mr. Roop Chand, for the Respondent.

Order.—The plaintiff firm Ruldu Ram-Daulat Ram through Daulat Ram of Phagwara, Kapurthala State, instituted a suit against Basanta Ram of Mauza Lidar Kalan, District Jullundur, for recovery of Rs. 285-2-3 alleged to be due on dealings between the parties, together with interest at 12 per cent. per annum in the Court of the Subordinate Judge, Fourth Class, Nawanshahr, District Jullundur. The defendant resisted the suit on various grounds. He pleaded that the suit was not maintainable in the name in which it was brought by the plaintiff, that it was barred by limitation, and that the amount claimed was not due and interest was not payable at the rate charged by the plaintiff. The trial Judge found against the defendant on all these points and after giving a small deduction on account of the price of gunny bags, granted the plaintiff a

decree for Rs. 274-13-9. On appeal before the Senior Subordinate Judge it was conceded by the defendant that the findings of the trial Judge on the merits were correct, but the technical pleas relating to the maintainability of the suit in the form in which it was brought and limitation were raised again. The learned Senior Subordinate Judge upheld both these contentions and dismissed the suit. Before me, Counsel for the defendant-respondent frankly admitted his inability to support the decision of the learned Judge on the first point. He conceded that in view of the fact that in the heading of the plaint it was expressly stated that firm Ruldu Ram-Daulat Ram is suing through Daulat Ram and in para (1) of the plaint it was clearly mentioned that Daulat Ram was the sole proprietor of the "firm", the suit must be taken to have been brought by Daulat Ram as the sole proprietor of the "firm" Ruldu Ram-Daulat Ram and was clearly maintainable, even though the "firm" had its place of business outside British jurisdiction."

On the second point, the question for determination is whether Art. 83 or Art. 85 is applicable. It is common ground, that if the former Article applies, the suit is barred, but if the case falls under Art. 85, it is within limitation. In holding that Art. 83 is applicable, the learned Senior Subordinate Judge appears to have entirely misconceived the correct nature of the dealings between the parties. It is clear from the plaint, the letter Ex. P-1, which was admittedly written by the defendant, and the other documents on the record that there existed two separate and independent contractual relationships between them. The defendant used to purchase from third parties at Ludhiana and other places grain in his own name and instead of himself paying the price to those persons he used to instruct them to send *hundis* to the plaintiff and also to send him the grain. The plaintiff retired the *hundis* and debited the defendant with the amount so paid. The plaintiff then stored the grain as the defendant's agent, and on instructions received from him, sold it and credited the price to the defendant and debited him with brokerage, commission and other incidental charges. It is thus clear that there was dual contractual relationship between them: (i) that of borrower and creditor, and (ii) that of principal and agent. In these dealings, the plaintiff as creditor had demands against the defendant, while the defendant as the principal had independent

demands against the plaintiff as his agent, and the items relating to all the dealings were entered in one account.

Such an account is clearly a mutual, current and open account and under Art. 85 a suit for recovery of the amount due on it may be brought within three years from the close of the year in which the last item admitted or proved is entered in the account. Various rulings were cited by Counsel for the parties, but it is not necessary to discuss them in detail, as each case proceeded on its own peculiar facts. Reference may, however, be made to *Ratan Chand Jwala Das v. Asa Singh Bhoga Singh* (1), *Firm Bihari Lal Jai Narayan v. Har Narain Das* (2) and *Madhav Motiram v. Jairam Sakham* (3) the facts of which were very similar to those of the present case and in which Art. 85 was held applicable. The learned Senior Subordinate Judge has relied upon several rulings but he has not considered that dealings in them were of a wholly different character. In *Manghi Ram v. Ram Saran Das Maman Chand* (4) the plaintiff had entered into *badni* transactions of purchase and sale of grain on behalf of the defendant and these transactions had resulted in losses to third parties; the plaintiff sued to recover the amount of these losses from the defendant and it was held that Art. 83 applied and not Art. 61, Art. 65 or Art. 115. In that case, as also in *Bhagwan Das-Giani Ram v. Mutsaddi Lal* (5), *Devi Sahai Ramji Das v. Tirath Ram*, 73 Ind. Cas. 143 (6), *Kirpa Ram-Lachhman Das v. Sawan Mal-Gopi Chand* (7), *Bhagat Ram-Anant Ram v. Harjas Mal-Mehr Chand* (8) and *Ganesh Das v. Narsingh Das*, 115 Ind. Cas. 717 (9) relied upon by the learned Judge, the transactions between the parties were of one type only and the relationship of principal and agent alone existed; consequently Art. 83 was held applicable. In *Kadri Pershad Chhedi Lal v. Har Bhagwan* (10) also,

the facts were different and the dispute was whether the case was governed by Art. 83 or Art. 120. No question of applicability of Art. 85 arose. In *Kahn Chand Dula Ram v. Firm Dayaram-Amrit Lal*, 115 Ind. Cas. 764 (11) the dealings were originally on a mutual, current and open account, but that account had been closed and a balance struck. A suit brought on this balance was held to be governed by Art. 65 and not Art. 85, the *terminus a quo* being the date of the balance and not the last deal of the year in the original account. It will be seen, that the facts in the case before us are quite different, and none of these decisions is of any assistance.

The learned Counsel for the respondent, while agreeing that there was a dual contractual relationship between the parties, urged that the account was nonetheless not a mutual, current and open account, as the balance was always against the defendant-respondent. But as pointed out in *Ratan Chand Jwala Das v. Asa Singh Bhoga Singh* (1) and *Dau Dayal v. Pearey Lal* (12) the absence of a shifting balance is not decisive: see also cases collected in Chitaley's Lim. Act. Vol. 2, p. 1362 *et seq.* There is no doubt that the present case is governed by Art. 85 and as the last item in the account is dated April 3, 1934, the suit, instituted on December 19, 1936, is clearly within time. On the merits, the defendant accepted the finding of the trial Court before the Senior Subordinate Judge and expressly abandoned the grounds relating thereto which had been raised in the memorandum of appeal. These points, therefore, cannot be agitated again. The learned Senior Subordinate Judge has entirely misconceived the case and his decision cannot be maintained. I accept the petition for revision, set aside the judgment and decree of the Senior Subordinate Judge and restore that of the Court of first instance with costs throughout.

D.

Petition accepted.

(1) A I R 1921 Lah. 369; 59 Ind. Cas. 669; 31 P L R 1921; 3 U P L R (L) 3; 26 P W R 1921.

(2) A I R 1926 Lah. 283; 92 Ind. Cas. 674.

(3) A I R 1921 Bom. 451; 63 Ind. Cas. 950; 23 Bom. L R 540.

(4) 73 P R 1915; 26 Ind. Cas. 415; A I R 1914 Lah. 407; 100 P L R 1915.

(5) 12 L 190; 128 Ind. Cas. 316; A I R 1931 Lah. 392; 31 P L R 666; Ind. Rul. (1931) Lah. 44.

(6) 73 Ind. Cas. 143; A I R 1923 Lah. 473.

(7) A I R 1927 Lah. 826; 106 Ind. Cas. 40; 29 P L R 61; 9 L L J 493.

(8) A I R 1924 Lah. 424; 112 Ind. Cas. 719.

(9) 115 Ind. Cas. 767; 30 P L R 35; Ind. Rul. (1929) Lah. 431.

(10) A I R 1921 Lah. 167; 66 Ind. Cas. 900; 3 L L J 65.

(11) 115 Ind. Cas. 764; A I R 1929 Lah. 263; 10 L 745; 30 P L R 240; Ind. Rul. (1929) Lah. 428.

(12) A I R 1928 Lah. 236; 108 Ind. Cas. 694; 50 A 645; 26 A L J 353.

BOMBAY HIGH COURT

Second Appeal No. 386 of 1936

February 28, 1939

LOKUR, J.

KRISHNA VITNAK MAHAR AND ANOTHER

—PLAINTIFFS NOS. 1 AND 2 AND ANOTHER

—DEFENDANT NO. 5—APPELLANTS

versus

SHANKAR KRISHNA GANDHI AND

OTHERS—DEFENDANTS NOS. 1 TO 4—

RESPONDENTS

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15-D—Suit for account of mortgage requiring setting aside of sale of equity of redemption, if maintainable.

Suit claiming merely an account of the mortgage which requires setting aside of the equity of redemption is not maintainable under s. 15-D, Dekkhan Agriculturists' Relief Act. 9 Ind. Cas. 393 (1), 36 Ind. Cas. 517 (2), 80 Ind. Cas. 763 (3), 92 Ind. Cas. 628 (4) and 113 Ind. Cas. 381 (5), relied on, 148 Ind. Cas. 1145 (6) and 146 Ind. Cas. 165 (7), distinguished.

S. A. from the decision of the District Judge, Ratnagiri, in Appeal No. 150 of 1934.

Messrs. B. R. Ambedkar and B. G. Modak, for the Appellants.

Mr. M. G. Chitale, for the Respondents.

Judgment.—The only question arising in this appeal is whether the plaintiffs' suit for an account of a mortgage under s. 15-D, Dekkhan Agriculturists' Relief Act, is maintainable. The plaintiffs' grandfather Yesnak and his three brothers mortgaged their joint family property for a period of twenty years on May 11, 1865, each of the four brothers having a one-fourth share in the property. The plaintiffs' grandfather Yesnak had three sons, Devnak, Vitnak and Ratannak. The plaintiffs and defendant No. 5, Jiva are the sons of Vitnak, and Gourya is the son of Ratannak. On July 2, 1901, Devnak, on his own behalf and as guardian of Gourya, passed a sale-deed in favour of the mortgagee, purporting to convey the one-fourth share of Yesnak in the equity of redemption. The plaintiffs and defendant No. 5 were then minors, but their names were not mentioned in the sale-deed (Ex. 47). The plaintiffs, therefore, brought this suit for an account of the mortgage so far as their one-twelfth share in the property mortgaged was concerned. The trial Court held that the suit was maintainable, and on taking an account, it declared that nothing was due under the suit mortgage. In appeal the learned District Judge following the principle laid down by the Privy

Council in *Bachi v. Bickchand* (1), held that such a suit which required the setting aside of the sale of the equity of redemption was not maintainable under s. 15-D, Dekkhan Agriculturists' Relief Act.

In *Bachi v. Bickchand* (1), their Lordships of the Privy Council observed that the Dekkhan Agriculturists Relief Act gave extraordinary reliefs, in certain cases specified under the Act, and that although a suit may in form be a suit for redemption if in reality it was a suit to recover property of which the rightful owner had been deprived by fraud, a suit under the Dekkhan Agriculturists' Relief Act was not maintainable. In that case a mortgage was executed by three persons named Saindino, Mitho and Sachedino, in favour of two of the respondents, viz., Bickchand and Dipchand, mortgaging 500 acres of land for a sum of Rs. 1,700. Subsequently one of the mortgagors Mitho and his brother Mirzan sold 122 acres out of the 500 acres to the mortgagees in satisfaction of the entire mortgage and thereby redeemed the remaining 378 acres of land. Bickchand and Dipchand had thus become the full owners of 122 acres of land and they sold them to one Kherajmal and gave them into his possession. Sachedino and Saindino, who had not joined Mitho in the sale-deed, having died, their heirs filed a suit against the original mortgagees and their transferor Kherajmal to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, alleging that they were not bound by the sale-deed of Mitho and his brother Mirzan. The Privy Council then held that the special relief under the Dekkhan Agriculturists' Relief Act could not be granted in a suit which, though not in form, was in reality a suit to set aside the alienation by two of the mortgagors. This ruling was followed in several cases: *Chandabhai v. Ganpati* (2), *Krishnaji v. Sadanand* (3), *Vishvanathbhai v. Mallappa* (4), and *Chandika Prasad v. Shivappa* (5). In the last case the suit was filed for the redemption of a mortgage under the special provisions of the Dekkhan Agriculturists' Relief Act, and although it was held on the principle laid down by the Privy Council

(1) 13 Bom. L R 56; 9 Ind. Cas. 393.

(2) 18 Bom. L R 763; 36 Ind. Cas. 517; A I R 1916 Bom. 199.

(3) 26 Bom. L R 341; 80 Ind. Cas. 763; A I R 1924 Bom. 417.

(4) 27 Bom. L R 1103; 92 Ind. Cas. 628; A I R 1925 Bom. 514; 49 B 821.

(5) 30 Bom. L R 1099; 113 Ind. Cas. 381; A I R 1928 Bom. 425.

in *Bachi v. Bickchand* (1), that it was not competent to the plaintiffs to resort to the special provisions of the Dekkhan Agriculturists' Relief Act, still the suit could be treated as one brought in the ordinary way for setting aside the sale by one of the mortgagors and for redeeming the mortgage if the sale be set aside. Such a relief cannot be granted in the present suit since no redemption is claimed but merely an account of the mortgage is asked for under provisions of s. 15-D, Dekkhan Agriculturists' Relief Act. Such accounts cannot be claimed in an ordinary suit, but they are a special privilege given to an agriculturist by the provisions of s. 15-D, Dekkhan Agriculturists' Relief Act, which enables an agriculturist to file a suit valuing his claim even at Rs 5 only. All the cases above referred to have been summarized by Shingne, J. in *Ganesh v. Rajaram* (6). In that case the mortgage was admitted, but it was alleged that the mortgage had been extinguished by adverse possession, and Shingne, J. held that it was permissible to bring a suit for redemption of the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, although in deciding it, the Court had to determine whether the plaintiff's share in the mortgaged property was lost by adverse possession or to determine the extent of his share. In coming to that conclusion, he distinguished the *ratio decidendi* adopted in the previous cases. He observed (p. 1130*) :

"In all these cases, excepting the last one, there were subsequent transfers of the mortgaged property—or rather of the equity of redemption. They were impediments in the way of redemption and unless they were got rid off, the way to redemption was not clear but was blocked."

In the present case also, the sale-deed executed by Devnak is an impediment in the way of redemption and unless that sale is got rid off, the way to redemption is not clear, but is blocked. This view was taken both in *Chandabhai v. Ganpati* (2), and *Krishnaji v. Sadanand* (3). In *Savant v. Bharmappa* (7), the learned Chief Justice held that an agriculturist mortgagor could sue for an account under s. 15-D, Dekkhan Agriculturists' Relief Act, although the suit might involve a preliminary inquiry whether the transaction in suit was a mortgage or a sale. In that case after the property

(6) 35 Bom. L R 1123; 148 Ind. Cas. 1145; A I R 1934 Bom. 32; 58 B 75; 6 R B 330.

(7) 35 Bom. L R 804; 146 Ind. Cas. 165; A I R 1933 Bom. 306; 6 R B 137.

*Page of 35 Bom. L R—[Ed.]

was mortgaged, the equity of redemption had not been extinguished, but the mortgage was evidenced by a sale-deed and the question was whether the transaction represented by that sale deed was really a mortgage or an absolute sale. If the transaction was held to be a mortgage, then there was no impediment in the way of its redemption. Thus the cases which the learned Chief Justice and Shingne, J. had to consider in the two rulings reported in *Ganesh v. Rajaram* (6), and *Savant v. Bharmappa* (7), stand on a different footing. The present case is more analogous to the other cases referred to by me where a suit for redemption under s. 15-D, Dekkhan Agriculturists' Relief Act, was held to be not maintainable. I therefore agree with the view taken by the learned District Judge and dismiss the appeal with costs.

s. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Execution Second Appeals Nos. 414
and 415 of 1938.

September 20, 1939

ALLSOP, J.

Bibi JANNATUN-NISSA BEGAM—
PLAINTIFF—DECREE-HOLDER—APPELLANT
versus

PARSHADI—JUDGMENT-DEBTOR—
RESPONDENT

*Agra Tenancy Act (III of 1928), ss. 3 (14), 249—
Second appeal, if lies from appellate order of Revenue
Court in execution proceedings—Civil Procedure Code
(Act V of 1908), s. 100.*

The provision of the Civil P. O., by which orders passed under s. 47 amount to decrees is not applicable to proceedings in the Revenue Courts under the Agra Ten. Act. No second appeal, therefore, lies against an appellate order passed in execution proceedings by a Revenue Court.

Ex. S. As. from the decision of the District Judge, Aligarh, dated December 16, 1937.

Mr. Shabd Saran, for the Appellant.

Mr. Shiv Charan Lal, for the Respondent.

Judgment.—This is a second appeal against an appellate order passed in execution proceedings by a Revenue Court. There is a preliminary objection that no appeal lies and I think this must be upheld. Under s. 264, Agra Ten. Act the provisions of the Civil P. O. apply only if they are not inconsistent with anything in the Act. Now the Act defines a decree in s. 3 (14) as any order which so far as the Revenue Court is concerned, finally disposes of a suit. It follows that the provision of

the Civil P. O. by which orders passed under s. 47 amount to decree is not applicable to proceedings in the Revenue Courts under the Agra Ten. Act. A special provision has been made in the Act under s. 248 for appeals from such orders, and it is to be noticed that these appeals are as against orders and not as against decrees. Now it is stated in s. 249 that no appeal shall lie from any order passed in appeal. The result is that no appeal lies in this case and the memorandum of appeal is rejected with costs. This judgment also governs the connected Second Appeal No. 415 of 1938. Leave to appeal under the Letters Patent is refused.

s.

Appeals rejected.

LAHORE HIGH COURT

First Appeal No. 226 of 1938

July 4, 1939

RAM LALL, J.

Mst. HASSAN BI—APPELLANT

versus

NEK ALAM—RESPONDENT

Guardians and Wards Act (VIII of 1890), s. 7—Guardian, appointment of—Considerations in—Question, if can be settled by compromise between rival claimants—Appointment of guardian for minor's property—Enquiry regarding minor's property should be made—Enquiry, nature of.

What the Court has to consider in appointing a guardian is the welfare of the minors on evidence produced before it and not to pass judgment in accordance with the terms of a compromise entered into between the persons contesting for guardianship. It is the duty of the Court to consider whether or not the compromise is in the interests of the minors. 112 Ind. Cas. 451 (1), *Mahadeo Prasad v. Biadashri Prasad* (2), 84 Ind. Cas. 613 (3), referred to.

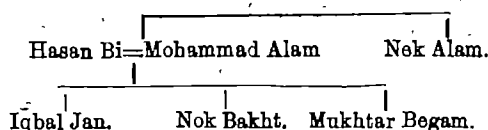
In an application for the guardianship of property of a minor, it must be shown that the minor has some separate property as without that there is no foundation for the application. It is true that an enquiry for the purposes of the Guardians and Wards Act is not meant to be a lengthy and elaborate enquiry, but there must be some basis for finding that there is some property at all. If the deceased father of the minor was governed by the Muhammadan Law, then the widow is entitled to her share and the balance would be the property of the minors of which a guardian could be appointed. If on the other hand this person was governed by the Customary Law, then his widow takes a widow's estate and during her lifetime the minors have no right in this property except for maintenance. No guardian of the minors can, in such circumstances, take possession of such property in the lifetime of the widow. [p. 810, col. 1]

Mr. Shamair Chand, for the Appellant.

Sayad Mohsin Shah, for the Respondent.

Judgment.—The following pedigree table will help in understanding the facts of

this case.



The paternal uncle of the three minor daughters of Mohammad Alam applied to be appointed guardian of their person and property and the application was opposed by their mother. In opposing this application the mother, Mst. Hassan Bi, filed a written statement on August 26, 1938, in which she stated: *Muzhira har tarah se apni jaidad wa babalighan ka achhi tarah se intizam kar sakti hai aur karti rahi hai* (I can and have been making adequate arrangements for the management of my property and of the minors). The implication of this statement appears to be that the property in the possession of Hassan Bi belongs to herself and that the minors have no property to all. The statement of one of the minors, Mst. Iqbal Jan, was recorded on October 14, 1938, to the effect that she preferred to stay with Hassan Bi and not with her paternal uncle. No further evidence was recorded and the parties entered into a compromise and the statements of Hassan Bi and Nek Alam were recorded. In accordance with the terms of this compromise, the Court appointed Nek Alam, guardian of the property of the minors and Hassan Bi as the guardian of the person of the minors, ordering that Nek Alam, as guardian of the property, should pay Rs 30 per mensem to the guardian of the person of the minors for their maintenance and further that he should file a security bond for Rs. 1,000 with two sureties. An appeal from the order of the Guardian Court has been preferred by Mst. Hassan Bi through Mr. Shamir Chand and is resisted by Sayad Mohsin Shah.

The main ground of attack is that the real point at issue in the case was not brought out or considered by the Court below and that the decision by way of compromise was illegal and *ulter vires*. It seems to me that there is considerable force in this objection. What the Court had to consider was the welfare of the minors on evidence produced before it and not to pass judgment in accordance with the terms of a compromise. It was the duty of the Court to consider whether or not the compromise was in the interests of the minors and there is nothing in the judgment of the Court below to indicate that this aspect, which is

after all the overriding consideration in such cases, was considered by the Court at all. It is clear law that the minor is entitled to the judgment of the Court on this crucial matter. In making an order in the terms of a compromise, the Court has virtually handed over its functions of judgment to the contesting parties. In *Ma Ngwe Nyun v. Ma Thwe* (1), it has been held that the selection of a guardian by arbitrators is illegal and that it is for the Court, and not the arbitrators, to be satisfied that it is for the welfare of a minor that a guardian should be appointed and if to be appointed who that person should be. The State is the guardian of all its minor subjects and the question of guardianship is not one of the private civil rights of any private person which he is by law allowed to submit to arbitration. See in this connection *Mahadeo Prasad v. Bindeshari Prasad* (2) and *Samid Chetty v. Adaikalam Chetty* (3). If such a matter could not be settled by arbitrators appointed by the contesting applicants for guardianship, it could no more be settled by an agreement by such persons. This appears to me to be a fatal objection to the procedure adopted by the learned Guardian Judge and therefore to the order under appeal.

Further, it appears to me that there is nothing on the record, other than an inference from the statement of Hassan Bi made at the time of the compromise, to show that the minors have any property at all of which a guardian should be appointed. The property in this case belonged to the deceased father of the minors. If this person was governed by the customary law, then Hassan Bi takes a widow's estate, and during her lifetime, the minors have no right in this property except for maintenance. No guardian of the minors can, in such circumstances, take possession of such property in the lifetime of Hassan Bi. If, on the other hand, the deceased father Mohammad Alam was governed by the Muhammadan Law then the widow is entitled to her share and the balance would be the property of the minors of which a guardian could be appointed. No enquiry, however summary, on the question whether the minors had any property and if so, what was made and Nek Alam has been appointed guardian of the property without

specifying what it is. In *Banamli Patra v. Arjun Sen* (4), it was held by a Division Bench that in an application for the guardianship of a minor governed by the Mitakshara Law, it must be shown that the minor has some separate property as without that there is no foundation for the application. It is true that an enquiry for the purposes of the Guardians and Wards Act is not meant to be a lengthy and elaborate enquiry but there must be some basis for finding that there is some property at all. As I have said, in this case either the minors have no property or only a share in the property of Mohammad Alam and at least in a summary way it should have been determined what that property was. If on such summary enquiry the Guardian Court had found that the parties were governed by custom, then obviously there was no occasion for the appointment of a guardian of the property. If, on the other hand, they were governed by the personal law then the guardian could only be appointed with respect to the share of the minors in the property of Mohammad Alam. From the order it appears that by compromise Nek Alam has been appointed guardian of the property of the minors assuming it to be the whole of the property left by Mohammad Alam. It appears to me, for the reasons stated above, that the Court has declined to exercise its proper functions and omitted to consider these crucial points in the case. I accordingly set aside the order passed by the learned Guardian Judge, Rawalpindi, and direct him to take such evidence as the parties wish to adduce and decide the application for guardianship in the light of the observations made above. The appeal is accordingly accepted but in view of the circumstances, I make no order as to the costs of this Court. The other costs will be costs in the case. Parties will appear before the Guardian Judge, Rawalpindi, on July 31, 1939.

D.

Appeal allowed.

(4) 36 C W N 769; 140 Ind. Cas. 198; A I R 1932 Cal. 730; 55 O L J 358; Ind. Rul. (1932) Cal. 688.

(1) 6 R 563; 112 Ind. Cas. 451; A I R 1929 Rang. 137.

(2) 30 A 137; 5 A L J 101; A W N 1908, 51.

(3) 7 M 459; 84 Ind. Cas. 613; A I R 1924 Mad. 484; 45 M L J 179; (1924) M W N 222; 34 M L T 15.

CALCUTTA HIGH COURT

Execution Case No. 74 of 1938

May 29, 1939

SBN. J.

Sreeman RAI KISSENJI—APPLICANT

versus

SRI KISSEN MACKAR—OPPOSITE PARTY

Calcutta High Court (Original Side) Rules, Chap. XXXVLI, r. 77—Sheriff's right to poundage, nature of—Attachment by him under precept issued under Civil Procedure Code (Act V of 1908), s. 46—Claim under decree satisfied on compromise—Sheriff, if entitled to poundage.

The Sheriff has no Common Law right to reward for executing a writ. The Sheriff is not engaged by the litigant to realize the decree. There is no privity between the Sheriff and the litigant. The latter applies to the Court for the enforcement of its own decree and it is the Court that employs the Sheriff as one of its officers to enforce its orders. If the Sheriff is to be remunerated for such services, it is a matter between the Court and the Sheriff with which the litigant has no direct concern. If the Court or the Legislature consider that the Sheriff should receive remuneration, it is for those authorities to make provision by rule or statute for such remuneration, and in doing so they may undoubtedly levy fees on the litigant. Such rule or statute being a taxing rule or statute must be strictly construed so as to guard against any enlargement of its scope to the detriment of the subject who, but for such rule or statute, would be under no liability to pay. 70 Ind. Cas. 488 (1), referred to. [p. 812, col. 1.]

There are two sets of circumstances under which the Sheriff can get poundage (a) where the Sheriff levies a sum in execution, and (b) where the claim in respect of which the Sheriff has taken steps to levy a sum in execution is satisfied, compromised or settled. The alternative portion of the rule is not independent of the first portion; the Sheriff is not entitled to poundage under the second portion of the rule unless he has taken steps under the first portion of the rule with a view to levying a sum in execution. An order issuing a precept is not an order directing execution and the attachment under a precept under s. 46, Civil P. C., is not an attachment in execution proceedings. The attachment under s. 46, Civil P. C., is merely a step taken to facilitate execution; it is not a step taken in the proceedings in execution. So where the Sheriff has attached certain property pursuant to a precept issued under s. 46, and the claim under the decree has been satisfied on compromise entered into after such attachment, the Sheriff is not entitled to poundage. 90 Ind. Cas. 527 (2), applied, 70 Ind. Cas. 488 (1), relied on.

Mr. S. N. Banerjee (Jr.), for the Applicant.

Mr. H. D. Bose, for the Opposite Party.

Order.—The only point for determination in this application is whether the Sheriff of Calcutta who attached certain property pursuant to a precept issued to this Court by a Court at Benares is entitled to poundage, the claim under the decree having been satisfied on a compromise entered into after such attachment. One Rai Kissenji brought a suit against the

petitioner in the Court of the Civil Judge at Benares and got a decree for over two lacs of rupees. Thereafter the decree-holder applied under s. 46, Civil P. C., to the Court at Benares for the issue of a precept to this Court for the attachment of certain property belonging to the petitioner at Calcutta. The precept was issued and under orders of this Court, the Sheriff attached the properties some time in January 1938. As an attachment under a precept lapses after the termination of two months' the period of attachment was extended from time to time. In the meantime the decree was transmitted to this Court for execution, but no application for execution was made in this Court. In December 1938, while the attachment was still subsisting, the decree-holder and the judgment-debtor entered into a compromise whereby *inter alia* the judgment-debtor agreed to pay the decree-holder the sum of Rs. 1,05,000 in full settlement of the decretal dues by March 1, 1939. The judgment debtor also agreed to pay to the decree-holder all costs incurred by the decree-holder from and after December 19, 1938. The sum agreed upon as liquidating the decretal dues was paid within the stipulated time and a sum of Rs. 3,000 has been deposited in payment towards costs with the solicitor of the decree-holder. On March 20, 1939, the attachment ceased to exist as no further application was made to extend the period of the attachment. The Sheriff, however, refuses to release the property on the ground that his poundage has not been paid. The petitioner has therefore applied for an order for the release of the attachment upon payment of only the actual costs incurred by the Sheriff without poundage.

The contention of the Sheriff is that as the compromise has been effected and the amount under the compromise has been realized as a result of or at any rate under pressure of the attachment levied by him, he is entitled to a poundage under the rules of this Court. On behalf of the petitioner the contention broadly put is that as the attachment has not been effected in execution proceedings, it cannot be said that the amount has been realized as a result of any action by the Sheriff in execution and that therefore the Sheriff is not entitled to poundage. Learned Counsel on behalf of the petitioner states that his client is perfectly willing to pay the Sheriff his poundage if it is held that the Sheriff is entitled to the same and that he is not

going to contend that the Sheriff should realize his poundage from anybody else or by any other proceedings or that the amount of poundage claimed is incorrect. The only question for decision therefore is whether in the circumstances related above the Sheriff is at law entitled to poundage. The nature of the right of the Sheriff to poundage has been elaborately discussed in *A. D. Pickford v. Janaki Nath Roy* (1). The Sheriff has no common law right to reward for executing a writ. The Sheriff is not engaged by the litigant to realize the decree. There is no privity between the Sheriff and the litigant. The latter applies to the Court for the enforcement of its own decree and it is the Court that employs the Sheriff as one of its officers to enforce its orders. If the Sheriff is to be remunerated for such services, it is a matter between the Court and the Sheriff with which the litigant has no direct concern. If the Court or the Legislature consider that the Sheriff should receive remuneration, it is for those authorities to make provision by rule or statute for such remuneration, and in doing so, they may undoubtedly levy fees on the litigant. Such rule or statute being a taxing rule or statute, must be strictly construed so as to guard against any enlargement of its scope to the detriment of the subject who but for such rule or statute would be under no liability to pay. So far as this Court is concerned, poundage is a charge authorized by Items Nos. 22 and 23 of r. 77 of Chap XXXVI, of the rules of this Court. We are concerned in this case with Item No. 22 which is as follows:

"The fees allowed to the Sheriff and his officers shall be as follows: Poundage on sums levied by the Sheriff in execution or in the event of the claim being satisfied, compromised or settled, upon the amount of such satisfaction, composition or settlement for the first Rs 1,000 at 5 per cent and for the next at 2½ per cent."

It will be noticed that there are two parts to the rule, one part deals with the case where a sum is levied by the Sheriff in execution of a decree and the other with the case where the parties settle the claim. The Sheriff is said to levy a sum when he realizes it by converting the property seized by him into money or when he receives the sum from the judgment-debtor who wishes to avoid or lift the attachment. We are not concerned with the first part of the rule as no sum has been levied by the Sheriff. We are concerned with the alternative portion

of the rule, viz., when the claim has been settled. This portion of the rule has been explained, if I may say so with respect, very clearly by Rankin, J. in the case mentioned above. In explaining the words "the claim" he says that they do not mean "any and every claim which one party may have against the other but the particular claim which was the subject-matter of execution. In other words, the claim must be one in respect of which the Sheriff took steps in execution under the first part of the rule. In this view he held that where subsequent to an attachment before judgment the parties compromised the claim, the Sheriff was not entitled to poundage inasmuch as the attachment before judgment was not an attachment for the purpose of levying a sum in execution but an attachment made merely for the purpose of preserving the property *in medio* pending the decision of the suit and inasmuch as the claim settled was not one in respect of which execution had been levied.

Thus there are two sets of circumstances under which the Sheriff can get poundage (a) where the Sheriff levies a sum in execution, and (b) where the claim in respect of which the Sheriff has taken steps to levy a sum in execution is satisfied, compromised or settled. It is clear that the alternative portion of the rule is not independent of the first portion: the Sheriff is not entitled to poundage under the second portion of the rule unless he has taken steps under the first portion of the rule with a view to levying a sum in execution. Now in this case what has been done by the Sheriff? Has he taken any steps to levy a sum in execution? In my opinion he has not. The attachment is one under s. 46, Civil P. O. Under that section upon application by the decree-holder in proper circumstances, the Court, which passed the decree, will issue a precept to another Court to attach certain property belonging to the judgment-debtor pending orders for execution of the decree. The attachment is made not for the purpose of converting the property attached into money for the realization of the decree but for the purpose of keeping the property of the judgment-debtor *in medio* until the decree can be executed. It is similar to an attachment before judgment in this sense. It is not an attachment in execution but an attachment before execution.

After there is an attachment pursuant to a precept under s. 46, Civil P. O. fur-

(1) 26 O W N 673; 70 Ind. Cas. 488; A I R 1921 Cal. 763.

ther steps have to be taken before the decree can be executed. First there must be an application under s. 39 of the Code to the Court which passed the decree for transmission of the decree to the Court which is to execute the decree. Then there must be an application for execution of the decree to the Court to which the decree has been transferred and the application must be in tabular form as provided in O. XXI, r. 11, Civil P. O. when the executing Court is not the High Court. If the Court to which the decree has been transferred is the High Court, then the application for execution must be in Form I of the rules of this Court and must contain in addition to the particulars mentioned in O. XXI, r. 11, certain other particulars (*vide* Chap. XVII, r. 10 of the Original Side Rules). It is thus clear that after an attachment under a precept there must be an application for execution in the proper form and it is only upon such application that execution can issue. The order issuing a precept is, therefore, not an order directing execution and the attachment under a precept is not an attachment in execution proceedings. In *Kasiswar De v. Aswini Kumar Pal* (2) it was held that an application for an attachment under s. 46, Civil P. O. cannot be regarded as an application for execution. This was a case regarding rateable distribution but the principle underlying this view applies.

In the present case, although the decree has been transferred to this Court, there has as yet been no application for execution. Learned Counsel for the Sheriff draws my attention to the fact that s. 46, Civil P. O. is to be found in a portion of the Code entitled "Execution" and he argues that the attachment is really an attachment in execution. In my opinion the fact that the attachment has been made in accordance with the provisions of a section appearing in a portion of the Code entitled: "Execution," does not make the attachment an attachment in execution. This portion of the Code deals with matters leading up to execution as well as with matters regarding execution itself. The attachment under s. 46, Civil P. O. is merely a step taken to facilitate execution; it is not a step taken in the proceedings in execution. As stated before, the Sheriff's right to poundage is a right granted by the provisions of r. 77 of Chap. XXXVI, of the Rules of the Original Side of this Court; in my view, that rule

(2) A I R 1926 Cal. 249; 90 Ind. Cas. 527

comes into operation only when the Sheriff has taken steps to levy sums in execution of a decree. I have held that no such steps have been taken in the present case. The Sheriff is, therefore, not entitled to any poundage. The result is that the application must be allowed with costs.

D.

Application allowed.

BOMBAY HIGH COURT

Civil Revision Application No. 471 of 1937

December 7, 1938

WASSOODBW, J.

AJAM IBRAM MODAN—PLAINTIFF—
APPLICANT

versus

BAI HAVA BIBI AND ANOTHER—DEFENDANTS
Nos. 1 AND 3—OPONENTS

Bombay Civil Courts Act (XIV of 1869), s. 23 (5) —Powers of transfer under—Jurisdiction—Objection to—Waiver—Civil Procedure Code (Act V of 1908), O. XX, r. 13, s 115—Order reversing preliminary decree on ground of want of jurisdiction—Setting aside of—Proper form of remedy.

The powers of transfer conferred by s. 23 (5), Bom. Civil Courts Act, on the Court are controlled by the provisions of s. 24, Civil P. O. and are necessarily limited to administrative orders allocating business. Hence, the order of transfer purporting to have been made under cl. (5) of s. 23, Bom. Civil Courts Act, after another Subordinate Judge has taken cognizance of the suit, is incompetent, 158 Ind. Cas. 382 (1), relied on. [p. 814, col. 2.]

Where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party, who has invoked or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings. [p. 815, col. 2.]

Where therefore, the defect in the jurisdiction of the Court arises due to the irregularity in the commencement of the proceedings before the transferee Court and the parties lead evidence concurring in the Court's assumption of jurisdiction under a wrong order of transfer, the concurrence of the parties amounts to consent and their conduct is tantamount to a waiver of objection to jurisdiction. They cannot, therefore, subsequently object to jurisdiction. *Ledgard v. Bull* (3), relied on, 158 Ind. Cas. 382 (1), distinguished.

[Case-law referred to.]

The more appropriate form of remedy to set aside an order reversing a preliminary decree on the ground that it was passed without jurisdiction, is by a civil revision application. 156 Ind. Cas. 662 (2), relied on.

C. R. Ap. from an order of the District Judge, Surat, in Appeal No. 49 of 1936.

Mr. M. R. Vidyarthi, for the Applicant.

Mr. I. I. Chundrigar, for Opponents
Nos. 1 and 2.

Judgment.—This is an appeal from the order of the District Judge of Surat revers-

ing the preliminary decree passed by the Extra Joint Second Class Subordinate Judge of Surat in a suit for administration and accounts on the ground that the decree was passed without jurisdiction. The appellant is the plaintiff in whose favour the decree was passed in the trial Court. The suit was originally instituted in the Court of the First Class Subordinate Judge of Surat. There was a Joint First Class Subordinate Judge attached to that Court, and the suit upon its registration was transferred to his Court on February 3, 1930. The Joint First Class Subordinate Judge framed issues on August 11, 1932, and ordered a commission to issue for the examination of certain witnesses on March 9, 1933. At that stage the First Class Subordinate Judge withdrew the suit, and transferred it to the Court of the Extra Joint Second Class Subordinate Judge, who ultimately decided it three years thereafter on July 8, 1933, after considering the voluminous evidence recorded in the case. In first appeal from that decision, the learned District Judge relying upon *Shankarji Samalji Dhobi v. Vrajlal Bapalal Patil* (1), thought that the order of transfer made by the First Class Subordinate Judge was without jurisdiction, as the Court from which the suit was withdrawn had already taken cognizance of the case. Accordingly, he held that the decree passed by the Extra Joint Second Class Subordinate Judge was a nullity, and quashed it, and ordered a re-trial by the Joint First Class Subordinate Judge from the stage at which it was sent to the Second Class Subordinate Judge's Court. The plaintiff filed a second appeal against that order, and, under instructions of the office, that appeal was described as an appeal from order. As an extra precaution the plaintiff also filed a civil revisional application which is No. 471 of 1937. Therefore, the question as to the form, which the application to set aside the order of the District Judge should take, becomes academic, although, in my opinion, in view of the decision in *Motibhai Jesinghbhai Patil v. Ranchhodbhai Shambhubhai Patil* (2), the more appropriate remedy will be by a civil revisional application. I have, therefore, treated the appeal as a civil revisional application. The transfer of the suit was made apparently in accordance with the practice prevailing in the *mofusil*

in the matter of allocating business to particular Judges attached to the Subordinate Judge's Courts. That practice which has been referred to in *Shankarji Samalji Dhobi v. Vrajlal Bapalal Patil* (1), seems still to continue. It is presumably based upon the provisions of s. 23, Bom. Civil Courts Act of 1869. Clause (5) of that section provides that :

"A Subordinate Judge.... appointed or deputed to assist in the Court of another Subordinate Judge shall dispose of such civil business within the limits of his pecuniary jurisdiction as may, subject to the control of the District Judge, be referred to him by the Judge of such Court."

Undoubtedly, the Judge of the Court in question was a First Class Subordinate Judge, and the jurisdiction was clearly assumed under the supposed powers of transfer conferred on him by cl. (5) of s. 23. If, as has been held in *Shankarji Samalji Dhobi v. Vrajlal Bapalal Patil* (1), those powers are controlled by the provisions of s. 24, Civil P. C., and are necessarily limited to administrative orders allocating business, then, undoubtedly, the order of transfer purporting to have been made under cl. (5) of s. 23, Bombay Civil Courts Act, after another Subordinate Judge had taken cognizance of the suit, was incompetent. On the other hand, if the phrase "shall dispose of such civil business as may be referred to him" confers a wider jurisdiction, then the District Judge's order under appeal is clearly wrong. I shall, however, assume that *Shankarji Samalji Dhobi v. Vrajlal Bapalal Patil* (1), is correctly decided. The question then is, whether in the circumstances of this case the principle of waiver of objection to jurisdiction can be invoked. Fundamentally speaking, a judgment of a Court without jurisdiction, would be a nullity. Halsbury (see Halsbury's Laws of England, Edn. 2, Vol. VIII, pp. 531-532, paras. 1176 and 1178) explains what jurisdiction of Courts means, and states the general rule that consent cannot give jurisdiction and that the plea of want of jurisdiction cannot usually be waived. He says:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision."

In *Shankarji Samalji Dhobi v. Vrajlal Bapalal Patil* (1), the suit which was wrongly transferred had not been decided finally and the question as to waiver of objection did not arise and was not considered. But Courts have drawn a distinction between want of jurisdiction as described by Halsbury and irregularity in

(1) 37 Bom. L.R. 255; 158 Ind. Cas. 332; 59 B 466; A I-R 1935 Bom. 286; 8 R B 123.

(2) 37 Bom. L.R. 241; 156 Ind. Cas. 663; A I-R 1935 Bom. 222; 8 R B 17; 59 B 430.

the assumption and exercise of jurisdiction. The case in *Ledgard v. Bull* (3) decided by the Privy Council, is a leading case on the subject. That was a suit for damages and injunction for infringement of a patent. Under the Indian Patents and Designs Act such a suit could only be brought in a District Court, but it was brought in the Court of a Subordinate Judge who had no jurisdiction to entertain it. The suit was eventually transferred from the Subordinate Judge's Court to the District Judge's Court and there heard and decided. It was contended on behalf of the defendant that an order for transfer of a suit from one Court to another under s. 24, Civil P. O., could not be made unless the suit had been brought in a Court having jurisdiction. Their Lordships observed that, although jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by his own conduct from objecting to the irregularities in the institution of the suit, unless the Judge has no inherent jurisdiction over the subject-matter of the suit. This is what they say (p. 145*) :

"... there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which if objected to at the time, would have led to the dismissal of the suit."

Ultimately on the question as to whether a proper inference of waiver could be drawn, they held that the defendant had not waived the objection and that therefore the decree of the District Judge could not stand. That principle was affirmed in *Meenakshi Naidoo v. Subramanya Sastri* (4). Mookerjee, J. in *Gurdeo Singh v. Chandrika Singh* (5), drew a distinction between total incompetency and mere irregularity in the exercise and assumption of jurisdiction. There are other cases such as *Ex parte Prett* (6), and *Ex parte May* (7), which reiterate the same principle that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party, who has invoked or allowed

the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings. Those cases are cases where the parties had themselves invoked the jurisdiction in an improper way. But it seems to me that the principle would be common to cases where in the preliminary stage in invoking jurisdiction the Court itself has proceeded in a wrong way without the invitation of the parties and where the latter have neglected to question the irregularity; or, in other words, the defect in jurisdiction arises merely by reason of the irregularity in the commencement of the proceedings before the transferee Court: see *Kishen Lal v. Jai Lal* (8).

Here it cannot be doubted that the First Class Subordinate Judge, in whose Court this suit was originally instituted, was perfectly competent to entertain and try the suit. It cannot also be denied that the Extra Joint Second Class Subordinate Judge had the necessary jurisdiction over the subject-matter of the suit. Consequently, the principle recognized by the Privy Council in *Ledgard v. Bull* (3), would apply if a proper inference of waiver can be drawn from the circumstances. It seems to me clear upon the facts of this case that both the parties led evidence concurring in the Court's assumption of jurisdiction under a wrong order of transfer. A large body of evidence was led, as I have said, directly before the Court and considerable expense has been incurred in examining witnesses on commission. The fruit of that effort and expense would be completely lost if the concurrence, which amounts to consent, is not given its legitimate effect in mitigating the consequences of the erroneous order. It seems to me that the conduct of the respondents is tantamount to a waiver of objection of jurisdiction and that *Shankarji Samalji Dhobi v. Vrajilal Bapalal Patil* (1) which was relied upon for setting aside the decree by the District Judge is clearly distinguishable. Accordingly, I set aside the order of the District Judge, and remand this case to his Court for disposal according to law on the evidence recorded in the suit before the Extra Joint Second Class Subordinate Judge. Consequently, I make the Rule absolute with costs in the civil revisional application, and the appeal from order which shall be treated as part of the former application.

D.

Rule made absolute.

(8) 1 L. 158; 52 Ind. Cas. 352; A I R 1919 Lah. 27; 95 P. L. R. 1919.

(3) 13 I. A. 134; 9 A. 191; 4 Sar. 741 (P. O.).
 (4) 14 I. A. 160; 11 M. 26; 5 Sar. 54 (P. O.).
 (5) 38 C. 193; 1 Ind. Cas. 913; 5 O. L. J. 611.
 (6) (1884) 12 Q. B. D. 334; 53 L. J. Ch. 613; 50 L. T. 294; 1 Morrell 27.
 (7) (1884) 12 Q. B. D. 497; 53 L. J. Q. B. 571; 50 L. T. 744; 32 W. R. 839; 1 Morrell 50.

*Page of 13 I. A.—[Ed.]

PATNA HIGH COURT

Appeal from Appellate Decree No. 994 of 1938

December 5, 1939

FAZL ALI AND MEREDITH, JJ.

RAJA SINGH AND OTHERS—DEFENDANTS—
APPELLANTS

versus

CHAICHOO SINGH—PLAINTIFF

—RESPONDENT

Fraud—Inference of from circumstances—Criterion—Second appeal—Inference drawn from circumstances—Finding involves legal question—Deed—Execution of, by illiterate person upon misrepresentation of its nature—Void or voidable—Limitation—Document void ab initio—Suit to set it aside—No question of limitation arises.

Where fraud is to be inferred from the circumstances, and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility except that of fraud. In other words, the criterion is similar to that which is applicable to circumstantial evidence in criminal cases. [p. 818, col. 1.]

Though a Court of second appeal is not competent to question the soundness of a finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may, therefore, be questioned by a Court of second appeal. *Ram Gopal v. Shamskhaton* (1), followed. [ibid.]

Where there is no direct evidence of alleged fraud and only an inference is drawn from circumstantial evidence, then the finding involves the legal question as to whether the circumstances are such that the necessary inference can legally be derived. [ibid.]

Obiter.—Where an old and illiterate person has executed a document upon a representation that it was lease, while in fact it was gift deed, there was a misrepresentation as to the nature of the document and not merely as to its contents and there was no real execution and the document is void *ab initio* and not merely voidable. *Foster v. Mackinnon* (4), *Howatson v. Webb* (5) and 80 Ind. Cas. 67 (6), referred to. [p. 819, col. 1.]

Obiter.—Where a document is wholly void *ab initio*, it is not necessary to get it cancelled or set aside and therefore question of limitation for a suit does not arise. [ibid.]

A. from a decision of the Subordinate Judge at Patna, dated September 20, 1938.

Dr. D. N. Mitter and Messrs. B. N. Mitter and Ajit Kumar Mitra, for the Appellants.

Messrs. S. M. Mullick and K. N. Lal, for the Respondent.

Meredith, J.—This is an appeal by the defendants from a decision of Babu Anjani Kumar Sahay, Subordinate Judge at Patna, dated September 20, 1938, setting aside a decision of Babu Bhagwan Prasad, Munsif at Patna, dated August 31, 1937.

The suit was originally instituted by one Titai Singh, as a pauper, for recovery of

possession of certain properties, and for mesne profits, on a declaration that a deed of gift, said to have been executed by him on June 18, 1931 in respect thereof, was fraudulent and null and void. The suit was instituted on August 3, 1935. Titai Singh died on September 2, 1936, and an agnate of his, the present respondent, Chaichoo Singh, was substituted as plaintiff in his place on October 12, 1936. The substituted plaintiff paid full court-fees on the subject-matter of the suit. The suit was not heard, or evidence recorded, until 1937. Hence Titai Singh could not be examined as a witness.

The alleged facts upon which the action was brought, were that some ten years before the suit Titai Singh employed the defendant No. 1 to look after his cultivation and his affairs generally, as he had become too old to manage them himself. After some time the defendant No. 1 asked Titai to grant him a lease of his *raiya* lands in order that he might have an incentive to look after Titai's affairs with greater zeal and care. Titai agreed, and in October, 1928, purchased a stamp paper for the purpose and put his thumb mark thereon. In June, 1931, the defendant No. 1 asked Titai to get the lease registered, whereupon Titai came to Patna, where the defendant No. 1 fraudulently induced Titai to execute a deed of gift in his favour under the impression that he was executing a lease. Shortly afterwards, the defendant No. 1 left Titai uncared for, and went away with all the papers. The defendants Nos. 2 and 3 thereupon, finding Titai helpless, dispossessed him from the suit land, representing themselves to be purchasers from the defendant No. 1 as a donee of Titai. Titai thereupon got inquiries made and learnt of the fraud that had been practised upon him. Hence the plaintiff's suit for a declaration that the deed of gift was void and that the defendants had acquired no title to the lands.

The defence was that there was no fraud in execution of the deed of gift, that it was validly executed and was acted upon that the defendant No. 1 having acquired a good title thereunder made a *bona fide* sale of $4\frac{1}{2}$ *bighas* of the land and the house to the defendant No. 2 for a sum of Rs. 1,400 and 1 *bigha* odd to the defendant No. 3 for a sum of Rs. 200 by registered sale deeds. The defendant No. 2 subsequently sold a portion of the land purchased by him by a registered sale

deed to the defendant No. 5. It was alleged that Chaichoo Singh and some others had wanted to purchase the properties themselves, and so had induced Titai Singh, who did not like the idea that the defendant No. 1 should sell away the properties in his lifetime, to file this false suit.

The learned Munsif found that there was no satisfactory evidence to substantiate the case of fraud. Fraud could only be established by cogent and convincing evidence, but no such evidence was produced. On the contrary, the scribe was examined, and stated that he had read over and explained the deed of gift to Titai Singh, who had instructed him to write it out. An attesting witness and one Ramdeo Singh, who purported to have signed the deed of gift for Titai, who was illiterate, gave evidence to the same effect. In this view he dismissed the suit with costs.

The learned Subordinate Judge conceded that there was no direct evidence of fraud but was of opinion that fraud could be inferred from the circumstances on the record. He enumerated these circumstances as follows :

(1) that Titai Singh was old and illiterate ; (2) that the stamp-vendor was not examined ; (3) that the deed contained a false recital that the defendant No. 1 was Titai's grandson whereas there was actually no evidence at all of any relationship ; (4) that Titai was falsely described as being a resident of Chiraura, defendant No. 1's village, whereas actually he was a resident of village Hulaschak, (5) that the defendant No. 1's name was not mutated in the landlords *sarishda*; and (6) that the attesting witnesses were all of Chiraura and none of Hulaschak. In this view he held that the plaintiff was entitled to a decree for possession and mesne profits, and hence allowed the appeal and decreed the suit with costs.

The points taken in appeal are :

First, that there was no evidence in the case on which a finding of fraudulent misrepresentation could legally be based. Secondly, that, even if executed upon a fraudulent misrepresentation as to the contents, the deed is not void *ab initio* but merely voidable, and a suit to set it aside must be brought within three years of the date of knowledge ; it being found that the present plaintiff knew from the time of its execution that it was a deed of gift, a suit to set it aside was barred by limitation at the time the present suit was instituted. Thirdly, that there has been no

proper trial of the question of the *bona fides* of the purchase of the other defendants from the defendant No. 1.

I am of opinion that the appeal must succeed upon the first point. I have enumerated the materials from which the lower Appellate Court infers fraud. It is necessary to specify clearly what this inference involves. In this case the fraud alleged is a misrepresentation to Titai that he was executing a lease whereas, in fact the document he was executing was a deed of gift. The fraud, if any, therefore consisted in a direct misrepresentation of fact. Of this there was no direct evidence, no one came forward to prove any misrepresentation, and Titai himself was dead. The only direct evidence in the case was the evidence of the scribe and the attesting witness that the document was read over to Titai and that he executed it knowing it to be a deed of gift. A finding of fraud could, therefore, be based only upon an examination of the circumstances ; and it is obvious that upon none of the circumstances specified could any direct inference of misrepresentation be based. The finding of misrepresentation, if arrived at all, could only be from a consideration of the circumstances as a whole. Some of these circumstances were largely explained away ; for example, the recital that the defendant No. 1 was Titai's grandson, might have referred only to village or courtesy relationship, and as regards the question of residence, Titai in the document was actually described as a resident of Hulaschak, but it was mentioned that at that time he was residing in Chiraura, and it was not disproved that Titai had gone to reside in Chiraura as alleged, though that might have been upon the execution of the deed of gift and not prior to it. That circumstance would largely remove the justification for suspicion in the fact that the attesting witnesses were of Chiraura, not Hulaschak. Again, the fact that Titai was old and illiterate, would justify the inference that he could be defrauded, but not that he was in fact defrauded. As for the fact that defendant No. 1's name was not mutated in the landlord's office, that was largely offset by the fact that canal *parchas* and *chaukidari* receipts were filed in his name. These, however, are circumstances which are, strictly speaking, irrelevant in second appeal ; and the only question is whether upon the learned Subordinate Judge's valuation of these circumstances, fraud

was an inference which could legally be made. Now, it is well-settled that where fraud is to be inferred from the circumstances, and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility. In other words, the criterion is similar to that which is applicable to circumstantial evidence in criminal cases.

The learned Subordinate Judge has not applied this criterion to the circumstantial evidence. He has not proceeded on any finding of fact that the circumstances enumerated by him exclude every reasonable possibility other than that Titai was induced to execute the document upon a fraudulent misrepresentation with regard to its nature (and indeed he could hardly have done so); but he has proceeded rather upon a wrong legal view of the nature of the circumstantial evidence from which fraud can be inferred.

In these circumstances, the finding is based upon a legal error and can be interfered with in second appeal, the case being of the nature of *Ram Gopal v. Shamskhaton* (1) where their Lordships of the Privy Council laid down that though a Court of second appeal is not competent to question the soundness of a finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may, therefore, be questioned by a Court of second appeal. The legal error of the lower Appellate Court in the present case is with regard to the criterion applicable where fraud is attempted to be proved not by direct but by circumstantial evidence. This criterion as I have said, is that the circumstances must exclude every reasonable possibility except that of fraud. Where there is direct evidence, the matter is otherwise that the finding of fraud may be a pure finding of fact, as has been laid down in *Satgur Prasad v. Har Narain Das* (2). But where there is no direct evidence and only an inference, then the finding involves the legal question as to whether the circumstances are such that the necessary inference can legally be derived.

In the present case, I am of opinion that it cannot be. There is no evidence in the case upon which a finding of fraud could legally be based.

As the appeal must succeed upon the first ground, the other questions argued do not really need determination. I may state, however, that upon these points I would not be prepared to accept the contentions of the learned Advocate for the appellants. If Titai executed the document under the impression that it was a lease, when in fact it was a deed of gift, then I think there was no real execution since Titai's mind would have been directed to one thing whereas what he put his hand to was something of an altogether different character. The executant's mind was not with his hand. If there was no real execution, the document was wholly void and not merely voidable. That is what was laid down in *Sarat Chandra Gupta v. Kanai Lal Chakrabarti* (3) the ruling relied upon by the learned Subordinate Judge. This ruling appears to me strictly applicable to the case. Therein it was held that where the plaintiff had prayed for a declaration that a deed or gift was void and inoperative since the donor signed it believing, owing to a fraudulent misrepresentation, that it was only a power of attorney, the three years' limitation provided by Arts. 95 and 91 of the Lim. Act had no application, since the principle laid down in *Foster v. Mackinnon* (4) that the alleged deed was no deed, was applicable, and the deed being void *ab initio*, did not require to be set aside or cancelled. Richardson, J. in that case observed that the Courts draw a distinction between void and voidable instruments, and held that Art. 91 did not apply to instruments which were void *ab initio* so as not to require setting aside, as would be the case when the plaintiff raises and establishes the plea known to English lawyer as *non est factum*.

The learned Advocate for the appellants argued on the basis of *Howatson v. Webb* (5) that *Foster v. Mackinnon* (4) was no longer good law. But, in fact, what the later rulings really lay down is that a misrepresentation as to the contents of a document will make it voidable, and only a misrepresentation as to its character will make its execution absolutely void.

(3) 26 O W N 479; 70 Ind. Cas. 525; A I R 1921 Ca 786.

(4) (1869) 4 O P 704; 38 L J O P 310; 20 L T 887; 17 W R 1105.

(5) (1907) 1 Ch. D 537; 76 L J Ch. 346.

(1) 20 O 93; 19 I A 228; 17 Ind. Jur. 38; 6 Sar. 247 (P C).

(2) A I R 1932 P O 89; 136 Ind. Cas. 108; 9 O W N 196; Ind. Rul. (1932) P O 60; 38 O W N 461; 63 M L J 451; (1932) A L J 297; (1932) M W N 502; 55 O L J 255; 35 L W 667; 34 Bom. L R 771; 59 I A 147; 7 Luck. 64 (P O).

And, moreover, this principle seems to have been based to some extent upon the assumption that where a man is able to read the document before executing it but omits to do so, he cannot afterwards in view of his own negligence be heard to say that he was induced to execute the document by a fraudulent misrepresentation. It has, I think, never been laid down that the principle of *Foster v. Mackinnon* (4) is not still applicable where the person executing the document is blind or illiterate. The law on the subject has been clearly and concisely laid down in *Jem Singh v. Bhagwat Singh* (6) from which would like to quote the following passage:

"Whether the statement of law in *Foster v. Mackinnon* (4) would be wholly supported to-day is a matter of some doubt. A distinction has been drawn in the more modern cases between misrepresentation as to the character of a document and misrepresentation as to the contents of a document, and it seems to be the modern view that when there is a misrepresentation as to the contents of a document, but not as to the character of the document, the plea of *non est factum* is not available to the party deceived unless—and this is very important—he is blind or illiterate. So far as I understand the more modern decision in *Houtson v. Webb* (5) the rule does not apply to a man who can read but who forbears to read the document".

In the present case the finding is that Pitai was a very old man and illiterate. Hence, in my opinion, if he signed the document upon a misrepresentation as to its contents, there will be no real execution, the plea of *non est factum* will succeed, and the document will be void *ab initio*. But, apart from that, it seems to me that a representation that a document was a lease when it was in fact a deed of gift, would be a misrepresentation as to the nature of the document and not merely as to its contents. Obviously, the line of distinction might sometimes be a fine line. I can conceive cases where it might be very difficult to say whether the document signed and the document fraudulently represented actually differed in nature or merely in contents; but I feel no doubt that as between a lease and a deed of gift, there is a difference of nature and not merely a difference of content.

Where the document is wholly void *ab initio*, any prayer to set it aside is unnecessary and redundant. That is enough to dispose of the questions of limitation and *bona fides*. The suit could not be barred by limitation, and the defendants Nos. 2 & 5 could acquire no title, however *bona*

fide their purchase from the defendant No. 1 might have been.

As, however, the appellants have succeeded upon the first point, I would allow the appeal and dismiss the suit. Having regard to the circumstances of the case, we direct that the parties shall bear their own costs throughout.

Fazi Ali, J.—I agree.

S

Appeal dismissed.

RANGOON HIGH COURT

Full Bench

Civil Miscellaneous Application No. 70 of 1938

March 20, 1939

ROBERTS, O. J., BAGULEY AND SHARPE, JJ.

ISMAIL PIPERDI—APPLICANT

versus

MOMIN BI BI AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLV, r. 7—Time for furnishing security beyond that prescribed by O. XLV, r. 7, if can be extended—Privy Council Rules—R. 9.

Under r. 9 of the Privy Council Rules, the High Court has power for cogent reasons to extend the time for furnishing security beyond that which would be allowed by O. XLV, r. 7, if it were real alone. 98 Ind. Cas. 417 (1), *Overruled*, 101 Ind. Cas. 555 (3) and 177 Ind. Cas. 188 (1), *relied on*, 143 Ind. Cas. 559 (2), *dissented from*.

O. Misc. App. arising out of First Appeal No. 154 of 1937.

Mr. Foucar, for the Applicant.

Mr. Clark, for the Respondents.

Roberts, C. J.—This is an application by Ismail Ahmad Piperdi who has been granted a certificate of appeal to His Majesty in Council for further time in which to furnish security for the costs of his appeal. It is conceded that the time given by O. XLV, r. 7, expired six weeks from the date of the granting of the certificate, namely on January 18, on which date the application was filed; but the applicant says that O. LII, r. 66, operate in his favour and that the Court can extend the time in pursuance of the power given to us to make such other order in the premises as the justice of the case requires. Alternatively he says that the Court has such power by virtue of r. 9 of the Order in Council notified in the *Gazette of India* on April 24, 1920, which is ordered to be observed by all Courts in India and which still applies to Burma by reason of the provisions of s. 84, Govt. of Burma Act, 1935. In *J. N. Surty v. T. S.*

Chettyar Firm (1) at p. 288 a Bench of this Court considered that by reason of the provisions of O XLV, r. 7, which came into operation of January 1, 1921, the period of six weeks from the date of the grant of the certificate cannot be extended by the exercise of any discretionary power. Neither O LII, r. 66 nor r. 9 of the Privy Council rules was referred to and the correctness of this decision has been doubted by Page, O. J. delivering the judgment of a Bench in an unreported case, *Daw Byaw v. Maung Kyaw*, Civil Misc. Appl. No. 109 of 1930.

In *Bahadur Lal v. Judges of the High Court, Allahabad* (2) it was held by a majority that the provisions of r. 9 of the Privy Council rules could not override the provisions of O XLV, r. 7. The latter rule was held to be the expression of a particular intention by the Legislature and as an exception to the general intention contained in r. 9. Niamatullah, J., however, considered that it did not follow that if the security were not furnished, the Court was bound to cancel the certificate but might pass any order *ex debito justitiae*. It appears that this view has the assent of the Bombay High Court in *Nilkanth Balwant Natu v. Shri Satchidanand Vidya Narsinha Bharati* (3) and also of the High Court of Madras in *Mathukumallu Rammayya v. Vippalapatti Lakshmayya* (4) at p. 1017.

It could not be denied that this Court has powers enabling it to make any rules regulating its own procedure, and that such rules may annul, alter or add to any or all of the rules in Sch. I. The provisions of s. 122 of the Code are clear on this point. However it has been ingeniously contended that O. LII, r. 66, the provisions of which are substantially the same as those of r. 9 of the Privy Council rules, does not go so far as to do this and must be read consistently with O. XLV, r. 7, so that the discretion of the Court as regards time is limited. It is also urged that once the certificate has been granted, the Court is *functus officio*; that it has no more procedure left to regulate as regards the appeal to His Majesty in Council; so that O. LII, r. 66 does not regulate the procedure of

(1) 4 R 265 at p. 288; 98 Ind. Cas. 417; A I R 1927 Rang. 20; 5 Burr. L J 187.

(2) 55 A 452; 143 Ind. Cas. 559; A I R 1933 All. 241; (1933) A L J 207; Ind. Rul. (1933) All. 290 (F B).

(3) 51 B 430; 101 Ind. Cas. 555; A I R 1927 Bom. 217; 29 Bom. L R 352 (F B).

(4) I L R (1938) Mad. 1007 at p. 1017; 177 Ind. Cas. 188; A I R 1938 Mad. 796; (1938) M W N 678; 48 L W 35; (1938) 2 M L J 128; 11 R M 276 (F B).

this Court at all. Then it is said that the Order in Council from which O. LII, r. 66, derives its source is a mere delegation of powers by the Judicial Committee. In this view, the certificate may be cancelled and orders consequential upon the cancellation may be made, but no more may be done. But the Court is not bound to cancel the certificate. This clearly appears from the terms of r. 9 itself. If it does not do so, the certificate remains in force and some order must be made having regard to the failure to furnish security. It cannot be supposed that the Court was to be left powerless to do anything except to cancel the certificate or in a proper case to refuse to cancel it. If there is a refusal to cancel the certificate, some consequential order may well be necessary. In *Mathukumalli Rammayya v. Vuppalapathi Lakshmayya* (4). Leach O. J. pointed out that by s. 112 Civil P. O., if there is any conflict between the Code and the Privy Council rules, the latter must prevail. This case appears to me to be a further authority in support of the view that the High Court has power for cogent reasons to extend the time for furnishing security beyond that which would be allowed by O. XLV, r. 7, if it were read alone.

In the present case I think there are cogent reasons for permitting the security which has already been paid into the office of the legal advisers of the applicant to be furnished forthwith. We are told that the applicant is only 19 years of age and he therefore needed advice as to how best to prosecute the appeal he desired to make. He says he was helped by his uncle to make arrangements furnishing the necessary security and it was arranged with one Abdul Aziz (whom he describes as his grandfather but who, it is now stated was his great-uncle) to raise a loan upon security of the deposit of title deeds of the latter's immovable properties. The lender wished to come to Rangoon and deposit the money personally in Court so as to assure himself that the reason given for the advance was genuine. Accordingly he was to visit Rangoon on January 17; there was on the date a disturbed state of affairs in many parts of Burma including Rangoon and the lender failed to arrive. On January 18, applicant filed an affidavit asking for time and on January 20, Abdul Aziz died. The money was deposited with the applicant's Advocates on February 10, and on February 11, he filed a further affidavit setting out the circumstances. In our

opinion it is desirable that the security furnished should be paid into Court and that the appeal should proceed forthwith.

Baguley, J.—I agree.

Sharpe, J.—Subject to the question as to whether we have power to extend beyond January 18 last, the time fixed by this Court's order of December 7, 1938, for giving security for costs and making a deposit for printing copies of the records in this appeal to His Majesty in Council, I agree that there are in this case reasons for granting a short extension of time, which reasons may, to my mind, be not improperly described as cogent ones. The question of our power to grant such an extension is not, however, entirely free from difficulty. I desire to base my answer to that question entirely upon r. 9 of the Order in Council dated April 17, 1920. To base my answer to that question on r. 66, O. LII, Civil P. C., which is an Order added to that Code by this High Court under the provisions of s. 122 of that Code, would involve further careful consideration on my part as to whether this High Court had power to make such a rule under that section, for, as at present advised, I feel considerable doubt as to whether this Court had such power. It is, however, unnecessary, in my judgment for me to pursue that line of inquiry, for the material words of r. 9 of the Order in Council are identical with those of r. 66 of O. LII. I therefore confine myself to a consideration of r. 9 of the Order in Council. The question which we have to decide is precisely the same as that which was before a Full Bench of the Madras High Court last year. In the case of *Mathukumalli Rammayya v. Vuppalapatti Lakshmayya* (4), the Madras High Court has not, seemingly, added to the Code of Civil Procedure any rules corresponding to our O. LII. In that Madras case Leach, J. J said, at p. 1017*:

"The question is reduced to this: Does r. 9 of the Privy Council Rules give a discretion to the Court to extend the time?"

I myself at one time thought that the proper construction of r. 9 of the Order in Council required that the words "make such further or other order in the premises as, in the opinion of the Court the justice of the case requires," should be read with the words "may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit," a construction which was

urged before, but ultimately rejected by the Madras High Court. Despite the not inconsiderable body of judicial opinion which has accepted the above construction, I have come to the conclusion that the view which I at first took is not the correct one. To my mind the word "may," when it first appears in r. 9, between the word "Court" and the words "on its own motion," is the key to the construction of the whole rule; had there been the word "shall" there instead of "may," I think that there would be considerable difficulty in not giving r. 9 the construction which was rejected by the Madras High Court and urged before us by Mr. Clark. But, as it is "may" and not "shall," the decision of the Madras High Court was, if I may respectfully say so, a correct one, and we must now give a similar decision. As my Lord the Chief Justice has pointed out in his judgment, this view has had the assent of the Bombay High Court for about 12 years, and, as he pointed out during the course of the argument before us, it is more likely than not that, were that an erroneous view to take, there would by now be a reported decision of their Lordships of the Privy Council expressing disapproval of the view taken by the Bombay High Court. For these reasons, I agree that we should in the present case extend, in the way suggested by my Lord the Chief Justice, the time already fixed for giving security and making the necessary deposit in connection with the appeal to His Majesty in Council.

D.

Order accordingly.

PRIVY COUNCIL

Appeal from the Bombay High Court

November 14, 1939

LORD THANKERTON, LORD ROMER AND SIR

GEORGE RANKIN

THE COMMISSIONER OF INCOME-TAX,
BOMBAY PRESIDENCY, SIND AND
BALUCHISTAN—APPELLANT

versus

THE AHMEDABAD ADVANCE MILLS,
LTD—RESPONDENTS

Income Tax Act (XI of 1922), s. 4 (2)—Assessee receiving interest on Government Bonds in England—This sum expended in England in purchasing machinery for use of assessee's business and sent to India—Whether income received or brought into British India.

What the Income Tax Act charges with tax is income and nothing but income, whether that income accrues or arises or is received in British India or is deemed so to arise or accrue or be received by reason of being brought into British India. But it

*Page of I. L. R. (1938) Mad.—[Ed.]

income arising or accruing without British India is spent or otherwise so dealt with that it ceases to be income instead of being brought into British India, it is not chargeable under the Act merely because the thing upon which it has been expended or into which it has been turned, is subsequently brought there. [p. 822, col. 2]

Assesseees were the owners of certain sterling bonds of the Govt. of India, the interest on which was payable in England. The assesseees received such interest in England and this sum was expended by their agent in the purchase in England on behalf of the assesseees of certain mill stores and machinery which were then sent to the assesseees in British India and there used by them for the purposes of their own mills. The Income-tax officer included this amount in the income of the assesseees as being income brought into British India:

Held, that the things brought into India could, in no sense, be described as income brought into British India within meaning of s. 4 (2) and as only income could be taxed under the Act, the sum so received and expended could not be taxed.

Messrs. J. Millard Tucker, K. C. and H. Hull, for the Appellant.

Mr. R. P. Hills, for the Respondents.

Lord Romer.—The respondents, who carry on the business of cotton spinners and weavers in British India, are the owners of certain sterling bonds of the Govt. of India, the interest on which is payable in England.

In the year ending March 31, 1936, interest on such bonds was paid in sterling in England to certain agents of the respondents, the amount of such interest expressed in rupees being Rs. 18,333. This sum was expended by such agents in the purchase in England on behalf of the respondents of certain mill stores and machinery which were then sent to the respondents in British India and there used by them for the purposes of their business.

In these circumstances the Income-tax Officer in assessing the respondents to income-tax for the year of assessment 1936-37 included in their income for the year 1935-36 the sum of Rs. 18,333 as being income "brought into British India" within the meaning of s. 4 (2) of Indian Income Tax Act, 1922.

It will be convenient at this stage to set out s. 3 of the Act and the material portions of s. 4 as these sections stood in the year of assessment.

"Section 3.—Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of all income profits and gains of the previous year of every individual Hindu

undivided family, company, firm and other association of individuals."

Section 4 (1).—Save as hereinafter provided, this Act shall apply to all income, profits, or gains, as described or comprised in s. 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(3) Income, profits and gains accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year."

The respondents in due course appealed to the Assistant Commissioner against the assessment in respect of the Rs. 18,333, but he dismissed the appeal and confirmed the assessment.

The respondents then applied to the Commissioner of Income-tax, Bombay Presidency, to refer a question of law with respect to their liability to be assessed to income-tax in respect of the amount in question to the High Court under s. 66 (2) of the Act. The Commissioner accordingly made a reference of the following question:—

"Whether in the circumstances of the case the Income-tax Officer has rightly included in the income liable to tax, the amount of Rs. 18,333 on account of interest on sterling securities on the ground that though the said income accrued or arose in England, it was received or brought into British India within the meaning of s. 4 (2) of the Act."

In making the reference the Commissioner, as required by the Act, expressed his own opinion upon the question referred. His opinion was that the answer to the question should be in the affirmative.

The reference* in due course came before the High Court before Beaumont, C. J. and Blackwell, J. and on September 27, 1937, the Court gave judgment answering this question that had been referred to them in the negative.

In so doing the High Court was, in their Lordships' opinion, plainly right. What the Act charges with tax is income and nothing but income, whether that income accrues or arises or is received in British India or is deemed so to arise or accrue or be received by reason of being brought into British India. But if income arising or accruing without British India is spent or otherwise so dealt with that it ceases to be income instead of being brought into British India, it is not, in their Lordships' judgment, chargeable under the Act merely because the thing upon which it has been expended or into

*Reported as 174 Ind. Cas. 658—[Ed.]

which it has been turned is subsequently brought there. It is not necessary, of course, in order to attract tax that income received abroad should be brought into India in the exact form in which it has been received. As was said by Beaumont, C. J. in his judgment in the present case:

"Foreign income may be received in sterling or francs or dollars and may be brought into India in the form of rupees or income received abroad may be remitted to India by means of a banker's draft. To use Lord Brampton's phrase in *Gresham Life Assurance Society, Ltd. v. Bishop* (1), the income may be received 'in specie or in any form known to the commercial world for the transmission of money from one country or place to another.'"

Much to the same effect was said by Lord Lindley in the same case.

"A sum of money" [he said] "may be received in more ways than one, e. g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money although no money may pass."

Other examples can readily be imagined. Beaumont, C. J. indeed suggested the case of an assessee, who was desirous of bringing into British India foreign income for use there as income, purchasing bonds with the foreign income, bringing the bonds to India, and then selling them and applying the proceeds as income. It is possible that such a case might occur, although it would give rise to the question among others whether the sum to be brought into tax in India should be the sum expended on the bonds in the foreign country or the proceeds of the bonds received in India. That question can be dealt with when it arises. It does not arise here. It is not and cannot be suggested in the present case that the mill stores and machinery were purchased in England and shipped out to India as a method of bringing over the sterling interest that had been received in this country. No one in his senses would think of employing such a method of transmitting money. But apart from the inherent improbability of the thing, it is found as a fact by the Commissioner that the mill stores and machinery were required by the respondents for their business in India and it is not suggested that they will be sold or will be employed otherwise than in and for the purposes of the respondents' mills.

It is, however, contended on the part of the appellant that the use to which the stores and machinery are put in India is

immaterial. They were bought, says the appellant, with the sterling equivalent of Rs. 18,333 and whatever their value, whatever the intention with which they were bought, whatever the purpose to which they are now being put, their arrival in India resulted in Rs. 18,333 foreign income being brought into British India.

Their Lordships are not prepared to accept so extravagant a contention. To show how extravagant it is, many illustrations might be given. It will be sufficient to take one suggested by Mr. Hills in the course of his argument before their Lordships. A resident in British India when on a visit to this country receives here the sum of £500 sterling as interest on British Govt Stock. He expends it here in replenishing his wardrobe and in purchasing a motor car. At the end of two years he returns to British India taking with him the garments and the motor car. The garments have been worn for two years and the car in that time may have been driven 40,000 miles or more. Yet if the appellant is right, the person in question will, on his return to India, be deemed to have brought back with him the £500 interest that he received in this country. The truth of the matter is that in such a case he does not bring back into India a penny of the £500. He has spent it all in England. If upon his return to India the question were put to him, "How much have you left of the £500?" his answer would be "none," and the answer would be a true one whether addressed to a casual enquirer or to the Income-tax Officer. What he has taken back to India are some much worn clothes and a car much depreciated in value. But these things can in no sense be described as income; and it is only income that can be taxed under the Indian Income Tax Act.

For these reasons their Lordships are of opinion and will humbly advise His Majesty that this appeal should be dismissed. The respondents' costs of the appeal must be paid by the appellant.

s.

Appeal dismissed.

Solicitor for the Appellant:—*The Solicitor, India Office.*

Solicitor for the Respondents:—*Messrs, Lattey & Dawe.*

MADRAS HIGH COURT**Full Bench**

Criminal Revision Cases Nos. 245, 246, 298 and 340 and Petition Nos. 226, 227, 276 and 316 of 1939

September 19, 1939

LEACH, C. J., KRISHNASWAMI AYYANGAR AND
PATANJALI SASTRI, JJ.

In re MUTHUSWAMI CHETTIAR

AND OTHERS—PETITIONERS

Criminal Procedure Code (Act V of 1898), ss. 107, 112—Notice under s. 107, if must relate to breach of peace or wrongful act in contemplation at time when information is given to Magistrate.

Action taken under s. 112, Criminal P. O., constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. While that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, the Code does not require the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case. 47 Ind. Cas. 72 (8), relied on. [p. 826, col. 2.]

[Case-law discussed.]

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of s. 112, but before doing so, it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under s. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. [p. 827, col. 2.]

Cr. R. Cases and Ps. to revise an order of the Sub-Divisional Magistrate, Pollachi, dated February 22, 1939.

Order of Reference to a Full Bench

Patanjali Sastri, J. — These criminal revision cases raise an important question as to the construction and scope of s. 107, Criminal P. O. On the one hand, it is argued for the petitioners that the information and the evidence on which a Magistrate can act under this section must relate to a breach of the peace or wrongful act in contemplation at the time when such information is given to the Magistrate, and that any wider construction of the provision might have the effect of turning the section into a weapon of oppression in the hands of the magistracy. On the other hand, it is contended by the learned Public Prosecutor that such a restriction of the scope of the

section would impair its practical usefulness as a provision authorizing preventive or precautionary proceedings being instituted against persons who, in the opinion of the local Magistrates, are likely to disturb public tranquillity, and it is therefore urged that a wider construction should be placed upon it. The language of the provision is by no means free from ambiguity and there is considerable divergence of judicial opinion on the point: see, for example, *High Court Proceedings No. 1952, dated August 29, 1916* (1), *Maruthapali Goundar v. Empevor* (2) and *Raja Run Bahadur Singh v. Rani Tileasuree Koer* (3), relied upon for the petitioners; and *Kumarappa Chettiar v. Emperor* (4) and the decision of Lakshmana Rao, J. in Criminal Revision Case No. 105 of 1939 (not yet reported), relied upon by the Public Prosecutor. Having regard to the general importance of the question raised and the conflict of decisions referred to above, I think it is desirable that there should be an authoritative ruling on the point by a Division Bench or Full Bench and I therefore direct this case to be placed before my Lord the Chief Justice for necessary orders as to posting.

Messrs. K. S. Jayarama Iyer, N. Shanker Bhat, G. Gopalaswami, S. R. Subramaniam and N. Somasundaram, for the Petitioners.

The Public Prosecutor, for the Crown.

Order of the Full Bench

Leach, C. J. — In the village of Negamam in the Coimbatore District, there are two factions and there is strong enmity between them. Their enmity dates back to the Legislative Assembly elections held in 1934, if not earlier. At the present time the factions are opposing one another with regard to the management of an institution known as the Lakshmi Vilas and Dravyasagaya Nidhi, Ltd., and the management of a temple known as the Kannikaparameswari temple. On September 23, 1938, the Sub-Divisional Magistrate of Pollachi served notice on twelve persons under s. 112, Criminal P. O., calling upon them to show cause why they should not be ordered to execute security bonds under s. 107. Ac-

(1) (1876) 2 Weir 49.

(2) (1937) M W N 48; 169 Ind. Cas. 97; A I R 1937 Mad. 356; 38 Cr. L J 699; 9 R M 685; 45 L W 308.

(3) 22 W R 79 Cr.

(4) (1937) M W N 1072; (1938) M W N 212; 174 Ind. Cas. 248; A I R 1938 Mad. 213; 39 Cr. L J 416; 47 L W 323; 10 R M 684.

cording to an affidavit of the petitioner in Cr. R. O. No. 245 of 1939 filed in the present proceedings, rioting had taken place on that day. The accusations against these twelve persons, who have been referred to as the counter-petitioners, are set out in para. 3 of the petitioner's affidavit which reads as follows :

"The counter-petitioners Nos. 1 to 12 noted in col. 4 who are residents within the jurisdiction of the Sub-Divisional Magistrate, Pollachi, and who are members, partisans and hirelings of a faction of which Pillaya Chetty of Nagamam is the leader, have been systematically committing acts of rowdyism, assault, trespass and intimidation on members of the opposite party, and on September 23, 1938, all of them were found armed with weapons for a similar purpose endangering public peace. The feelings between the parties are very much strained and they are likely to come to a clash at any moment resulting in a breach of peace disturbing the public tranquillity seriously. Hence it is requested that the counter-petitioners may be ordered to execute a bond with sureties for keeping peace for a period of one year. Pending termination of the proceedings, all the counter-petitioners may be ordered to execute *interim* bonds as breach of peace is likely to occur at any time."

The Magistrate considered that the information was of such a nature that he was justified in ordering the counter-petitioners to execute *interim* security bonds. These bonds were executed on October 14, 1938. On February 5, 1939, the Police laid information against the petitioner, and it is obvious from the notice which was subsequently served upon him under s. 112, that the information was to the effect that he was also a leader of the faction of which the counter-petitioners were said to be members and was giving them active support. At the same time information was laid against Pillaya Chetti, the person previously referred to as the leader of the faction, and one Mylsami Goundan. The Magistrate was satisfied that there was a likelihood of a breach of the peace occurring and issued notice under s. 112, against the petitioner and the two other persons. In this notice they were referred to as counter-petitioners Nos. 13, 14 and 15, respectively. The petitioner says that the notice served upon him does not comply with the requirements of the section and that the proceedings which have been instituted against him have been unlawfully instituted. The notice reads as follows :

"Whereas it has been made to appear to me by credible information that there are two factions in the village of Nagamam led by Annal Chetti on the one side and Muthuswami Chetti (petitioner) and Pillaya Chetti on the other side.

That there is misunderstanding between Annal Chetti and counter-petitioners Nos. 13 and 14 (Muthuswami Chetti and Pillaya Chetti) regarding the

management of Lakshmi Vilas and Dravyasagaya Nidhi, Ltd. and owing to the Delhi Assembly Elections in 1934 and also in respect of the management of the Kannikaparameswari temple ;

That there is dispute and civil litigation between the two factions regarding possession of the temple lands, that consequently, the feelings between the two parties have become strained and that there is likelihood of the breach of the peace in the village, that counter-petitioners Nos. 13 to 15 (petitioners herein and the counter petitioners Nos 14 and 15) are giving active support to counter-petitioners Nos. 1 to 12 to further their nefarious activities in the village ;

That counter-petitioner No. 15 trespassed into the house of Kamatchi Chetti on September 23, 1938, and created trouble ;

That counter-petitioners Nos. 1 to 12 who were responsible for the disturbance in the village on September 23, 1938, had come there at the instance of counter-petitioner No. 15 to help counter-petitioner No. 14 and his son and to retaliate the attempted attack on them on September 21, 1938 ;

That you are likely to commit a serious breach of the peace and disturb the public tranquillity at the village of Nagamam ;

You are hereby required under s. 107 (1), Criminal P. O., to appear before this Court at 11 A. M. on March 8, 1939, at Pollachi and to show cause why you should not be ordered to execute bonds for Rs. 1,000 each with two sureties each in a like sum to keep the peace for one year."

As pointed out by our learned brother Patanjali Sastri, J. in the Referring Order, the petitioner's case is that a notice under s. 107, Criminal P. O., must relate to a breach of the peace or wrongful act in contemplation at the time when the information is given to the Magistrate, and that a notice which does not go to this length is necessarily void. The Public Prosecutor challenges this contention and says that if the section were so interpreted, it would impair its practical usefulness. Section 107 (1) states :

"Whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, the Magistrate if, in his opinion, there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without surety for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix."

The requirements of this sub section are therefore: (i) there must be information that a person is likely to commit a breach of the peace or disturb the public tranquillity or do a wrongful act which may probably cause a breach of the peace or disturb the public tranquillity, (ii) the Magistrate, if he is of the opinion that there is sufficient ground for requiring the person against whom the information is laid to show cause why he should not be ordered to execute a security bond for

keeping the peace, should issue notice to him; (iii) and in calling upon the person to show cause, the Magistrate must proceed "in manner hereinafter provided" which means that he must issue a notice in accordance with the requirements of s. 112. That section says that when a Magistrate deems it necessary to require a person to show cause he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character, and class of sureties (if any) required. As will be shown presently, s. 112 has on occasions been misread and further particulars than those required by the section have been insisted upon. All that the section requires is that the substance of the information shall be set forth and if this is done and the other requirements of the section are complied with, the notice is a valid one.

Section 117 provides the procedure to be followed when a notice has been issued under s. 112. When an order under s. 112 has been read or explained under s. 113 to a person present in Court or when a person appears or is brought before a Magistrate in compliance with, or in execution of a summons or warrant issued under s. 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary. The enquiry shall be made as nearly as may be practicable where the order requires security for keeping the peace, in the manner prescribed for conducting trials and recording evidence in summons cases. Therefore before a person on whom a notice has been served under s. 112 can be required to enter into a security bond under s. 107, the matter must be fully investigated by the Magistrate.

The cases on which the petitioner relies in support of his contention that the notice must set forth the particular breach of the peace or wrongful act in contemplation are *High Court Proceedings No. 1952, dated August 29, 1876* (1) and the decisions in *Nagireddi Konda Reddi v. Emperor* (5), *Maruthapali Goundar v. Emperor* (2), *Santhanaramaswami v. Emperor* (6) and *Kalia*

Goundan v. Emperor (7). In *High Court Proceedings No. 1952 dated August 29, 1876* (1) complaints were made against 21 persons that they were constantly creating disturbances in bazaars and they were called upon to show cause why they should not be bound over to keep the peace. The Court expressed the opinion that the act of which information is given and in respect of which security is required, must be an act which is shown to be in contemplation at the time the information is given and not merely one a repetition of which may be apprehended from past misconduct of the kind without anything further. This case was under the old Code, but the language of ss. 107 and 112 was materially the same. While we agree that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, we are unable to agree that the Code requires the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case. In *Nagireddi Konda Reddi v. Emperor* (5) *Abdur-Rahim and Napier, JJ.* considered that proceedings under s. 107, Criminal P. O., should be quashed if the notice issued did not give particulars of the persons threatened and when the apprehension of a breach of the peace arose. There the notice stated that :

"seven persons headed by Nagi Reddi Konda Reddi, accused No. 1, a rich and influential resident of Kaluvoy, and others are addicted to crimes of violence involving a breach of the peace and threatened injury to the lives and property of several persons and there is an imminent danger of a breach of the peace."

The decision in a particular case must depend on the facts of the case and we are unable to agree that the absence of such particulars, as these, would necessarily vitiate the notice. In the first instance, the particulars may not have been given to the Magistrate, but nevertheless he may have been convinced that there was a likelihood of a breach of the peace, in which case it was his duty to issue the notice. The passing of an order requiring security will, of course, depend on the nature of the evidence given at the subsequent inquiry. In *Maruthapali Goundar v. Emperor* (2) *Pandrang Row, J.*

(7) 59 M. L. J. 887; 127 Ind. Cas. 652; A. I. R. 1930 Mad. 859; (1930) Or. Cas. 1035; (1930) M. W. N. 698; 32 L. W. 320; Ind. R. L. (1930) Mad. 1036; 32 Or. L. J. 27.

(5) 41 M. 246; 41 Ind. Cas. 990; A. I. R. 1918 Mad. 555; 18 Or. L. J. 878.

(6) (1937) M. W. N. 885.

accepted the proposition that it was necessary to state in the notice the likelihood of the commission in the near future of a particular breach of the peace or a wrongful act likely to lead to a breach of the peace. In *Santhanaramaswami v. Emperor* (6) King, J. considered that the notice in that case was wrong because neither time, nor place, nor any indication of the identity of the persons alleged to have been threatened had been given, but here the learned Judge was insisting upon something which the section does not insist upon. In *Kumarappa Chettiar v. Emperor* (4) King, J. rightly observed that in order to justify an order under s. 107, it must be proved that the persons concerned are likely to break the peace. In *Kalia Goundan v. Emperor* (7) Krishna Pandalai, J. considered that s. 112 requires the Magistrate to give an "abstract of the facts" upon which he charges the persons proceeded against with being likely to commit a breach of the peace. If by an abstract is meant something more than the substance of information we do not agree. The learned Judge did not regard the notice in that case as being sufficient but this opinion is certainly to be doubted. It is, however, not necessary for the purposes of this case to discuss the facts of that case as the judgment does not appear to go beyond the other judgments to which reference has been made.

There is no doubt that action taken under s. 112 constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. The person who gives the information may not be in a position to give details, but the source of the information may be sufficient to convince the Magistrate that breach of the peace is likely, and if he is convinced the law requires him to take action. We consider that Knox, J. aptly stated the position in *Jaguji Rai v. Emperor* (8), when he said:

"As I read this section, there may be cases in which a Magistrate of the first class is merely informed that a person is likely to disturb the public tranquillity without any information being given

as to his intent to do wrongful acts. The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received. In this case we are not told that the Magistrate has received any information of definite acts intended. Apparently from the information he received, he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars, he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by s. 112."

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of s. 112, but before doing so, it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under s. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. Far too much stress has been laid in the past on the wording of the notice and too little regard paid to the safeguards provided by the subsequent procedure. In the course of the arguments advanced on behalf of the petitioner, several cases have been quoted which relate to action taken under s. 110. There are conflicting decisions on the question of what the notice in such a case should contain. It is, however, not necessary for us to discuss the cases relating to s. 110. Section 107 is a self-contained section and the Court is not required for the purposes of this petition to travel beyond the cases which have reference to that section.

Now, applying the provisions of s. 112 to the notice issued in this case, what is the position? The notice states that the petitioner, is a leader of one of the rival factions in the village, that the feelings between the factions have become strained, that there is a likelihood of a breach of the peace in the village and that the petitioner is giving active support to the members of his faction to further their nefarious activities in the village. The nefarious activities referred to are known to the petitioner who has set them out in the affidavit which he has sworn and filed in support of his petition asking for the

(8) 16 A L J 567; 47 Ind. Cas. 72; A I R 1918 All. 93; 19 Cr. L J 876.

quashing of the proceedings. It is impossible in these circumstances to say with reason that the substance of the information received by the Magistrate has not been set out and it is also impossible to say with reason that there is no case shown for inquiry under s. 107. We regard this notice as complying with the requirements of the section, and therefore there is no foundation for the application to this Court to exercise its revisional powers. It follows that the petition must be dismissed and the Magistrate will proceed with the inquiry in accordance with law.

N.-D.

*Petition dismissed.***LAHORE HIGH COURT**

Second Appeal No. 219 of 1939

June 2, 1939

ADDISON AND RAM LALL, JJ.

Mst. DHARMON AND OTHERS—DEFENDANTS
—APPELLANTS
versus

RAN SINGH AND OTHERS—PLAINTIFFS AND
ANOTHER—DEFENDANT—RESPONDENTS

Custom (Punjab)—Person dying leaving grandson with step-mother—Share of step-mother—True heir—Civil Procedure Code (Act V of 1908), s. 151—Remand—Necessary issues not tried—Case can be remitted for trial of these issues.

Where a person dies leaving behind him a grandson with his step mother, the true heir is the grandson but a half is frequently given under Customary Law to a step-mother for her maintenance and the maintenance of her daughters. She has only a life-tenure in half share thus given to her.

Where the necessary issues in the case have not been tried, the Appellate Court can under the provisions of s. 151, Civil P. O., remit the suit to the trial Court for a re-trial upon those issues.

S. A. from the decree of the District Judge, Hoshiarpur, dated December 1, 1938.

Mr. Shamair Chand, for the Appellants.

Mr. Jiwan Lal Kapur, for the Respondents (Plaintiffs).

Addison, J.—The following pedigree-table is necessary in order to understand the facts of this case:

SUBA SINGH			
Achhar Singh = Mst. Dharmon			
(defendant No. 1)			
Bhagat Singh = Mst. Sant			
Kaur			
(defendant No. 2)			
Mst. Bhagwan Devi		Mst. Askaur	
alias Ohint Kaur		(defendant	
(defendant		Kaur	
No. 5.)		No. 4.)	
		Mst. Sant	
		(defendant	
		No. 3.)	

The property in suit comprises houses and agricultural land which originally belonged to Suba Singh. His son Achhar Singh, husband of Mst. Dharmon, defendant No. 1, died in his lifetime. When Suba Singh died in 1912, his land was mutated in the names of his grandson Bhagat Singh and his step-mother, Mst. Dharmon, in equal shares. The true heir remained of course Bhagat Singh but a half is frequently given under customary law to a step-mother for her maintenance and the maintenance of her daughters. Mst. Dharmon had in fact two daughters, Mst. Sant Kaur and Mst. Askaur, defendants Nos. 3 and 4. The half share which went to Mst. Dharmon would, of course, only be on the usual life tenure. When Bhagat Singh died, his half share was mutated in the name of his widow, another Mst. Sant Kaur, defendant No. 2. She has a married daughter, Mst. Bhagwan Devi, defendant No. 5. On April 20, 1936, Mst. Dharmon and Mst. Sant Kaur, defendants Nos. 1 and 2, gifted by two registered deeds the whole estate in equal shares to their daughters, Mst. Sant Kaur, Mst. Askaur and Mst. Bhagwan Devi, defendants Nos. 3 to 5. The plaintiffs, who claim to be collaterals of Bhagat Singh in the sixth degree, thereupon instituted the present suit for a declaration that these gifts would not affect their reversionary rights after the death of the two ladies, defendants Nos. 1 and 2. The trial Court decreed the claim with respect to the half share of Mst. Sant Kaur but dismissed the suit with respect to the half share of Mst. Dharmon on the ground that she took the property absolutely and had acquired title by adverse possession and had therefore the power to gift her half share. The learned District Judge on appeal decreed the claim in full on the ground that Mst. Dharmon held only a life estate in the half share which was mutated in her favour. Against this decision the defendants have preferred this second appeal.

There is no doubt that Mst. Dharmon had only a life-tenure but this is far from disposing of the case. According to the answer to question 45 of the *Riwaj-i-am* of Hoshiarpur District prepared in 1914, the Sainis of this District stated that a daughter succeeded in the absence of descendants of a great grandfather. That means that only collaterals up to the fourth degree can displace a daughter. The plaintiffs, therefore, according to this answer have no *locus standi* to sue as they are not heirs in the presence of the married daughter of Bhagat

Singh, namely *Mst. Bhagwan Devi*, defendant No. 5. There has, however, been no trial of this question and the learned Counsel appearing for the plaintiffs stated that there should be a remand so that he might be enabled to disprove the answer to question 45 given by the Sainis.

As regards sisters, in which category *Mst. Sant Kaur* and *Mst. Askaur*, defendants Nos. 3 and 4 would come, the answer to question 54 is that Sainis stated that sisters succeeded in the absence of all collaterals. This would mean that the plaintiffs would, according to the Customary Law, be nearer heirs than *Mst. Sant Kaur* and *Mst. Askaur*, though this matter is not important in the presence of the married daughter, *Mst. Bhagwan Devi*. As the necessary issues in the case have not been tried, we accept this appeal, set aside the orders of the Courts below and under the provisions of s. 151, Civil P. O., remit the suit to the trial Court for re-trial upon the following issues : 1. Is the suit property ancestral or self-acquired and does this make any difference? 2. Are the plaintiffs, who are collaterals in the sixth degree, the heirs of Bhagat Singh and not *Mst. Bhagwan Devi*, his daughter? 3. Are the sisters, *Mst. Sant Kaur* and *Mst. Askaur*, preferential heirs instead of the collaterals in the sixth degree? Even if it be held that the sisters are not to be preferred to the collaterals, this would be unimportant so far as the collaterals are concerned, if *Mst. Bhagwan Devi* is held to be a preferential heir to the collaterals, which would *prima facie* appear to be the case, according to the answer to question 45. With these remarks, we send the case back for re-trial but allow the defendants-appellants their costs in this Court and in the Court of the District Judge; costs in the trial Court will be in the discretion of that Court at the time when the suit is re-decided by it.

D.

Case remanded.

MADRAS HIGH COURT

Referred Trial No. 60 and
Criminal Appeal No. 258 of 1939
June 19, 1939

MOCKETT AND KRISHNASWAMI
AYYANGAR, JJ.

EMPEROR—PROSECUTOR

versus

TADUTURU POLIGADU—PRISONER

—ACCUSED

Evidence Act (I of 1872), s. 27—Confessional state-

ment must be voluntary — Criminal trial—Murder—Presumption—Accused's recent possession of property of murdered person—Cause of death not proved—Presumption of guilt, if arises.

The general rule that a confession should be voluntary should apply to a confessional statement under s. 27.

Where a person had been persistently questioned for hours, throughout being under arrest, this process is such as to taint any result which may arise from it. It is a clear breach of the Police instructions which are not to pester people who are under arrest. The statement thus extracted cannot be considered as voluntary confession and is not receivable in evidence. [p. 831, col. 2.]

Where the charge is specific, that the murder was caused by throttling and it is not proved and there is no evidence to show that the deceased was murdered at all, the presumption of guilt cannot be drawn from the recent possession by the accused of jewellery taken from the murdered person. 143 Ind. Cas. 46 (1 distinguished).

Refd. T. and Cr. A. referred by the Sessions Judge, Vizagapatam, dated April 5, 1939.

The Public Prosecutor, for the Crown.

Mr. R. Sadasivam Pillai, for the Accused.

Mockett, J.—The appellant has been convicted and sentenced to death for the murder of one Allu Akkamma by throttling her on December 4, 1938, and it is well to remember that the charge is specific, that the murder was caused by throttling. On the morning of December 4, the deceased was proceeding from Goladi, a village which will be found on the south of the plan, Ex. M, towards a village called Yedlavalasa, which is not marked on the plan, but which it is conceded is beyond Mettavalasa which is to the north of the plan. The learned Judge has summarized the facts in this case very fully and we may say at the outset that we are largely in agreement with him with regard to his findings of fact. The deceased set out on that morning according to P. W. No. 5, her brother-in-law; at about 8 A. M. and she was seen about one furlong from Goladi village walking in front of a man who, P. W. No. 16 was almost but not quite certain, was the accused. She was wearing a black sari similar to M. O. No. 2, for that is no doubt what P. W. No. 16 means when he says that she was wearing M. O. No. 2. Her later history is spoken to by P. Ws. Nos. 17 and 18. P. W. No. 17 says that at about 9 o'clock he saw her near the uplands between two hillocks. He says he was going to Goladi with change to pay coolies. He also saw the accused. He was 100 yards in front

of the deceased when he saw him. If that is so, between the place where P. W. No. 16 saw the accused and the hillocks, the accused had overtaken the deceased. P. W. No. 18 who also was in the neighbourhood of the hillocks says that he saw the accused going towards Mettavalasa and behind him a woman with a black sari similar to M. O. No. 2. He says he saw P. W. No. 17 going towards Goladi. We agree with the learned Sessions Judge that the evidence is more than sufficient to show that on that morning the deceased left her house and proceeded along the road, and we think, too, that the accused was sufficiently identified as walking at one time behind and at a later stage in front of her. That was the last heard of the deceased. She did not return to her village and there seems to be little doubt that the next seen of her was by P. W. No. 4, a little boy, who on Tuesday, December 6, went to the neighbourhood of P. W. No. 3's field, which is adjacent to the road, to cut grass. He said he saw a person lying down with a black sari covered over the face in the *cholam* field of P. W. No. 3. He went away because he thought it was P. W. No. 3 watching for persons who had gone to cut grass without his permission. P. W. No. 3 on Thursday next went to the field and there discovered the body, or rather half the body, of the deceased. She has been satisfactorily identified and no argument was seriously put before us that that was not her body. But by that time the body was in two pieces, one-half of which was found a considerable distance to the west of the point where the upper half was found, which was at the point E, on the plan near P. W. No. 3's field.

It is naturally important to ascertain the cause of death in a case of murder. P. W. No. 2, the Assistant Surgeon of Bobbili Local Fund Hospital, has given evidence about it. He has described the state of this body, which it must be remembered was in two pieces, and he quite definitely says: "I cannot give the cause of death owing to the fragmentary nature of the corpse and the advanced nature of decomposition." The tongue was protruding apparently. He says that this might have been due to strangling, but it might equally well have been due to decomposition. He does, however, make one interesting statement, namely that there was a stab on this woman, three-fourth of an inch long, on the left side of the

chest between the sixth and seventh ribs. He was unable to trace it further owing to the fact that the lung underneath it had decomposed. He says that might have been caused by the tusk of a wild boar. In this connection it is evident there are wild boars in the neighbourhood, because after seeing what was supposed to be P. W. No. 3 concealed under a black sari, P. W. No. 4 actually joined a hunting party who were after wild pigs. So we are in this position, that it is not possible to say on the evidence before us how this woman met her death.

The Police were obviously at a loss. They seem to have suspected a lot of people although they were not willing to admit it. P. W. No. 6 says that at first P. W. No. 5, the brother-in-law of the deceased, was suspected and was arrested as also were three other persons, but this is denied by P. W. No. 20, the Sub-Inspector, who says that he never arrested any other person. He did, he admits, suspect P. W. No. 5 and some gamblers of Mettavalasa. But in this connection it is right to say that apparently in this district the Police take a rather strange view as to what constitutes an arrest. For reasons which naturally are not known, being no doubt part of Police investigation, the accused was later arrested, he was arrested by P. W. No. 20, and we use that expression advisedly because what happened was he was taken from Goladi village where he was repeatedly questioned by P. W. No. 20 in custody to Mettavalasa at 11 or 12 noon. From then or from an earlier stage, because there is a variation in the evidence as to the exact time when he was taken there, it is evident that this man was subjected to persistent questioning by the Circle Inspector. P. W. No. 9 states that the Circle Inspector questioned him from 9 or 10 in the morning till 1 or 2 in the afternoon. At first the accused denied everything, but after persistent questioning he gave the statement in Ex. J at 1 or 2 p. m. Then says P. W. No. 9 the accused was arrested after he had given the statement in Ex. J. That was not the only thing that happened. The Circle Inspector seems to have thought it well to make a production of P. Ws. Nos. 17 and 18 before the accused and examined them for the second time in his presence. P. W. No. 10 also states—and he is the President of the Panchayat Court and the Co-operative Union—"The Sub-Inspector of Police or the Circle Inspector of Police

arrested him formally at 12-30 P. M. or so." Now in our opinion there is not the slightest doubt that this man was taken in charge by the Police at Goladi village, questioned there and taken to Mettavalasa and there closely questioned for a period of some hours. This seems to us, apart from any other aspect of the case, to be entirely contrary to the orders issued to the Madras Police relating to investigation of offences. Para. 303 is most explicit that while questions to persons who might give useful information are proper, when once an accused person has been arrested, the Police are strictly forbidden to interrogate him or press him to make any statement, and we consider that it is tantamount to reducing this paragraph to a farce for the Police to take a man, hold him for a long period, subject him to incessant question, press him to confess, as we think happened, and then after they had extracted what they wanted, go through the solemn process of formally arresting him. The importance of this is that under this process the accused made a statement which is recorded in Ex. J. It is as follows:

"Last Sunday Allu Akkamma, a Golla woman of Goladi village, was coming 20 yards behind me. I threw her down and throttled her and she died. Then I removed her two gold nose rings, two gold ear rings and four gold top ear rings. On the next day while it was still dark I secreted them (the ornaments) after tying them up in small rags, in the row of pots in a corner of my sister Poli's house in Mugada. I will pick out and give the ornaments if you come with me."

That was attested by the Village Munsif, P. W. No. 9, P. W. No. 10 and the Circle Inspector P. W. No. 21, in addition to two other persons who were examined. It will be observed that the statement, namely about the woman coming behind him, bears considerable resemblance to the evidence of some of the prosecution witnesses and in this case the accused has suggested that this crime has been laid at his door in order to remove the suspicion from the other Gollas including P. W. No. 5. On receipt of this statement the Police and certain of the witnesses including P. Ws. Nos. 9 and 10 proceeded to the house of P. W. No. 11 who is the sister of the accused. She seems to have been a curious person to choose as a depository for stolen goods because according to her cross-examination she was not friendly with the accused and he had not visited her for a long time. But the Police party went there and according to them, they recovered a bundle which contained M. O's Nos. 3, 4 and 5. Their procedure also seems to have been

strange. It appears from the evidence of P. W. No. 12 that on their arrival they sat down outside P. W. No. 11's house for a period of an hour or 1½ hours, presumably until it was dark. According to the Police Officers they recovered these material objects from a pot. P. W. No. 11 is quite clear that she never saw them until they were in the hands of the Police. She has denied that she ever looked at them in the interval between the accused going away and the Police coming; though this statement seems to contradict her evidence-in-chief. That is the evidence for the prosecution.

The defence was a complete denial of the whole affair and an allegation that it has been foisted upon the accused by the Gollas in order to take away suspicion from themselves. The prosecution therefore say that the inference of guilt is sufficient to enable us to uphold this conviction and they summarize their case as follows: First, they say there has been a murder. Secondly that, from the accused has been recovered jewels proved to have been on the body at the time of the murder. We may say that it is amply established that the jewels, M. Os. Nos. 3, 4 and 5, were the property of the deceased and were worn by her on the day of her death. We agree with the learned Judge in his conclusion with regard to that. Thirdly, the prosecution says that there is a statement receivable within s. 27, Evidence Act, which led to the discovery of a fact and is, therefore, admissible and which contained a confession so wrapped up with the statement leading to the discovery of the fact as to make it, even though it was a confessional statement, admissible under s. 27. Had the statement been free from the infirmities to which we shall later refer, this contention with regard to its admissibility might have been acceptable. We think that the learned Judge rightly admitted that part of it as is reproduced in Ex. J on the basis that it was an ordinary statement under s. 27. But was it an ordinary statement under s. 27? We take the view that it was not. It contained a confession extracted from the accused by a process which we consider wholly foreign to methods and notions which are accepted by the Courts and, we hope, by the heads of the Police themselves. This man had been persistently questioned at Goladi; he was persistently questioned for hours at Mettavalasa throughout being under arrest and we consider that this process was such as to taint any result which may arise from

it. It was a clear breach, in our view of the Police instructions, which are not to pester people who are under arrest as this man undoubtedly was. We consider that so far as the statement was a confession, it was not a voluntary confession and was not receivable in evidence. We see no reason why the general rule that a confession should be voluntary should not apply to a confessional statement under s. 27; but in any case, induced as it was, it is of no evidential value. We therefore exclude from consideration of this case the statement attributed to the accused, and we are left entirely with the fact that he took the Police to the house of his sister and there produced the jewellery which was on the body of the deceased the day before. The position therefore is that the prosecution must rely on the presumption of guilt which has to be drawn from this recent possession of jewellery taken from a murdered person. But the answer to that is that there is no evidence on which we can say with certainty that the deceased was murdered at all. It is probable that she was murdered. But it is not impossible, according to the evidence on the record that she might have died otherwise and not necessarily by strangling. The stab wound and the possibility of it being a wound from a tusk of a bear cannot be overlooked. The nature of the wild animals in this part of the world was not investigated, but there were wild pigs according to the evidence. The fact is, however, that the cause of her death is not proved. That being so, the presumption which might well have been hostile to the accused within the decision in *Narayana v. Emperor* (1) does not arise. The only evidence we have against this man when Ex. J is rejected is that he was in recent possession of jewellery belonging to a woman who had died owing to an unknown cause. That being so, it is inevitable in our view that this case must fail. It may be that the accused is fortunate. But if the Police in excess of zeal think fit to employ methods of this sort, they must expect results of this sort also. In view of the above observations, we are satisfied that it would be in the highest degree unsafe to maintain this conviction. The conviction will therefore be set aside, the appeal allowed, and the appellant set at liberty.

N.-D.

Conviction set aside.

(1) 56 M 231; 143 Ind. Cas. 46; A I R 1933 Mad. 233; (1933) Cr. Cas. 269; 34 Cr. L J 481; 64 M L J 88; (1932) M W N 801; 37 L W 220; Ind. Rul. (1933) Mad. 261.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Applications Nos 366, 367, 368 and 369 of 1938

March 15, 1939

DAVIS, J. C. AND TYABJI, J.

NEBHANDAS HOLLARAM AND OTHERS—

APPLICANTS

versus

EMPEROR—RESPONDENT

Bombay Prevention of Adulteration Act (V of 1925). s. 4—Applicability to sale of articles of food of which ghee is necessary ingredient—Alleged adulterated ghee taken from shop where sweetmeats were offered for sale—Presumption—Burden to show that article is adulterated—Criminal trial—Revision—Question of fact not disputed in lower Court, if can be introduced in revision.

Section 4, Bom. Prev. of Adul. Act, does not apply only to the sale of ghee simply as such but applies also to the sale of articles of food of which it is a necessary ingredient. The words of the section are wide enough to include articles of food which contain ghee mixed with other substance.

The fact that this ghee was taken from a shop where sweetmeats and *pakorae* were offered for sale, and indeed from a frying-pan in which other sweetmeats and *pakorae* were being made, makes it quite clear that the presumption apart, the admission of the accused himself apart, the sweetmeats and *pakorae* in his shop had been manufactured for sale within the meaning of s. 4 (1) (b) of the Act and that he was manufacturing and offering for sale sweetmeats and *pakorae* as containing pure ghee which contained the alleged impure ghee.

It is true that the burden of proof that the article of food is adulterated lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admissions of the accused himself.

High Court sitting in revision cannot allow the applicant to introduce before it questions of fact which, as they were not disputed, by implication were admitted in the lower Court.

Ori. R. Apps. from the order of the City Magistrate, Shikarpur, dated October 12, 1938.

Mr. H. T. Raymond, for the Applicants.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, J. C.—This is an application in revision against an order of the City Magistrate of Shikarpur, convicting the applicant of an offence under s. 4, Bom. Prev. of Adul. Act of 1925. Objections were taken to the order of this Magistrate based on questions of fact which, if they had been taken in a lower Court in the same manner in which they have been taken by the learned Advocate for the applicant in this Court, might possibly have secured an acquittal for the accused. But we are sitting here in revision and we cannot allow the applicant to introduce before us in

revision questions of fact which, as they were not disputed, by implication, were admitted in the lower Court. For instance, it was argued that the Health Officer of the Shikarpur Municipality was not an Inspector validly appointed, as required by s. 8 of the Act; but whether he was or was not so appointed quite clearly must turn upon questions of fact which cannot be raised before us for the first time in revision. Similarly it was objected before us that the summons did not contain the necessary particulars required by s. 13 of the Act, but although the case was adjourned from time to time in the lower Court and the complaint which was before the Court and a copy of which was most certainly served upon the accused contained all the necessary particulars required by s. 13, no objection was taken as to the summons itself. We think the proper inference to be drawn under the circumstances is that the summons was in order, accompanied as undoubtedly it was, by a copy of the complaint.

The principal objection taken, however, was that the accused did not sell ghee and that he has been convicted for sale of adulterated ghee; while what in fact he sold were sweetmeats or *pakor*as and it is not proved that these *pakor*as or sweetmeats as sold by the accused purported to contain pure ghee, or that their nature, substance or quality was such that pure ghee was an ingredient in their manufacture. We do not accept the argument that s. 4, Adul. Act, applies only to the sale of ghee simply as such and does not apply to the sale of articles of food of which it is a necessary ingredient. For, apart from the fact that the words of the section are wide enough to include articles of food which contain ghee mixed with other substance, to accept this argument would be to frustrate one of the purposes of the Act which is to secure that articles of food purporting to be sold as pure and unadulterated are pure and unadulterated and that the purchaser should buy what he is led to expect he is purchasing, or what he is led to expect is sold to him. Therefore, if in this case the accused had taken the defence that while it is true he sold sweetmeats or *pakor*as, it was not expected, nor did he by implication suggest, that they were made of pure ghee, he might have made a good defence upon the record as it stands. But he did not take that defence at all; on the contrary, he contended that the ghee was pure and was of good quality; and that if

analysis showed a certain percentage of foreign matter, that came not from the ghee but from the other substances with which it was mixed in the frying-pan from which the sample of ghee was taken. But, again, this defence has nothing to recommend it beyond its apparent ingenuity. Because in a case of *pakor*as and of sweetmeats there is nothing else besides ghee which could contain that percentage of foreign fat which the analysis in this case showed. Moreover, the evidence will show that the sample of the ghee was taken before it was mixed or combined with the other ingredients in the frying-pan. Far then from the accused taking the defence that the sweetmeats or *pakor*as he sold did not purport to contain pure ghee, his case was that they did contain pure ghee and it appears clear from the evidence on the record that this case of his is false.

It is said that the learned Magistrate has wrongly relied upon Explan. 2 which appeared in s. 4 of the Act before its amendment by the Amending Act of 1935. But really Explan. 2 in no way affects the prosecution case, because while it is true the Magistrate in his judgment quotes this Explanation and says that it raises a presumption that the articles were manufactured for the purposes of sale, he goes on to say that the fact that the sweetmeats and *pakor*as were intended for sale is admitted by the accused also. Moreover, the fact that this ghee was taken from a shop where sweetmeats and *pakor*as were offered for sale, and indeed from a frying-pan in which other sweetmeats and *pakor*as were being made, makes it quite clear that the presumption apart, the admission of the accused himself apart, the sweetmeats and *pakor*as in his shop had been manufactured for sale within the meaning of s. 4 (1) (b) of the Act and that he was manufacturing and offering for sale sweetmeats and *pakor*as as containing pure ghee which contained impure ghee.

Lastly, a point was taken that the accused has been convicted under s. 4 generally of the Act and that section contains many parts, and reference was made to a previous judgment of this Court, where this question of the different parts of s. 4, Adul. Act, was referred to; but the facts of that case were entirely different. In that case there was confusion on the part of all parties concerned, confusion as to the offence of which the accused was charged and of which he was convicted, while in this particular case from the details given in the complaint and from the evidence recorded, it is

perfectly clear that the conviction is under s. 4 (1) (b) of the Act. There is nothing then in this question to admit of a mistake. It is true of course that the burden of proof lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admissions of the accused himself. We think, therefore, there is no reason why we should interfere in revision in this case and we dismiss the revision application accordingly. We also have before us three other revision applications Nos. 367 of 1938, 368 of 1938 and 369 of 1938 in which the facts and the arguments are similar. The reasons and the arguments of our decision in the case with which we have just dealt apply equally effectually in the case of these three other revision applications now before us; hence we dismiss them all accordingly.

D. Applications dismissed.

ALLAHABAD HIGH COURT
Miscellaneous Case No. 186 of 1938
May 1, 1939

COLLISTER AND ALLSOP, JJ.
T. H. CHANDLER—APPLICANT
versus

MRS. A. CHANDLER—OPPOSITE PARTY
Divorce Act (IV of 1869), ss. 36, 37—*Alimony*—*Subsequent unchastity of wife, effect—Bench passing decree nisi observing that alimony should be continued so long as wife remained chaste and unmarried—Observation, whether binding on another Bench confirming decree and making order for permanent alimony—Such order not containing dum sola et casta clause—Order cannot be varied or discharged on ground of subsequent unchastity.*

Observations made by a Bench of the High Court which passed the decree nisi to the effect that alimony could only be paid so long as the wife remained chaste and unmarried, could have no effect beyond the period of *interim* alimony and would not be binding on the another Bench which confirms the decree nisi and which passes orders as regards permanent alimony. If there is no *dum sola et casta* clause in the order making the decree nisi absolute and granting alimony to the wife, that order, should not be varied or discharged on the ground of subsequent unchastity. *Collins v. Collins* (1), followed.

Mr. S. M. Faizullah, for the Applicant.

Mr. S. N. Seth, for the Opposite Party.

Collister, J.—These are two cross-petitions. One is by Annie Chandler praying that the alimony which was allowed to her by this Court be increased from Rs. 12-8-0 per mensem to Rs. 20 per mensem and the other is by Thomas Henry Chandler praying that the order of alimony be discharged or modified on the ground of un-

chastity on the part of Annie Chandler. Annie Chandler petitioned for dissolution of her marriage or, in the alternative, for judicial separation, in the Court of the District Judge of Cawnpore. The District Judge on March 27, 1926, dismissed the petition for dissolution of marriage, but granted a decree for judicial separation and directed the respondent to pay his wife Rs. 10 per mensem as maintenance. There was an appeal by the petitioner, i. e. Annie Chandler, to this Court, and on April 11, 1927, the appeal was allowed and a decree nisi was granted. In the course of their order the learned Judges said:

"By s. 36 our powers of granting alimony are limited, until the decree is made absolute to the sum of Rs. 10, which is the sum awarded by the Court below. We have no power under s. 37 to grant permanent alimony until the decree is made absolute, which cannot happen until after the expiration of six months. But in order to save the parties' further expenditure, we express the decided opinion that when the decree is made absolute, there are no grounds upon which the Court ought to increase the permanent alimony to a sum larger than that which has been fixed for the alimony *pendente lite*."

At the end of their order the learned Judges said that the payment of Rs. 10 a month would only continue while the petitioner remained chaste and unmarried. The decree nisi was made absolute by another Bench of this Court on July 5, 1929. The alimony was fixed at Rs. 12-8-0 per mensem, being Rs. 2-8-0 in excess of the amount which had been fixed *pendente lite*; and the order of this Court confirming the decree nisi contained no clause to the effect that this alimony should only be paid during chastity. It is obvious that the observations of the Bench which passed the decree nisi to the effect that alimony could only be paid so long as the petitioner remained chaste and unmarried could have no effect beyond the period of *interim* alimony and would not be binding on the Bench which confirmed the decree nisi and which passed orders as regards permanent alimony; and as we have shown, the order under which the decree nisi was made absolute contains no *dum sola et casta* clause. In *Collins v. Collins* (1) it was held that where, upon a decree absolute being obtained by a wife on a petition for divorce against her husband, an order is made for the payment of a fixed sum for her maintenance by the divorced husband, and in such order, there is no *dum sola et casta* clause inserted, the Court cannot vary the order as made

where the divorced husband alleges that his wife has been guilty of adultery. The *dum sola et casta* clause must be inserted in the order; it will never be inferred. The Court observed :

"The argument of the respondent's Counsel really amounts to this, that in every order of the present kind which is made a *dum sola et casta* clause ought to be included. If, in fact, such a clause is inserted, it is expressed; if by any chance it is not inserted, it ought to be inferred. I cannot think that such a contention is right. When an order of this kind is made, all the circumstances of the case are considered and it is then determined, subject to any appeal that may be made, whether the *dum sola et casta* clause should be inserted; and I think that there is no more reason now for varying that order than for saying that an order which does not contain the clause ought by implication to be held to contain it. It is not suggested that the means of the husband have been altered. The only question before me is the alleged misconduct of the wife. About that I know nothing and say nothing, and in any case it is not enough to entitle the present motion to succeed."

This is authority for the proposition that if there is no *dum sola et casta* clause in the order granting alimony to the wife, that order should not be varied or discharged on the ground of subsequent unchastity. In the present case, as we have already shown, there was no such clause or condition in the order of July 5, 1929, under which the decree *nisi* was made absolute and the amount of permanent alimony was settled. In the circumstances, the petition of Thomas Henry Ohandler fails and is dismissed with costs. As regards the application of Annie Chandler for enhancement of the amount of alimony, there is an affidavit by Thomas Henry Ohandler containing an averment to the effect that he has been discharged by the company in whose service he was; and in view of this affidavit, the learned Counsel on behalf of Annie Ohandler states that he does not press his application. In the circumstances, this application also is dismissed with costs.

B.

Petitions dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 16 of 1937

February 22, 1939

DAVIS, J. O. AND TYABJI, J.

DOLARAM ARATMAL—APPELLANT

versus

MULOMAL RADHAKISHINDAS

AND ANOTHER—RESPONDENTS

Limitation Act (IX of 1908), Art. 182 (5)—
In accordance with law—Application held not in

accordance with law—Failure of Court to see whether requirements of rr. 11 to 14 of O. XXI, Civil Procedure Code (Act V of 1908), are complied with—Decree-holder, if protected from consequences of time-barred application.

Although the duty is cast upon the Court under O. XXI, r. 17, Civil P. C., to see whether the requirements of rr. 11 to 14, are complied with, the decree-holder is not protected if the Court fails to do so, from the ordinary consequences which follow when his request to the Court for its assistance is barred by time.

It is a matter of policy laid down by the Legislature that applications to the Court for its assistance must be made in time whether that application takes the form of a plaint or an application in execution.

An application for execution dated February 1, 1932, which on the face of it was time-barred was not an execution application made in accordance with law, as it did not mention a previous execution application dated February 5, 1929, which it should have mentioned if the application of February 1, 1932, itself was to be in time. But the Court instead of complying with the provisions of O. XXI, r. 17, admitted the application and ordered notices to issue and costs to be deposited. In the subsequent application dated December 8, 1932, the decree-holder again failed to mention the application of February 5, 1929, but subsequently applied for amendment of the application :

Held, that the application of December 8, 1932, was barred and that there was no substance in allowing the amendment as the application of February 1, 1932, which omitted reference to the application of February 5, 1929, and which was consequently out of time was not in accordance with law and it therefore did not give fresh starting point for limitation. The fact that it was an error to allow the execution of February 1, 1932, did not make any difference. 65 Ind. Cas. 14 (1), relied on, *Fusloor Rahman v. Altaf Hussain* (2) and 93 Ind. Cas. 166 (4), distinguished, 107 Ind. Cas. 303 (3), referred to.

S. A. against the order of the First Class Sub-Judge, Sukkur, dated January 5, 1937.

Mr. Srikishindas Lulla, for the Appellant.

Mr. Kundanmal Dayaram, for the Respondents.

Davis, J. C.—This is an appeal against a judgment of the First Class Subordinate Judge of Sukkur with appellate powers in which he allowed an appeal against an order of the Joint Subordinate Judge of Shikarpur who allowed execution to proceed upon an execution application dated December 8, 1932, of a decree dated September 20, 1922. The appeal was allowed on the ground that a previous execution application dated February 1, 1932, was not an execution application made in accordance with law, as it did not mention a yet more previous execution application dated February 5, 1929, which it should have mentioned if the application of February 1, 1932, itself was to be

in time. There were in these proceedings five execution applications: the first was of March 8, 1924; the second of March 20, 1925; the third of February 5, 1929; the fourth of February 1, 1932, and the fifth and last is that which is the subject of the appeal and is dated December 8, 1932. Now there can be no doubt that the execution application of February 1, 1932, was not made in accordance with law. It omitted all reference to the previous execution application of February 5, 1929, so that between the application of March 20, 1925, and the application of February 1, 1932, there was a period of more than three years and the application dated February 1, 1932, should have been rejected by the Court under O. XXI, r. 17, Civil P. C., as being barred by time. But the Court did not comply with the provisions of O. XXI, r. 17, as on the face of it the execution application was time-barred, but ordered notice to issue under O. XXI, r. 22, and costs to be deposited. No costs were in fact deposited, so that this execution application was infructuous. In the execution application of December 8, 1932, the decree-holder omitted to mention the execution application of February 5, 1929, and the executing Court allowed the application of December 8, to be amended in exercise of its discretion; but as the learned Appellate Judge has pointed out, this amendment would be of no avail if the execution application preceding it, namely that of February 1, 1932, was itself out of time by reason of the fact that it omitted to mention the previous application of February 5, 1929. There was no point therefore in allowing the execution application of December 8, 1932, to be amended when the previous application of February 1, 1932, itself was time-barred.

Now the learned Advocate who has appeared for the decree-holder and has argued the case with great diligence and care contends that even if the omission to state in the execution application of February 1, 1932, the previous execution application of February 5, 1929, is a material omission so as to make the execution application in which that omission occurs not in accordance with law, yet the case before us can well be distinguished from the case in *Sahjram Tahilram v. Tower* (1), in that, in this case the Court, however, wrongly accepted the execution application of February 1, 1932, ordered it to be registered and costs to be deposited; and the fact that costs were not deposited did not affect the case;

for once the Court ordered the execution application to be registered, it must be deemed that that execution application was in accordance with law. Under O. XXI, r. 17, the duty rests upon the Court of seeing that an application in execution is within time. The learned Advocate relies strongly upon two cases, wherein the point is stressed that the decree-holder should not suffer for the fault of the Court. In *Fuzloor Rahman v. Altaf Hussain* (2), the defect was not a material defect at all. It was merely a case where the wrong number of a suit was given; while in the Madras case in *Maheswaran Nambudripad v. Velappa Menon* (3), the point was again stressed that the party should not be made to suffer by reason of the failure of the Court to check the correctness of the entries in the execution application. But we think that if we listened to this argument *ad misericordiam* in this case, we should just as well listen to it in a case where a plaint on the face of it is time-barred and should not have been accepted by the Court. We do not think that a plaintiff, when at some later stage in his suit the fact that his suit was time-barred was discovered, could be heard to say that he should not suffer because the Court should not have accepted the plaint in the first instance. We do not think that because the duty is cast upon the Court under O. XXI, r. 17, to see whether the requirements of rr. 11 to 14, Civil P. C., are complied with, the decree-holder is therefore protected from the ordinary consequences which follow when his request to the Court for its assistance is barred by time. The matter of time so far as execution application is concerned is dealt with in Art. 182 (5); Sch. I, Lim. Act, and we think, it matters not whether the Court has before it a plaint or execution application, the burden lies upon the Court under any circumstances to see that its assistance is sought for in time. If it does not do so, then we do not think that either the plaintiff or the decree-holder is freed from the consequences of his delay. It is a matter of policy laid down by the Legislature that applications to the Court for its assistance must be made in time and whether that application takes the form of a plaint or an application in execution, we think it matters not.

We think, therefore, there is no real difference between this case and the case in

(2) 10 O 541.

(3) 54 M L J 154; 107 Ind. Cas. 303; A I R 1926 Mad. 24; 39 M L T 371; 27 L W 796.

(1) 15 S L R 156; 65 Ind. Cas. 14; A I R 1922 Sind. 29.

Sahigram Tahilram v. Tower (1), by which we are bound. The learned Advocate referred us to another case, the case in *Pittambar Jana v. Damodhar Gachait* (4), at p. 673, but again in that case the Court had before it an execution application which was not defective in material particulars. In that case Suhrawardy, J. said:

"On a consideration of the cases to which I have made reference and the other cases which have been cited at the Bar, the conclusion to which I have arrived is that the expression 'in accordance with law' in Art. 182 (5) should be taken to mean that the application though defective in some particulars was such upon which execution could be issued."

The case, however, before us is quite clear. The Court could not order execution to issue upon an application that was on the face of it out of time. The fact that it was an error to allow the execution application to be registered appears to us to make no difference. We think, therefore, the judgment of the lower Court is right and the appeal is dismissed with costs accordingly.

D. *Appeal dismissed.*

(4) 53 C 664 at p. 673; 98 Ind. Cas. 166; A I R 1926 Cal. 1077; 45 C L J 86; 30 C W N 918.

ALLAHABAD HIGH COURT

Second Appeal No. 186 of 1937

February 13, 1939

IQBAL AHMAD, J.

AHMAD HUSAIN—DEFENDANT—
APPELLANT

versus

Mst. AMIR BANO—PLAINTIFF—
RESPONDENT

Muhammadan Law—Marriage—Sunnis—Option of puberty—Such right is prolonged till woman has knowledge of such right—But must be exercised within reasonable time of her knowledge—Burden of proving knowledge—Evidence Act (I of 1872), s. 106.

A woman's right of repudiating the marriage performed during her minority is prolonged amongst Sunni Muhammadans until she is acquainted with the fact that she has such a right. In other words the woman has the right of repudiating the marriage within reasonable time of her knowledge of the fact that she has the power to repudiate the marriage. 63 Ind. Cas. 702 (1) and 113 Ind. Cas. 183 (2), relied on, 76 Ind. Cas. 45 (3), not followed.

The fact, that a woman has knowledge of her marriage or of her right to exercise the option of puberty at a particular time, must be specially within her knowledge, and therefore the burden of proving such fact must, in view of the provisions of s. 106, Evi. Act, be on her. 137 Ind. Cas. 739 (4), not followed.

S A. from the decision of the District Judge, Bulandshahr, dated October 19, 1936.

Messrs. M. A. Aziz and Ihsanul Haq, for the Appellant.

Mr. Mushtaq Ahmad, for the Respondent.

Judgment.—This is a defendant's appeal arising out of a suit brought by the plaintiff-respondent for a declaration that the marriage of the plaintiff with the defendant stood dissolved in consequence of the exercise of the "option of puberty" by the plaintiff. It is common ground that the parties to the present litigation are Sunni Muhammadans and that they were married in July, 1926. The plaintiff's case was that she was nine years of age at the time of her marriage with the defendant and that her brother Zahiruddin acted as her guardian for the marriage. She further alleged that, some time before the institution of the suit, she became aware of the fact of the marriage and at once exercised the "option of repudiation" and intimated the fact of the repudiation of the marriage to the defendant by means of a written notice. The defendant contested the suit on the allegation that the plaintiff had attained puberty at the time of the marriage. He denied that the plaintiff had the option to repudiate the marriage or that she ever exercised that option. The trial Court held that the plaintiff had attained majority at the time of the marriage, and that, even if she exercised the "option of repudiation," she did so long after she had attained puberty. In view of these findings, the trial Court dismissed the plaintiff's suit. On appeal by the plaintiff the lower Appellate Court held that the plaintiff was about nine years of age on the date of the marriage and that "she had not attained puberty at the time of the nikah." This finding of the lower Appellate Court being based on the evidence in the case, is binding on me in second appeal. Having arrived at this finding, the lower Appellate Court proceeded to consider the question whether the option of puberty had in fact been exercised "without unreasonable delay" and it held that "it is proved that the option of puberty has been exercised and without unreasonable delay." The only reason given by the lower Appellate Court in support of this finding is in the following words:

"As to this it is in evidence that the plaintiff consulted a pleader in Aligarh and had a notice issued to the defendant-respondent."

I am unable to appreciate the reason assigned by the lower Appellate Court in

support of its finding on the question as to whether the "option of puberty" was exercised by the plaintiff and that without unreasonable delay. It may be that the finding recorded by the lower Appellate Court on the question is correct or it may be that that Court, without applying its mind to the evidence bearing on the question, recorded the above finding. Be that as it may, the finding does not appear to be satisfactory and accordingly I cannot decide this appeal without having findings on certain issues that I propose to remit to the lower Appellate Court. The law on the question as to when a female, who was married during her minority, should, if she so desires, exercise the right of option to repudiate the marriage, has been settled by this Court in *Bismillah Begum v. Nur Muhammad* (1) and *Sughra v. Muzaffari* (2). It was held in these cases that the rule laid down by Imam Muhammad is the more reasonable and equitable to be applied to India, namely that a woman's right of repudiating the marriage performed during her minority is prolonged amongst Sunni Muhammadans until she is acquainted with the fact that she has such a right. In other words the woman has the right of repudiating the marriage within reasonable time of her knowledge of the fact that she has the power to repudiate the marriage. Having regard to these decisions, it is necessary to have findings from the lower Appellate Court on the following issues: (1) When did the plaintiff for the first time repudiate the marriage? (2) When did the plaintiff first come to know that she had the right to exercise the option of repudiating the marriage? Parties will be allowed to adduce further evidence on the point and the findings will be returned to this Court within four months from to-day's date. On receipt of the findings, the usual ten days will be allowed for filing objections. The learned Counsel for the respondent placed reliance on the decision of the Lahore High Court in *Khanoo v. Bhaq Bhari*, 76 Ind. Cas. 45 (3). The learned Judge, who decided that case, observed:

"That the principle underlying the crude provision of Muhammadan Law that the option of puberty must be exercised by a female immediately on the appearance of the physical signs of puberty, which was promulgated to people living under very different conditions from those which obtain to-day, is that there must be no acquiescence in the marriage

by the female, so that the question in all such cases is whether the plaintiff has acquiesced in the marriage."

With all respect I am unable to agree with this decision. In the first place I am unable to appreciate what the learned Judge meant by the phrase "crude provision of Muhammadan Law." So far as I can see, the provision entitling a minor girl to exercise the option of repudiating the marriage far from being crude is in consonance with the rules of conduct governing a progressive state of society, which allows a person on whose behalf a contract has been entered into during her minority to elect on attaining majority whether she would affirm or repudiate the contract. Apart from this, to hold that a woman has the right to exercise the option of repudiating the marriage so long as she has not acquiesced in the marriage would be to legislate for the Muslims and not to follow the dictates of Muhammadan Law, and this the Court is not competent to do. It is to be remembered that there are two parties to a contract of marriage, viz., the husband and the wife and while the law gives the wife in certain cases the option to repudiate the marriage, that option has to be exercised within reasonable time as it is not in the interest of society that the finality of the marriage tie should be kept in suspense for an unreasonable length of time.

The learned Counsel for the respondent further placed reliance on a decision of the Lahore High Court in *Mukhan v. Haidar* (4). It was held in that case that a Muhammadan girl is entitled to exercise her option of puberty within a reasonable time from her knowledge of marriage or from her knowledge of the fact that she has right to repudiate the marriage on attaining puberty. To this extent this decision of the Lahore High Court is in consonance with the two decisions of this Court noted above. But it was further held in that case that the burden of proving that the plaintiff had knowledge of her marriage or of her right to exercise the option of puberty any considerable time before the institution of the suit lies on the husband. Again with all respect I am unable to agree with this proposition of law. The fact, that a woman has knowledge of her marriage or of her right to exercise the option of puberty at a particular time, must be specially within her knowledge, and therefore the burden of proving

(4) A I R 1932 Lah. 449; 137 Ind. Cas. 739; 33 F. L. R. 576; Ind. Rul. (1932) Lah. 341.

(1) 19 A L J 845; 63 Ind. Cas. 702; A I R 1922 All. 155; 44 A 61.

(2) (1929) A L J 101; 113 Ind. Cas. 383.

(3) 76 Ind. Cas. 45; A I R 1925 Lah. 66.

such fact must, in view of the provisions of s. 106, Evi. Act, be on her. (On the findings by the lower Appellate Court his Lordship allowed the appeal and restored the decree of the trial Court).

s. *Appeal allowed.*

BOMBAY HIGH COURT

Second Appeals Nos. 187 and 293
of 1935

February 23, 1939

BROOMFIELD AND MACKLIN, JJ.

DATTATRAYA VISHNU DABHOLKAR

—DEFENDANT—APPELLANT

versus

SADASHIV SHIVRAM NISAL—

PLAINTIFF—RESPONDENT

Pensions Act (XXIII of 1871), s. 4—Suit relating to property subject of grant—Plaintiff's claim independent of grant—If falls under s. 4—Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (f) (d), Proviso—Government having no interest in revenue of alienated village—Applicability of s. 4 (f)—Purchaser from inamdar claiming to be shown in village papers as person entitled to revenue—Suit, if barred by s. 4 (d) against Government—Proper order to be passed in such case—Dispute as to who is entitled to be holder—S. 4, Proviso, if applies—Inam—Grant—Construction—Grant held conferred heritable and alienable estate.

The Pensions Act is to be construed strictly in favour of the right of suit. A suit relating to property which has been the subject of a grant, but in which plaintiff's claim is quite independent of the grant is not a suit relating to a grant of land revenue within the meaning of s. 4, Pensions Act. [p. 841, col. 2.]

Clause (f) of s. 4, Bom. Revenue Jurisdiction Act can have no application to the case of an alienated village where Govt. has ceased to have any interest in the revenue at all.

Although the Revenue Jurisdiction Act is to be construed strictly, that does not mean that it should be construed so technically as to make its provisions a dead letter. [p. 842, col. 1.]

Where in a suit brought by a purchaser of a share of a village from inamdar, the plaintiff wants to be shown in the village papers as the person entitled to the revenue of the village, he really claims to be the superior holder as defined in the Bom. Land Revenue Code, and the suit is barred by s. 4 (d) against Govt. and the Govt. cannot be ordered not to pay the revenue to the inamdar but to pay it to the plaintiff direct. An injunction against Govt. to pay the plaintiff direct, and not to pay the superior holder, would be contrary to the spirit, if not to the express terms, of the Land Revenue Code. The relation between Govt. and the superior holder is not affected by the sale of the superior holder's rights. The proper thing to do in such a case is to order the inamdar to pay it to the plaintiff as soon as he receives it from the treasury. [p. 843, col. 1.]

The proviso to s. 4, relates to cases where there is a dispute as to the nature of a holding, that is to say, as to whether it is exempt from the payment of land revenue or not. It does not relate to disputes as to who is entitled to be the holder.

Held, on construction that grant was not *saranjam* but conferred heritable and alienable estate. 174 Ind. Cas. 256 (1), relied on.

S. As. against the decision of the First Class Sub-Judge, Ahmednagar, in Appeal No. 191 of 1932.

Messrs G. N. Thakor and P. V. Nijure, for the Appellant.

Messrs. A. G. Desai and J. G. Rele and B. G. Rao (Assistant Government Pleader), for the Respondents.

Broomfield, J.—These are two appeals by the defendants against a decree of the First Class Subordinate Judge of Ahmednagar with appellate powers in a suit relating to a share in the villages of Akolner and Khedle Parmanand in the Ahmednagar District. The facts are briefly these. Vishnu Moreswar Dabholkar and his brother Janardhan, who were the owners of a two-annas share in the village of Akolner and a six annas share in the village of Khedle Parmanand, mortgaged their share along with other property to Sadashiv Shivram, who is respondent No. 1 in these appeals. This mortgage was in January, 1915. In 1920, a suit was brought on the mortgage against the two mortgagors and their sons, among whom was Dattatraya Vishnu Dabholkar, who is respondent No. 2 in Appeal No. 293 and the appellant in Appeal No. 187. A decree was passed by consent in 1921 for an amount of Rs. 32,000 odd. Eventually the mortgaged property was put to sale and purchased by Sadashiv. The latter made applications to the revenue authorities to get his name entered in the place of Vishnu Moreswar in the village records, and to get his share of the amount paid to him by the village officers. These applications were refused. The appeals made to the superior revenue authorities and to Govt. were unsuccessful, and accordingly this suit was filed in December 1930.

For our purposes it will be sufficient to state the reliefs claimed in the suit. They were, firstly, a declaration that the shares in the two villages are of the ownership of the plaintiff Sadashiv by right of purchase; secondly, a declaration that the name of defendant No. 2, Dattatraya Vishnu, whose name was entered in the records on the death of his father in 1926 should be removed and the name of the plaintiff entered instead as the owner of the shares in the villages. Alternatively, it was prayed that Dattatraya's name might be

retained nominally and the plaintiff's name entered as the purchaser of the shares. It was further prayed that the amount of plaintiff's share should be paid to him directly by the village officers and that defendant No. 1, i. e. the Secretary of State, should be requested to give proper and necessary orders to the village officers in respect of the plaintiff's management of the villages. It was further asked that a sum of Rs. 2,500, which had been collected and was held in the treasury should be paid to the plaintiff.

The trial Court found that the grant of these villages was a *saranjam* grant, that it was a grant of the royal share of the revenue only, that a certificate under the Pensions Act was therefore necessary and that the suit against the Secretary of State was barred under the Revenue Jurisdiction Act. Accordingly, the suit was dismissed. On appeal, the learned First Class Subordinate Judge took a different view. He decided that the grant was not *saranjam* but personal *inam*, that it was not inalienable, that it was a grant of the soil and not merely of the revenue, and therefore no certificate under the Pensions Act was necessary, and that the suit was not barred by s. 4, Bom. Revenue Jurisdiction Act, as found by the trial Court. He therefore reversed the trial Court's decree, gave a declaration that the plaintiff has a two annas share in the village of Akolner and a six annas share in the village of Khedle Parmanand, ordered that the plaintiff's name should be entered in the accounts of the two villages, and ordered further that defendant No. 2, i. e. Dattatraya, should refrain from obstructing the plaintiff in receiving the amount direct from the treasuries, and that defendant No. 1, the Secretary of State, should arrange to pay the amount of plaintiff's share to him direct, and should also pay the sum of Rs. 2,500 lying in the treasury to the plaintiff. Against this decree, appeals have been brought both by Dattatraya. Appeal No. 187, and by the Secretary of State, Appeal No. 293.

I propose to deal first with the appeal of Dattatraya, defendant No. 2. The learned Counsel who appears for him has contended (1) that the grants in question were *saranjam*, i. e. for life only and inalienable, and that therefore the mortgage was void, (2) that if the grants were not strictly *saranjam*, nevertheless the estate conveyed was inalienable, (3) that there was a grant of the revenue only and not of the soil, and therefore a certificate was necessary under

the Pensions Act, and (4) that the suit is barred by the Bom. Revenue Jurisdiction Act. It will be convenient to mention here the position taken up by Govt. in this case. It supports the other appellant as to the suit being barred by the Revenue Jurisdiction Act. It contends, however, that the grants in question are personal *inam* and not *saranjam*. It has not contended that a certificate is necessary under the Pensions Act, and it has not disputed the plaintiff's right to get the revenue from defendant No. 2 after it has been paid to the latter in due course from the Govt. treasuries.

The grants with which we are concerned are very ancient. The earliest documents now on record are two *sanads* of the year 1751, Exs. 138 and 139, relating to the villages of Akolner and Khedle Parmanand, respectively. They refer to former grants of the villages to the ancestor of defendant No. 2, and confirm the grants as regards Babs Forzdari, Amanat and Sekhdari and Kotwali, and Farmayash, and Chakari. The grant was made in favour of the grantee and his heirs lineal or collateral from generation to generation. In the year 1753 we have a *sanad*, Ex. 107, which relates to both the villages Akolner and Khedle Parmanand, and a third village Navagaon. It describes them as villages of Moglai Ammal in which the Moglai Ammal was enjoyed before, and probably, although the language is not very clear, it was merely a confirmation of the rights previously granted. Subsequently, by Ex. 109, there was a grant of the Swaraj Ammal in the villages of Akolner and Navagaon in addition to the Moglai Ammal. This *sanad* contained an important recital that the Ammals were granted including Kulbab Kulkanu and rights of trees, water, stones, earth and minerals, which rights were to be enjoyed in *inam* from generation to generation. Subsequently, it appears that the villages were attached by Govt. and, on the intercession of Daulatrao Scindia with the Peshwa, there was a re-grant in 1779, Exs. 113 and 140. According to the *sanad*, Ex. 140, the three villages of Akolner, Khedle Parmanand and Navagaon were granted in *inam* and it was provided that the grantee and his descendants should enjoy the *inam* from generation to generation.

Exhibits 101 and 89 and 92 and 88 are the proceedings and *faisals* of the Inam Commission relating to Akolner and Khedle Parmanand, respectively. In

each case the old *sanads* were referred to and treated as conferring a heritable estate. In each case also it was provided that the *inam* was to continue "so long as there shall remain in existence any male heir in the family of the original grantee Ramaji Anant" and the orders were passed under Sch. B, cl. 2 of Act XI of 1852, that is to say, the procedure followed was that appropriate for heritable grants not *saranjam*. There was a rather curious difference in the wording of the two *faisalanamas*. In the case of Akolner the grant was of "the whole of the village Akolner exclusive of Mokasa, Sardeshmukhi Kherij Watani and ancient *haks* and *inams*." In the case of Khedle Parmanand what was granted was "the Jahagir Ammal of the village equivalent to half the amount of the total revenue after deducting amounts due to *hakdars* and the village expenses." But the history of the two villages does not suggest that any difference was intended in the nature of the grant, and in the Alienation Register, Ex. 87, the villages are shown similarly as Class II. Personal *inam* (not *saranjam*, which would be Class I), and the grant was described as one of the entire villages in each case.

It is quite clear, we think, that the plaintiff has failed to establish that the villages were granted as *saranjam*. No doubt the grants were made in the first instance for political or military services. But such grants are not necessarily of the nature of *saranjam*, and there is nothing in the old *sanads* to indicate that a mere life-estate was intended. The indications are rather the other way. The grants were not treated as *saranjam* by the Inam Commission, nor have they ever been so treated since. The rules made by Govt. as to *saranjams* (see Dandekar's Law of Land Tenure, Vol. 1, p 174) provide that no *saranjam* shall be capable of sub-division, and also that the grant is liable to be resumed whenever the *saranjam* or its revenue passes into the hands of a person other than the *saranjamdar*. In para. 8 of the judgment of the Court of first appeal there is a reference to a case, which I shall have occasion to mention in detail in a moment, when an opportunity clearly arose for resumption under the *saranjam* rules, had they really applied to the case. Government, however, did not resume but recognized the alienation. Government to whose interest it is to assert that the grants are *saranjam*, has never done so, and does not do so in this case. It appears that a list is main-

tained of all *saranjam* estates and these villages are not in that list.

Mr. Thakor's argument that, even if not *saranjam*, the grants were inalienable is, we think, clearly untenable. *Faisalanamas* of the Inam Commission in the same form as those in the present case were held to confer a heritable and alienable estate in *Gajanan v. Jankibai* (1). Besides, this contention must be regarded as *res judicata* for the plea that the estate is inalienable and the mortgage therefore invalid ought to have been taken in the mortgage suit. The point under the Pensions Act is not quite so clear. If the case merely depended on the construction of the old *sanads* and the *faisalanamas*, it might have been rather difficult perhaps to say that there has been a grant of the soil, at any rate in the case of Khedle Parmanand. But in this connection we have to consider, firstly, that Govt. which would apparently be interested in maintaining that it was a grant of the revenue only, has not in fact taken that position, and, secondly, that defendant No 2, on whose behalf the argument is now put forward, has himself claimed in the witness-box to be the owner of the soil of these villages. Moreover, the Pensions Act is to be construed strictly in favour of the right of suit. Section 4 of the Act, which is relied upon speaks of suits relating to pensions and grants of money or land revenue. This is not strictly speaking a suit relating to a grant of land revenue. There is no dispute as to the fact of the grant, or as to its validity, or as to the persons entitled under it. It is a suit relating to property which has been the subject of a grant, but the plaintiff's claim is quite independent of the grant. If this could have been regarded as a suit relating to a grant of land revenue within the meaning of s. 4, the suit on the mortgage would also seem to have been such a suit, and the defence that a certificate was necessary could have been and ought to have been taken there. We think, therefore, that the objection based on the Pensions Act has properly been disallowed.

Both Mr. Thakor for defendant No 2, and the Assistant Govt. Pleader for the Secretary of State, rely upon s. 4 (d), Revenue Jurisdiction Act, which bars *inter alia* claims against the Crown to be entered in the village papers as superior holder, inferior holder, occupant or tenant. The argument is that the plaintiff is asking in

(1) 39 Bom. L R 1304; 174 Ind. Cas. 256; A I R 1938 Bom. 113; 10 R B 436.

effect to be entered in the village papers as a superior holder, for a person who claims to have his name either entered in place of or associated with that of the superior holder as being entitled to all the revenue payable to the superior holder is really claiming to be the superior holder himself. "Superior holder" means, according to the definition in the Land Revenue Code, a person entitled to the revenue. Clause (f) of s. 4 has also been relied on, on behalf of defendant No. 2. That clause bars claims against the Crown to receive payments payable out of the land revenue, and it is said that in the present suit the plaintiff is making such a claim. But land revenue is defined in the Revenue Jurisdiction Act as meaning all sums and payments in money or in kind received or claimable by or on behalf of the Crown. It seems clear, therefore, that cl. (f) of s. 4 can have no application to the case of an alienated village where Govt. has ceased to have any interest in the revenue at all.

But, though cl. (f) does not apply, there is, we think, no satisfactory answer to the objection based on cl. (d). Mr. Desai, who appears for the plaintiff, has had to concede that the first relief claimed, viz. that the plaintiff's name should be entered as owner, is obnoxious to the clause. He has argued that the alternative relief is not obnoxious to it because the plaintiff does not ask to be described as a superior holder but only as a purchaser. I have set out in detail the reliefs sought in the plaint, and it is quite clear that the plaintiff wants to be shown in the village paper as the person entitled to the revenue of the village and such a person is the superior holder as defined in the Bom. Land Revenue Code. Although the Revenue Jurisdiction Act, like the Pensions Act is to be construed strictly, that does not mean that it should be construed so technically as to make its provisions a dead letter.

The judgment of the Court of first appeal seems to be based mainly on the orders passed by Govt. in another case of an alienation of a share in the village of Akolner (see Ex. 119). It appears that the eight annas share of one of the *inamdars* of Akolner had been purchased by one Gadre whose name had been entered in the village accounts in 1880. In 1899 his grandson and heir applied that his name should be substituted. The possession of the share in the village had been all along with the purchaser, and no objection to the entry of the name of the heir was

made by the original owners. The only persons objecting were some people who claim to have purchased the rights of the original owners. It appears that in 1882 Govt. passed a resolution that in the case of *inam* villages such as those with which we are concerned, which are held under special conditions and not summarily settled, it is necessary to be strict and, as a general rule, to refuse to enter sub-divisions. This change of practice is referred to in the written statement put in on behalf of the Secretary of State in this suit. But, apart from that, the orders passed by Govt. in Gadre's case can have no bearing whatever on the question of the jurisdiction of the Courts to control the revenue authorities in such matters. Government may pass any orders that are considered proper in the particular case. One may think that in the circumstances of the present case it would really be more equitable and convenient that the moneys to which the plaintiff is clearly entitled should be paid to him direct, and that if any charges are necessary in the village papers, they should be made. But the matter is entirely within the discretion of Govt. and s. 4, cl. (d), Revenue Jurisdiction Act, debars the Civil Courts from ordering that the entries should be changed.

The learned Judge in the Court of first appeal also appears to have relied on the proviso to s. 4 and on s. 5 of the Act. But in our opinion these have no application whatever to the present case. The proviso to s. 4, as its terms show, relates to cases where there is a dispute as to the nature of a holding, that is to say, as to whether it is exempt from the payment of land revenue or not. It does not relate to disputes as to who is entitled to be the holder. The judgment and decree relied on by plaintiff to bring him within the proviso, that is to say, the judgment and decree in the mortgage suit, had nothing to do with the nature of the holding and the judgment did not declare the property in dispute to be exempt from payment of land revenue. As regards s. 5, cl. (b) of which was apparently relied upon, it is sufficient to say that this is not a suit between private parties because some at any rate of the main reliefs are sought against the Crown.

We must hold therefore that this suit as against Govt. is barred. It follows from that that no order can be made that plaintiff's name should be entered in the village papers, and defendant No. 2 must

remain as the superior holder. From that again it seems to follow that Govt. cannot be ordered not to pay the revenue to defendant No. 2 but to pay it to the plaintiff direct. The definition of superior holder in the Land Revenue Code, to which I have already referred, shows that he is entitled to the revenue. Section 85 of the Code provides that he is to receive his dues through the village officers. Under s. 86 the superior holder only is entitled to assistance from Govt. So that an injunction against Govt. to pay the plaintiff direct, and not to pay the superior holder, would be contrary to the spirit, if not to the express terms, of the Land Revenue Code. The relation between Govt. and the superior holder is not affected by the sale of the superior holder's rights.

In a somewhat similar case, already cited in a different connection, *Gajanan v. Jankibai* (1) an injunction was granted restraining an *inamdar* from receiving the revenue of his *inam* which he had alienated. Government was not a party to that case, and it is not clear that there was any objection on the part of Govt. to payment being made to the alienee direct. In any case that does not seem to be a very appropriate method of dealing with the present case. The plaintiff is quite obviously entitled to the share of the income of these villages which he has purchased, and, as long as Govt. is not prepared to pay it to him directly, we think the proper thing to do is to order defendant No. 2 to pay it to the plaintiff as soon as he receives it from the treasury. Such an order, we think, is required by the justice of the case. Mr. Thakor has argued that the plaintiff ought to have filed cross-objections, and, not having done so, is not entitled to any amendment of the decree. But as the decree stood, there was nothing to object to, and, we think, the order we propose to make is covered by r. 33 of O. XXI.

The result is, therefore, that Appeal No. 293 of 1935 will be allowed, and the suit so far as it is against the Secretary of State will be dismissed with costs throughout. As regards Appeal No. 187 of 1935, we substitute a new decree for that of the Code of first appeal. We give the plaintiff a declaration as already allowed by the Court of first appeal, and we also grant a mandatory injunction to defendant No. 2 that he do recover the amounts payable to plaintiff in respect of his shares in the two villages and do immediately pay to him

the amounts so recovered. We understand that in consequence of the decree of the Court of first appeal certain payments have already been made to the plaintiff. There is no reason why these moneys should be returned and all payments hitherto paid will stand confirmed. But interest on those payments is not allowed. Defendant No. 2 must pay all plaintiff's costs in the lower Courts, except those occasioned by making defendant No. 1 a party, and will also pay the costs of this appeal to this Court. Civil Application No. 473 of 1938, which was for additional evidence, is dismissed with costs.

S.

Order accordingly.

LAHORE HIGH COURT

Execution First Appeal No. 82 of 1939

June 27, 1939

RAM LALL, J.

LADLI PARSHAD—JUDGMENT-DEBTOR

—APPELLANT

versus

Lala CHAMAN LAL—DEEBE-HOLDER

—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 86, O. XXXIV—Notice under O. XXI, r. 86—Judgment-debtor appearing and contesting execution proceedings—Failure to give notice under O. XXI, r. 22, and omission to record reasons for failure—Proceedings, if vitiated—Agricultural land hypothecated in decree—Decree-holder authorised to recover decretal amount by sale—Attachment before sale, if necessary.

Where notice of the execution proceedings and sale thereunder is issued under O. XXI, r. 86, and the judgment-debtor appears and contests these proceedings, it is unnecessary to give the judgment-debtor notice of proceedings that he is already well aware of and failure to give notice under O. XXI, r. 22, and the omission to record reasons dispensing with this notice is no more than an irregularity which does not take away the jurisdiction of the Court. 55 Ind. Cas. 816 (1), 117 Ind. Cas. 648 (2) and 131 Ind. Cas. 702 (3), relied on.

Where in a decree which was based on an award agricultural land was hypothecated and the decree-holder was expressly authorized to get the amount due under the decree realized by sale of the property, the decree comes within the purview of O. XXXIV, Civil P. C. The decree being thus in substance a mortgage decree, it is not necessary to effect attachment of the land before ordering its sale in execution.

Ex. F. A. from an order of the Sub-Judge, First Class, Karnal, dated January 23, 1939.

Mr. Shamair Chand, for the Appellant.

Mr. F. C. Mittal, for the Respondent.

Judgment.—One Chaman Lal who had a mortgage decree against Ladli Parshad

for Rs. 14,632 with future interest, made an application for realization of the decretal amount by sale of agricultural land which is described as 515 *bighas* 7 *biswas*. The decree was passed on September 2, 1935, and one of the conditions laid down therein was that the decretal amount was payable within three years of the date of the decree. The application for execution was made on October 5, 1938, and a notice of proclamation of sale was issued under O XXI r. 66, Civil P. C. The judgment-debtor appeared and contested the maintainability of the execution proceedings. It appears that no notice under O. XXI, r. 22, Civil P. C. was ever issued and the judgment-debtor objected that in the absence of the issue of such a notice or of reasons for dispensing with this notice, the Court had no jurisdiction to proceed with the execution proceedings and to sell the property. The learned Subordinate Judge to whom the execution application was made overruled this objection holding that the failure to record reasons for not issuing a notice was only an irregularity not amounting to a defect in jurisdiction. It was also objected on behalf of the judgment-debtor that the decree in question was not really a mortgage decree and therefore attachment of land was necessary before orders for its sale were issued, as the decree was based on an award. The third objection which was taken was that only 445 *bighas* 16 *biswas* of land were hypothecated but now 515 *bighas* 7 *biswas* were intended to be sold.

The learned Subordinate Judge overruled these objections and an appeal has been preferred to this Court through Mr. Shamair Chand who has reiterated these objections. The main point on which the greatest stress has been laid by learned Counsel in arguments is the objection based on the failure to record reasons for not issuing a notice under O. XXI, r. 22. In ordinary circumstances, such a defect would be fatal and a sale concluded in such circumstances would be void but in the present case notice of the execution proceedings and sale thereunder was issued under O. XXI, r. 66 and the judgment-debtor appeared and contested these proceedings. In such circumstances it appears to me that it was unnecessary to give the judgment-debtor notice of proceedings that he was already well aware of and failure to give notice under O. XXI, r. 22 and the omission to record reasons dispensing with this notice is no more than an irregularity which does not take away the jurisdiction of the Court.

The matter appears to me to be covered by authority. In *Kora Lal v. Punjab National Bank, Ltd., Multan* (1), Sir Shadi Lal, O. J. held that where the Court did issue a notice to the judgment-debtor though it was issued not under O. XXI, r. 22, but under r. 66 and the latter was afforded an opportunity to show cause why the decree should not be executed against him, the object aimed at by r. 22 should be held to be carried out and the mere fact that the notice was not under that rule does not vitiate the proceedings.

It appears to me that this case is very similar in facts to the case before me. The object of the rule is obviously to give an opportunity to the judgment-debtor to urge any objection to the maintainability of execution proceedings, to prevent his being taken by surprise and to afford him an opportunity to satisfy the decree before execution issues. It appears to me that where a person contests a notice under O. XXI, r. 66, he is aware of the proceedings, is not taken by surprise and can, if he so desires, satisfy the decree before the property is brought to sale in the course of execution proceedings. In *Fakhrul Islam v. Bhubaneshwari Kuer* (2), the facts were that a notice was ordered to be issued under O. XXI, r. 22, but it did not in fact issue and was suppressed. It was held on an application to set aside a sale in execution on the ground that a fresh notice should have been issued, that no fresh notice was necessary. Kulwant Sahay, J. held that if notice was issued but not served and yet the judgment-debtor appeared and raised objection the object of the rule was satisfied. This proposition was laid down with greater emphasis by a Division Bench of the Calcutta High Court in a case reported in *Chandra Nath Bagchi v. Nabadwip Chandra Dutt* (3). There, too, instead of issuing a notice under O. XXI, r. 22, a notice under O. XXI, r. 66, was issued and the judgment-debtors appeared and objected to the valuation to be inserted in the proclamation of sale and later the sale could not proceed because originally no notice under r. 22, had been issued. Referring to a dictum of their Lordships of the Privy Council in

(1) A I R 1921 Lah. 384; 55 Ind. Cas. 816; 118 P L R 1920; 5 Lah. L J 67; 2 U P L R (L) 91.

(2) 7 Pat. 790; 117 Ind. Cas. 648; A I R 1929 Pat. 79; Ind. Rul. (1929) Pat. 456.

(3) A I R 1931 Cal. 476; 131 Ind. Cas. 702; 53 O L J 319; 35 O W N 9; Ind. Rul. (1931) Cal. 491.

Raghunath Das v. Sundar Das Khetri (4), Rankin, C. J. in delivering the judgment of the Division Bench observed that it was quite unnecessary to push the abstract logic of the dictum of the Privy Council in *Raghunath Das v. Sundar Das Khetri* (4), to the ridiculous extreme that in all circumstances a notice under r. 22, was a condition precedent to the sale before which the Court had no jurisdiction. The learned Judge went on to observe as follows:

"I do not in any way seek to throw doubt upon the proposition that where such a notice had not issued and the party who is entitled to notice does not in substance get notice and is not given or does not take an opportunity to object to the execution of the decree, the sale which follows will be without jurisdiction.....The parties in the present case have been litigating actively upon the question whether this execution should proceed and how it should proceed.....It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely, to dispute the execution of the decree when in point of fact they were busy disputing about it in all the Courts for the best part of the last two years. I decline to push the doctrine so far, as that and it seems to me that the execution should proceed."

I am in respectful agreement with the above exposition of law and I hold, therefore, that there is no substance in the objection based on the failure to record reasons for not issuing a notice. It may be observed that the Lahore High Court has by notification of 1932 amended r. 22, O. XXI. by adding to para. 2 thereof words to the effect that failure to record reasons shall be considered an irregularity not amounting to a defect in jurisdiction.

So far as the second objection is concerned, the decree was based on an award and in it agricultural land was hypothecated and the decree-holder was expressly authorized to get the amount due under the decree realized by the sale of the property. This, in my opinion, brought the decree within the purview of O. XXXIV, Civil P. C. The decree being thus in substance a mortgage decree, it was not necessary to effect attachment of the land before ordering its sale in execution. I see no substance in the third objection either, because the area hypothecated was 448 *bighas* in the decree and this has now become 515 *bighas* by the addition of *shamilat* land which was allotted

to the judgment-debtor on partition. The *shamilat* was also hypothecated and the decree-holder is, therefore, entitled to get his decree satisfied out of the whole area hypothecated including the *shamilat* land which fell to the share of the judgment-debtor. In these circumstances, I see no substance in this appeal which I dismiss with costs.

D.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Miscellaneous Second Appeal No. 40 of 1937.
May 23, 1939

DAVIS, J. C. AND TYABJI, J.

KHEMOHAND RAMDAS WADHWA—

DEFENDANT NO. 1—APPELLANT

versus

MATHRADAS GIRDHARIDAS AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Suit by minor coparceners for accounts of ancestral property in hands of third person—Manager not joined as co-plaintiff but joined as defendant—Suit, if maintainable.

Where the father, the manager of the joint Hindu family is not joined as co-plaintiff, the minor coparceners cannot bring a suit for accounts of the joint ancestral property in the hands of a third party, even if the father is joined as defendant and supports their claim. The minor plaintiffs cannot give that third person a receipt or quitance on settlement of his accounts, even should that person be willing to account. That can be done only by the manager, who therefore, alone is entitled to call for accounts and give a quitance or receipt on settlement. If therefore, the minor plaintiffs cannot give a good quitance or receipt on settlement of accounts, obviously they have no right to sue. Since it is the manager or *karta* who is alone competent to represent the family, to act for it and to bind it. The device of joining the manager as a defendant does not avoid the difficulty. 168 Ind. Cas. 801 (1), 133 Ind. Cas. 116 (2), 9 Ind. Cas. 759 (3) and *Atagappa Chetti v. Vellian Chetti* (5), relied on. *Arunachalla Pillai v. Vythialinga Mudaliar* (4), distinguished.

Mr. D. N. O'Sullivan, for the Appellant.

Mr. Srikrishindas H. Lulla, for the Respondents.

Davis, J. C.—The suit out of which this miscellaneous second appeal arises is a peculiar one. It was brought in the Court of the Second Class Subordinate Judge at Shikarpur ostensibly in the names of three minors, the sons of Girdharidas through their grandmother Tulsibai as next friend. Tulsibai was the mother of Girdharidas who was defendant No. 2 and identified herself with and supported the plaintiffs' case. Girdharidas, defendant No. 2 and his minor sons, the plaintiffs, are members of a Hindu joint family and Girdharidas is the guardian-in-law of the minor plain-

(4) 42 C 72; 21 Ind. Cas. 304; A I R 1914 P C 129; 41 I A 251; 18 O W N 1058; 1 L W 567; 27 M L J 150; 16 M L T 353; (1914) M W N 747; 16 Bom. L R 814; 80 O L J 555; 13 A L J 154 (P.O).

tiffs, and he is the manager of the joint Hindu family. Some explanation as to why he did not himself as plaintiff and manager of the joint Hindu family bring the suit on behalf of himself and his minor sons is obviously called for as the suit purports to be a suit for accounts of joint family property alleged to have been in the hands of defendant No. 1 as trustee since 1907, long before the minor plaintiffs were born, and the minor plaintiffs had asked for their three-fourths share to be awarded them after settlement of accounts. But it is obvious that the plaintiffs as members of a joint Hindu family are not entitled to any specific share in the undivided property, and the learned Advocate for the respondents in this appeal, the minor plaintiffs, dealt discreetly with that part of their claim by dropping it.

The Joint Subordinate Judge who tried the suit, dismissed it holding that the minor plaintiffs had no right to ask for accounts from defendant No. 1 who, it was found, stood in some sort of fiduciary relationship to defendant No. 2, but it was defendant No. 2 alone who was entitled to call on defendant No. 1 to account. The First Class Subordinate Judge in appeal, however, held that the minor plaintiffs as having a right independent of their father in the joint ancestral property in the hands of defendant No. 1 had a right to call upon defendant No. 1 to account, and he found that the fact that the father was joined as defendant No. 2 brought all necessary parties upon the record, and made the case complete. He did not refer to the fact that the minor plaintiffs, though undivided, claimed their separate share in the joint family property, apart from their father defendant No. 2, though the suit was not a suit for partition, nor did he refer to the fact that the minor plaintiffs could not give a receipt or quit-tance to defendant No. 1, even if he was prepared to account, and could not therefore be in a position to sue. He therefore allowed the appeal and reversed the order of the trial Judge dismissing the suit. Defendant No. 1 has appealed.

There is no real dispute about the facts in this case. Radhakrishindas, the father of Girdharidas, the father of the minor plaintiffs, died in 1907, and on his death Radhakrishindas' widow, the minors' present next friend, not unnaturally, approached defendant No. 1 Khemchand, her late husband's nephew, to look after the property and safeguard the interests of her minor son Girdharidas, the present defendant No. 2,

then aged six years old. Khemchand agreed. Also it is not now disputed, and it is found by both the lower Courts that whether Khemchand was a trustee *de son tort* or not, he was bound to account for the property whatever its value, which on the death of the father of defendant No. 2 he, at the request of the mother of defendant No. 2, undertook to administer and safeguard. The only question of difference between the two lower Courts is as to whom defendant No. 1 should be called upon to account—defendant No. 2 as the trial Court finds or to the minor plaintiffs as the lower Appellate Court finds? Our view is that he cannot be called upon to account by the minor plaintiffs in this suit.

Before us the case was argued at first broadly on the ground that the minor plaintiffs alone could not sue for accounts of the joint family property in the hands of defendant No. 1. Defendant No. 2 as manager of the joint family and the joint family property was alone entitled to sue, and he had not done so, but had put up his minor sons, with their grandmother as next friend to sue, so as to avoid that accounting between himself and defendant No. 1 which would take place if he, defendant No. 2, sued as plaintiff. There is no doubt in our minds that this explanation is the true explanation of the action of defendant No. 2. He supports the claim of his minor sons against defendant No. 1 but he will not sue himself. Reliance was placed on behalf of the appellant-defendant No. 1 on a case of this Court in *Kallianeshwar Bhagwandas v. Shewaram Nandram* (1) in which it was held that the manager or *karta* is alone competent to represent the family, to act for it and to bind it, and a mere co-parcener cannot sue or appeal alone. Reliance was also placed upon the judgment in *Ram Kishan v. Ganga Ram* (2). It is true that in *Kallianeshwar Bhagwandas v. Shewaram Nandram* (1), this Court was considering the case of an appeal by a co-parcener who was not joined as a party to the suit and other considerations besides that of the right of a co-parcener to oust the *karta* or manager from authority or interfere in his management were present; but all the diligence of the learned Advocate for the respondents has not enabled him to find one case where it has been held that minor co-parceners can bring a suit with respect

(1) 30 S L R 467; 168 Ind. Cas. 801; A I R 1937 Sind 94; 9 E S 246.

(2) 12 L 428; 133 Ind. Cas. 116; A I R 1931 Lah. 559; 32 P L R 199; Ind. Rul. (1931) Lah. 740.

to joint family property in the possession of a third party without the manager or *karta* being himself a plaintiff. All the cases cited merely show that it was at one time considered necessary to join the other co-parceners with the manager in a suit brought by the manager, which is no longer good law: *Kishan Parshad v. Har Narain Singh* (3) at p. 277; but not one case is cited to us to show that minor co-parceners can, therefore, bring a suit such as this and do what, it would appear, the manager only is competent to do.

The case nearest to the argument of the learned Advocate for the respondents was *Arunachala Pillai v. Vythialinga Mudaliar* (4), but this case merely decided that no member of an undivided family, except the manager, as such, is entitled to bring a suit to establish a right belonging to his family without making the other members of the family parties to the suit, but that case did not decide that minor co-parceners could bring a suit for accounts of the joint ancestral property in the hands of a third party, their father, the manager, not being joined as co-plaintiff, but being joined as defendant No. 2 and supporting their claim; nor did the case decide that adult co-parceners could usurp the authority and status of the *karta* or manager and bring a suit in their own names separately from him. We think this case can be looked at simply and decided simply in this way: The minor plaintiffs could not give defendant No. 1 a receipt or quitance on settlement of his accounts, even should defendant No. 1 be willing to account. That could be done only by the manager, who therefore alone was entitled to call for accounts and give a quitance or receipt on settlement. If therefore the minor plaintiffs could not give defendant No. 1 a good quitance or receipt on settlement of accounts obviously they had no right to sue, the truth being as, as laid down in *Kallianeshwar Bhagwandas v. Shewaram Nandram* (1), it is the manager or *karta* who is alone competent to represent the family, to act for it and to bind it and this proposition finds support in the judgments in *Alagappa Chetti v. Vellian Chetti* (5) and *Kishan Parshad v. Har Narain Singh* (3), which emphasize the right of the manager to sue alone; but the co-parcener has no such (3) 33 A 272 at p 277; 9 Ind. Cas. 739; 381 A 45; 8 L J 256; 15 O W N 321; 9 M L T 343; 13 O L J 345; 4 M L J 378; 13 Bom. L R 359; (1911) 2 M W N 395 (4) 6 M 27.
(5) 18 M 33; 4 M L J 283.

right. We do not think the device of joining the manager as a defendant avoids the difficulty. Reference may also be made to the case in *Ram Kishan v. Ganga Ram* (2), where after quoting from the judgment of the Privy Council in *Kishan Parshad v. Har Narain Singh* (3) Dalip Singh, J. said (p. 432*):

"It seems to me to follow from the above that it is not the form in which the manager sues which determines his capacity to sue, on behalf of the joint family, but the fact that nobody except him has the right to interfere in the business of the joint Hindu family or to give a discharge or a receipt for a debt due to or from that joint family which confers the capacity on the manager."

And

"It is clear law that a son could not interfere with the father's management of the family business."

To hold otherwise would be to deprive the father of the right and power of management. This is much the effect of the ruling in *Kallianeshwar Bhagwandas v. Shewaram Nandram* (1). We hold, therefore, the minor co-parceners had no right to sue, and we allow the appeal and restore the order of the trial Judge with costs throughout.

D.

Appeal allowed.

*Page of 12 L.—[Ed.]

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 5 of 1939

May 29, 1939

ROBERTS, C. J. AND DUNKLEY, J.

LEE SHI—APPELLANT

versus

CONSOLIDATED TIN MINES OF BURMA, LTD.—RESPONDENTS

Workmen's Compensation Act (VIII of 1923), ss. 12, 3—Principal's liability to compensate workmen employed by contractor—Wilful disobedience of workman—Liability of employer—Tests—At time of accident workman doing work for which he was employed, but having no right to go to place where he died—Employer's liability.

Section 12, Workmen's Compensation Act, shows that the principal who employs a contractor shall be liable to compensation to workmen whom he did not immediately employ but who are employed by the contractor. But before the principal is made liable, it must be established that the contractor was entitled to expect such workmen to do his work at his orders and that he was entitled to dismiss such workmen. It must be shown that there was a contract of service between the workmen and the contractor. Where there is only an agreement by which certain selected persons could come when they chose and do work on their own account which would get for them remuneration from the contractor, the principal is not liable to compensate such workmen.

Under s. 3, in spite of there being wilful disobedience on the part of the workman concerned, an employer may be liable in respect of injury

which results in death provided the accident arose out of and in the course of a person's employment. In considering this question the ambit or scope of a man's employment must be looked at in relation to the contract which he has made with his employer. There is one test which is always applicable, and it is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment.

In a case where the workman met with his death when he was doing the very thing which he was employed to do, the mere fact that he had no right to be working in the place where he was when he met his death, does not show that the accident did not arise out of and in course of employment and the employer would in such case be liable to compensation under s. 3.

[English Case-law relied upon.]

C. Misc. A. against the order of the Commissioner for Workmen's Compensation, Tavoy, dated November 3, 1938.

Mr. U. Chan Htoon, for the Appellant.

Mr. De; for the Respondents.

Roberts, C. J.—This is an appeal from the order of the learned Commissioner for Workmen's Compensation at Tavoy arising out of the death of one Chan Chi Lyan, a Chinaman, who was killed on August 24, 1937 whilst working in or about the mines of the respondent company. The cause of his death was the fall of a tree which collapsed into a drainage or ditch in which he was working, and this action is brought by his widow by her agent Ah Chan against the respondent company. The learned Commissioner framed four issues, the first being whether on the date in question the deceased was a workman employed by the respondent company, and that issue he answered in the affirmative for reasons which we find it difficult to understand. He states that his finding has been arrived at in view of the evidence of one Akbar and that at the time of his death the deceased was what is known as a tributor? We are not told in the order of the learned Commissioner what a tributor is: We are not told with whom he had a contract of service; we are not told of the nature of his work, or the place at which he was expected to work, or the wages which he earned; but we are left with the bare finding of fact that he was in the opinion of the Commissioner a workman within the statute. Akbar in his evidence says that the deceased was a tributor who during the four days before his death (which was the only period for which he had been a tributor) did not supply any ore to the company and that his name was not entered in any ledger. In cross-examination he said that contractors

do not employ tributors but tributors get and sell ore to contractors and get cash from them. And his evidence was therefore to the effect, so far as I can see, that the deceased was not employed by any body but was a free agent to come and go as and when he liked for the purpose of collecting ore or doing some other ancillary work which would result in his private gain when he sold the produce to a contractor. Another witness, Mr. Rajan, who was the Assistant Officiating Manager of the respondent company, said that the contractor engaged his own labour and made his own arrangements for paying them, and the contractor was paid by the company at an agreed price per viss won. This makes it doubtful as to whether the contractor would pay merely for the ore which was given to them by the tributors or whether they were dealing with the deceased upon the footing of a servant or some one who was having a series of contracts with them.

Section 12, Workmen's Compensation Act, plainly shows that the principal who employs a contractor (that is to say, the respondent company here) shall be liable to compensation to workmen whom he did not immediately employ but who are employed by the contractor. But there is so far as I can observe, nothing in the evidence in this case which shows that the deceased ever had a contract of service with the contractor at all. Loosely speaking of course, it might be permissible to say that the coolies who collect ore and are paid by a contractor for what they collect are employed by him, but the tests of employment must be looked to. Were the contractors entitled to expect such coolies among the deceased among them, to do their work under their orders? Were they entitled to dismiss such persons? Was there in short a contract of service between them or was there merely an arrangement by which certain selected persons when they chose could come and do work on their own account which would get for them remuneration from the contractors? We have not been favoured with the result of an examination into these matters, and this case must accordingly go back to the Commissioner so that he may take evidence and record the evidence that he has taken and that we may say whether upon that evidence there is any material upon which we can find that the deceased in this case was a workman within the meaning of the statute. If he was such a workman, the next question is whether the accident which

killed him arose out of or in the course of his employment, having regard to the provisions of s. 3 of the Act. And it is clear from those provisions, looking at sub-s. (1) (b) (ii), that the employer shall not be liable in respect of any injury not resulting in death caused by an accident which is directly attributable to the wilful disobedience of the workman to an order expressly given. That means to say that the first question to be faced is whether the accident arose out of and in the course of a workman's employment. If it does, the employer is *prima facie* liable unless there is a wilful disobedience by the workman to an order expressly given. But even though such wilful disobedience has existed, the liability occurs when the injury is found to have resulted in the workman's death. Accordingly, the Commissioner had to address himself, having found that the deceased was a workman, to the question whether this accident arose out of and in the course of his employment. This matter he has dealt with in a somewhat summary way. He said that it was clear that the deceased had no right to be working in the place where he was when he met his death, and that therefore the accident did not arise out of and in the course of his employment. But the Statute says in plain terms that in spite of there being wilful disobedience, an employer may be liable in respect of injury which results in death provided the accident arose out of and in the course of a person's employment.

Now in considering this question, the ambit or scope of a man's employment must be looked at in relation to the contract which he has made with his employer. The first thing to be noticed is that it is quite clear that there are a number of things which a person may do whilst he is being employed which do not arise out of and in the course of his employment. Two cases assist us in this connection. In the first case, *Davies v. Gwauncaegurwen Colliery* (1), a workman in contravention of express orders went to hang up his coat in a place to which he had been forbidden access, and it was held that the act of hanging up his coat, though done at or close to the place of his employment, was done for his own purpose and done in a place outside the scope of his employment, and was merely an act incidental to his employment, and therefore was not an act covered by the statute. A further illus-

tration of the same principle arose in a case to which I referred in argument, where a travelling ticket collector in the employment of the Great Western Ry. Co. was obliged during the course of his duties to remain on different occasions for a night at Swansea. Being qualified as a guard and therefore being liable to be called upon in any emergency to act as such, he was obliged to leave the address of his lodgings in Swansea with the Ry. Co.; but apart from that he was free to go to and fro wherever he chose in Swansea whilst not on duty. One morning whilst going from his lodgings to the station to join the train, he fell in the street and claimed compensation. It was held, while in the street proceeding from his lodgings to the station, he was not performing any duty under his contract of service, and therefore the accident did not arise in the course of his employment. And the whole question in this case is whether the accident which took place was one which took place owing to the nature of the person's employment and from a risk which was incident to the carrying out of his duties in that employment alone. In the case I have just cited *Alderman v. G. W. Ry. Co.*, (2), although the appellant would never have been at Swansea but for the nature of his employment, he was whilst at Swansea acting as an ordinary member of the public. In this case, however, it seems to me that the accident which arose was one which arose—assuming the deceased to have been a workman—by reason of the fact that he was doing the very thing which he may well have been employed to do, namely to find ore, and in the course of finding ore and while doing those things which directly concerned his work, he was injured by a falling tree.

In *Clarke v. Southern Railway* (3) the authorities in relation to the act of a person who does something which he is forbidden to do whilst engaged in his work received careful consideration at the hands of Scrutton, L. J. In that case Clarke, who was a workman in the employ of the Southern Railway, went by a shorter route along the permanent way to his work. This was a common practice although forbidden by the company's rules. When the servant had walked some distance along the line an engine was found to be going in

(2) (1937) A.C. 454; 106 L.J.K.B. 335; 30 B.W.O.O. 64; 156 L.T. 441; 81 S.J. 337; 53 T.L.R. 594; (1937) 2 A.E.R. 408.

(3) (1927) W.O.I. Rep. 282; 96 L.J.K.B. 572; 137 L.T. 200.

(1) (1924) 2 K.B. 651; 68 S.J. 882; 40 T.L.R. 659.

the same direction and he tried to mount it so as to get a lift, with the result that he was seriously injured. It was held on appeal that workmen were not any longer in their employment when they went into a definitely prohibited area and had gone outside their sphere of employment. Scrutton, L. J. said:

"Approaching this case therefore from that point of view and appreciating that it is not enough to say: 'You were forbidden to go on the line, therefore the accident cannot have arisen in the course of your employment,' what test are we to apply?"

and he applied the test laid down by Lord Sumner in the case which Mr. De has just cited to us *Lancashire and Yorkshire Railway v. Highley* (4) Lord Sumner said:

"There is, in my opinion, one test which is always applicable, and it is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

In this case the deceased Chan Chi Lyan was doing something which, so far as can be seen, arose from the nature of the contract of service which he had undertaken. It has been suggested that there was an added peril by reason of the fact that notwithstanding the prohibition, he went to a place which was near a dangerous tree which fell upon him; but that point has been dealt with by Lord Buckmaster in the case of *Thomas v. Ocean Coal Co., Ltd.* (5). Lord Buckmaster says (at p. 446*):

"In one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the Act contains no provisions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances. Conduct can of course be so reckless and so unnecessary as to take it outside the meaning of the statute."

Now, does the mere fact of an act of being a disobedient act take it outside the meaning of the statute because it must necessarily, by reason of being disobedient, be so reckless and so unnecessary that the dependent should not receive compensation? The answer is that the statute expressly deals with the matter in saying that where there is wilful disobedience, the employer shall not be liable unless—and this is the most important matter—the

(4) (1917) A.C. 352; 86 L.J.K.B. 715; 1917 W.O. 1 Rep. 179; 116 L.T. 767; 61 S.J. 397; 33 T.L.R. 286.

(5) 20 Butterworths' Workmen's Compensation Cases 438.

*Page of 20 Butterworth's Workmen's Compensation Cases—[Ed.]

injury results in death. Where the injury results in death, the employer has no defence in merely saying that it was sustained as the result of the wilful disobedience of the workman to an order expressly given; and that is all that he has been able to say here. I therefore think that the Commissioner has not rightly directed himself upon this matter. But all that we have to do at the present juncture is to send the case back to him to see whether there was any evidence upon which he could hold as a fact that the deceased was a workman within the meaning of the Act. We shall have to consider when he has taken fresh evidence and reported to us his conclusion on that matter, what are the proper steps to be taken in the circumstances. Having examined the other matters, the learned Commissioner must make an effort to deal with the question of wages in case it shall transpire that the appellant is entitled to compensation. The method of calculating wages is laid down by s. 5 of the Act and must be computed in accordance with its provisions.

Dunkley, J.—I agree, and desire to add only one word. The Act provides that in the case of an injury resulting in death, it shall be no answer on the part of an employer to a claim for compensation that the deceased workman acted in wilful disobedience of an order expressly given, and it appears to me that the answer of the learned Commissioner to his third issue must have the effect of rendering this provision nugatory.

D.

Case sent back.

MADRAS HIGH COURT

Appeal No. 132 of 1935

November 18, 1938

ABDUR RAHMAN, J.

V. V. VYTHILINGAM PILLAI

—APPELLANT

versus

SESHAN—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 98, s. 2—Plaintiff obtaining decree without fraud and collusion and bona fide believing person sued against to be legal representative of his deceased debtor—Other legal representatives not parties to suit, whether bound by decree—Such representatives, if judgment-debtors within meaning of O. XXI, r. 98—Order passed in their favour refusing to deliver possession to decree-holder, whether appealable as decree.

Where a plaintiff bona fide believing that the person who is sued, is the proper legal representative of his debtor, obtains a decree against him

without fraud or collusion, the other proper legal representatives of the deceased debtor would be bound by it even if they were not impleaded in the suit, when the person who has been sued as a legal representative is in possession of the whole estate left by the deceased debtor. The case would be still stronger if the interest of the person who had been sued turns to be identically the same as of those who were not impleaded for want of knowledge on the part of the plaintiff. When plaintiff in such a suit obtains a decree, the legal representatives who are not impleaded in suit must be regarded as judgment-debtors within meaning of O. XXI, r. 98, Civil P. O., and an order passed in their favour refusing to deliver possession to the decree-holder is appealable as decree. 4 Ind. Cas. 1059 (3), 31 Ind. Cas. 920 (4), 52 Ind. Cas. 509 (5) and 129 Ind. Cas. 469 (6), relied on.

A. against the appellate order of the District Court, Trichinopoly, dated January 25, 1935.

Mr. M. S. Vaidhyanatha Ayyar, for the Appellant.

Mr. A. V. Narayanaswamy Ayyar, for the Respondent.

Judgment.—One Srinivasulu Naidu executed a mortgage in favour of the appellant on July 3, 1921. The mortgagor died leaving him surviving a legitimate son, an illegitimate son and a concubine. The appellant instituted a suit on the basis of the mortgage after the mortgagor's death (O. S. No. 258 of 1930). He did not know of the existence of the illegitimate son and the concubine and thus impleaded the legitimate son alone who was considered by him to be the sole legal representative of the deceased mortgagor. It might be stated here that the legitimate son was in possession of the properties left by his father Srinivasulu Naidu including the house mortgaged by him. A decree was passed in favour of the appellant mortgagee on October 22, 1930. In execution of this decree the mortgagee brought the property to sale and purchased it himself some time in 1931. It seems that before the appellant had obtained the mortgage decree a suit was filed by the illegitimate son who is the respondent in this appeal (and respondent No. 1 in the trial Court) for partition and by the concubine (who is respondent No. 2 in the trial Court) for maintenance on March 7, 1930. This was decreed on April 15, 1931. A final decree was passed on February 11, 1932, under which respondent No. 1 got one-fourth share of the house mortgaged by his father and respondent No. 2 got a charge in respect of the three-fourths of the house in lieu of her maintenance.

Respondent No. 1 appears to have taken possession of the house through Court on August 18, 1932. After the purchase of the property, the appellant auction-purchaser tried to take possession through Court, but he was obstructed by respondents Nos. 1 and 2 and made an application for the removal of obstruction to the District Munsif of Trichinopoly on March 29, 1934. It was contended on behalf of respondents Nos. 1 and 2 that they were not parties to the decree and were therefore not bound by it. They also pleaded collusion between the decree-holder and the legitimate son. The executing Court's judgment is not very explicit but in the absence of evidence on the record in regard to collusion between the appellant-decree-holder and the legitimate son, it may be taken that the executing Court found against it. Holding that the concubine, i. e., respondent No. 2, was not in possession of the house, he declined to accept the objection raised on her behalf but finding that the illegitimate son, i. e., respondent No. 1, was in actual possession of one-fourth of the house on his own behalf, his objection was accepted with the result that the appellant decree-holder was ordered to be put into possession of the three-fourths of the house purchased by him but the Court declined to deliver possession to him in regard to the remaining one-fourth. The appellant decree-holder filed an appeal against that order to the District Judge of Trichinopoly who dismissed it in a very brief order on the ground that it was not competent as the order was passed by the executing Court under O. XXI, r. 97, Civil P. O. The present appeal has been filed against this order.

The narrative of facts which has been given above would show that the only question which arises for decision in this appeal is whether the illegitimate son was bound by the decree obtained by the auction-purchaser against the legitimate son in October 1930. As I have said above, there is no evidence on record that there was any collusion between the decree-holder and the legitimate son. There is nothing to show that the decree-holder knew of the existence of the illegitimate son or of the concubine before he filed a suit or obtained his decree. Moreover, the legitimate son was in possession of the whole estate left by his father at the time when the suit was instituted or even when the decree was obtained on the basis of the mortgage. It must, therefore, be held

that the decree-holder's action in impleading the legitimate son, who would, in the ordinary course, be the only legal representative was *bona fide*. This, however, would not be enough if the general principle of law that a person is not bound by a decree to which he is not a party is held to govern the present case. If that principle be held to be applicable, there is no doubt that the order passed by the learned District Judge would be correct and the only remedy which the appellant before me would have is to file a suit and appeals either to the lower Appellate Court or to this Court would not be competent. On the other hand, if it be found that although not a party to the suit he was yet bound by the decree passed against the legitimate son as the legal representative of his father, appeals would be competent. This can only be if respondents Nos. 1 and 2 are held to be judgment-debtors within the meaning of O. XXI, r. 98, and the order refusing to deliver possession found to be appealable as a decree.

There has been some divergence of opinion between the different High Courts on this question. While the Calcutta and the Allahabad Courts appear to have taken the view that in these circumstances the person who was not impleaded as a defendant in the case would not be bound by the decree which was passed in his absence, *Jagannath Prasad v. Jamuna Bai* (1) and *Dwipal Chandra v. Jiban Debi* (2) this Court has held in a number of decisions that if the plaintiff believed *bona fide* that the person who was sued was the proper legal representative of his debtor and a decree was obtained against him without any fraud or collusion, the proper legal representatives would be bound by the decree even if they were not impleaded in the suit. A great deal can be said in favour of the view if one finds the person who has been sued as a legal representative happens to be in possession of the estate left by the deceased. The case would be still stronger if the interest of the person who had been sued turns to be identically the same as of those who were not impleaded for want of knowledge on the part of the plaintiff. It is impossible to say in these circumstances as to what view one would have formed if the matter were *res integra*. But since the matter

has been decided by not one but three, i. not four, Division Benches of this Court and those decisions are binding on me it is impossible for me to go into the question *de novo* and find for myself whether the decree passed against the legitimate son in this case and would not be binding on the illegitimate son and the concubine, i. e. respondents Nos. 1 and 2. see *Ramaswami Chettiar v. Oppilaman Chetti* (3), *Gnanambal Ammal v. Veerasami Chetti* (4), *Socrayya v. Chinna Anjaneyalu* (5) and *Chaturbhuj Das Kushaldoss & Sons v. Rajamanickam Mucaliar* (6). It may be said in regard to the first case that the matter arose in execution and as pointed out by the learned Acting Chief Justice in *Jagannath Prasad v. Jamuna Bai* (1) the same principle which would apply to suits may not be held to be applicable to execution. But so far as the three other cases are concerned, they cannot be distinguished on their main facts from the present one. Following the cases decided by this Court, respondents Nos. 1 and 2 cannot be regarded as persons other than judgment-debtors within the meaning of O. XXI, r. 98, Civil P. C. This appeal must, therefore, be accepted and the order passed by the lower Appellate Court set aside. The lower Appellate Court is now directed to entertain the appeal filed by the appellant and dispose of the same in the light of my observations according to law. The appellant will have his costs in this Court. Costs in the lower Appellate Court will abide the result. Leave refused.

N.E.

Appeal allowed.

(3) 33 M 6; 4 Ind. Cas. 1059; 19 M L J 671; 6 M L T 269.

(4) 29 M L J 693; 31 Ind. Cas. 920; A I R 1916 Mad. 102.

(5) 26 M L J 106; 52 Ind. Cas. 509; A I R 1918 Mad. 16.

(6) 54 M 212; 129 Ind. Cas. 469; A I R 1930 Mad 930; 60 M L J 57; 32 L W 862; (1930) M W N 994; Ind. Rul. (1931) Mad. 277.

PATNA HIGH COURT

Appeal No. 310 of 1938

September 19, 1938

HARRIS, O. J. AND FAZL ALI, J.

Sm. PRABHAVATI DEVI—DEGREE-HOLDER—APPELLANT

versus

MRS. LILA SINGH—JUDGMENT-DEBTOR
—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 47—

(1) A I R 1932 All. 263; 139 Ind. Cas. 785; (1932) A L J 125; Ind. Lul. (1932) All. 589.

(2) A I R 1931 Cal. 574; 133 Ind. Cas. 335; 58 C 608; 35 O W N 286; Ind. Rul. (1931) Cal. 667.

Execution of decree deciding rights of parties to intestate estate—Court appointing Commissioner to investigate what sums were due to estate—Whether final order—Appeal, if lies.

During the course of execution proceedings in respect of a decree passed on an award deciding rights of parties in the intestate estate of a deceased, a Commissioner was appointed to investigate the question as to what sums were due to the estate in order that the amount of that estate may be ascertained, so that the parties may be able to enjoy their respective properties in accordance with the award made:

Held, that the order was in the nature of an interlocutory order and was in no sense a final order and the appeal was not maintainable.

A. from the original order of the Sub-Judge, Bhagalpur, dated September 14, 1938.

Messrs. S. M. Mullick and C. P. Sinha, for the Appellant.

Sir M. N. Mukharji, Messrs. P. B. Ganguli and N. C. Ganguli, for the Respondent.

Harries, C. J.—This is an appeal from an order of the Subordinate Judge of Bhagalpur dated September 14, 1938. The facts giving rise to the appeal can be shortly stated as follows. The appellant who is in the position of a decree-holder is the daughter of the late Mr. Deep Narain Singh, who died on November 29, 1935. The respondent is the widow of the said Deep Narain Singh. Before his death the deceased executed a deed of trust setting apart extensive property for the propagation of education in Bihar subject to payment of certain annuities. He reserved to himself a monthly payment of Rs. 4,250 during his lifetime out of which Rs. 3,000 per month was to revert to the trust after his death. As to the balance of Rs. 1,250, he reserved for himself a power of disposition, and on March 6, 1931, he executed a will bequeathing Rs. 750 per month to the appellant and the remaining Rs. 500 per month to the widow for their respective lives. He left no will dealing with the remainder of his property which therefore devolved on an intestacy. After Mr. Deep Narain Singh's death disputes arose between the appellant and the respondent. The appellant claimed the intestate estate as sole heir, alleging that the respondent had never been legally married to the deceased. Eventually the daughter brought a suit to establish these allegations. The widow brought another suit, alleging that there was an agreement between the parties to refer their disputes to arbitration and prayed that the dispute should be so referred. These two suits were compromised, and it was agreed between the parties

that all disputes existing between them should be referred to Dr. Rajendra Prasad as sole arbitrator.

The points which the arbitrator had to decide were: (1) What were the properties in respect of which Mr. Deep Narain Singh died intestate? (2) How were these properties to be enjoyed by the respective parties?

On August 12, 1937, Dr. Rajendra Prasad made his award in which he decided what properties formed part of the intestate estate. He further held that subject to payment of certain debts, these properties should be enjoyed half and half by the parties for their lives. The question as to who was entitled to the properties after the deaths of the parties was left to be decided in the ordinary course of law. A decree was passed in terms of this award, and eventually the appellant sought to execute the decree. During the course of this execution application questions arose as to what sums were payable to the intestate estate of Mr. Deep Narain Singh, and a Commissioner was appointed to investigate this question amongst others. After the Commissioner had been appointed, he applied to the Court on July 19, 1938, for directions on certain questions, and by the order under appeal, the learned Subordinate Judge gave the Commissioner directions upon the various points and directed the Commissioner to complete his investigation in the light of the directions which had been given. Against that order the appellant has preferred the present appeal, and a preliminary objection has been taken on behalf of the respondent. It has been contended by Sir Manmatha Nath Mukerji who appears for the respondent that this appeal is premature and that the proper time to challenge directions given to the Commissioner is when an appeal is brought against the final order of the learned Subordinate Judge.

In my judgment, this preliminary objection is well-founded. The Commissioner has been appointed to make inquiries and to ascertain what sums are due to the intestate estate in order that the amount of that estate may be ascertained, so that the parties may be able to enjoy their respective properties in accordance with the award made by Dr. Rajendra Prasad. What the ultimate finding of the Commissioner will be, it is impossible to say. He must now act upon the instructions given to him and make his report. It appears to

me that until that report has been made and the learned Judge has passed his final order, there can be no appeal. The order under appeal is in the nature of an interlocutory order and is in no sense a final order. It was argued by Mr. Sushil Madhab Mullick on behalf of the appellant that this is an order made under s. 47, Civil P. O., and therefore appealable; but, in my view, this is in the nature of an interlocutory order and has no finality about it. If this order was appealable, then it appears to me that the appellant might have, during the course of these proceedings, a series of appeals before the final order was ever passed.

Sir Manmatha Nath Mukerji concedes that all the points taken by the appellant in this appeal will be open to him in an appeal against the final order; and in my view it is only when the final order has been passed that the points which the appellant proposes to argue in this appeal can be properly taken. After the final order has been passed, the whole of these questions can be agitated, and the fact that this appeal has been dismissed on the ground that it is premature will, in no way, affect the rights of the appellant. For these reasons, I hold that there is no appeal against this order and I would accordingly dismiss the appeal with costs.

Fazi Ali, J.—I agree.

S. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Application No. 29 of 1938

September 15, 1939

Iqbal Ahmad and Ismail, JJ.

Babu GOVIND DAS AND OTHERS—

APPLICANTS

versus

Mst. INDRAWATI AND OTHERS—

OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 109 (c)—Applicability to interlocutory orders—Leave to appeal from interlocutory order, when granted.

Clause (c) of s. 109, Civil P. O., applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. The mere fact that the order superseding the arbitration passed by the Court below was an interlocutory order cannot therefore be a bar to the application for leave to appeal to His Majesty in Council. But before the application can be granted, the High Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. A case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. One of the matters to be taken into consideration

in this connection must invariably be whether the permission to appeal is or is not calculated to unduly delay the disposal of the substantive dispute between the parties on its merits. If the interlocutory order, the validity of which is sought to be tested by an appeal to His Majesty in Council, is one that is not calculated to prejudicially affect the right of either party to the litigation to have the substantive matters in dispute in the litigation decided by a competent Court ordinarily leave to appeal ought not to be granted. 103 Ind. Cas. 561 (2) and 147 Ind. Cas 376 (3), relied on. [p. 85, col 1.]

App. for leave to appeal to His Majesty in Council.

Messrs. S. K. Dar and M. L. Chaturvedi, for the Applicants.

Messrs. G. S. Pathak and V. D. Bhargava, for the Opposite Party.

Iqbal Ahmad, J.—This is an application for leave to appeal to His Majesty in Council from an order passed by a Division Bench of this Court dismissing a civil application in revision. It is conceded that the case does not fall within the purview of cls. (a) and (b) of s. 109 and s. 110, Civil P. O., but it is maintained that in view of the provisions of cl. (c) of s. 109 the case should be certified to be a fit one for appeal to His Majesty in Council. The facts giving rise to the present application may be briefly stated as follows: **Mst. Indrawati**, respondent, filed a civil suit in the Court of the Civil Judge of Muttra against **Rai Saheb Govind Das** and certain other defendants. The value of the subject-matter of the suit was Rs. 18,00,000. The suit was for a declaration that **Indrawati**, plaintiff, was the next reversioner after her mother **Mst. Bhagwati** of the property left by her father **Kalyan Singh** who was alleged to be separate from **Govind Das** and the other members of his family. **Indrawati** further claimed a declaration that a deed of agreement dated October 18, 1919, entered into between her mother **Mst. Bhagwati** and the other members of the family of **Kalyan Singh** was null and void.

The defendants contested the suit and pleaded *inter alia* that **Kalyan Singh** was a member of a joint Hindu family with them and that the agreement dated October 18, 1919, was a valid and binding agreement and had been acted upon by all the partners. They maintained that the agreement was in the nature of a family settlement and was binding not only on the parties to that settlement but even on **Indrawati** plaintiff. They also alleged that **Kalyan Singh** had before his death made an oral will to the effect that the male

members of his family would be the owners of the property after his death. After the issues were framed in the case the suit was transferred for trial to the Court of the Additional Civil Judge of Muttra and we are informed that the learned Judge recorded oral evidence adduced by the parties for about 10 to 11 months. During the progress of the hearing of the suit the parties agreed to refer the matter in difference between them to the arbitration of three persons, viz. (1) *Rai Bahadur Ram Nath Bhargava*, Muttra, (2) *B. Basdeo Sahai*, Vakil, Agra, and (3) *B. Mathura Prasad*, *Rais*, Sasni. They accordingly filed an application in Court on January 2, 1934, praying for an order of reference to the three gentlemen named above. In the application, the authority given to the arbitrators to summon and record evidence and to decide the dispute between the parties was specified. There was, however, no provision in the application to meet the contingency of difference of opinion amongst the arbitrators. The Court accepted the application and referred to the three arbitrators the matter in difference between the parties for decision. In making this order of reference the Court also overlooked the provisions of para. 4 of Sch II to the Civil P. O., and failed to make any provision in the reference about the appointment of an umpire or the decision of the case being according to the opinion of the majority of the arbitrators in the event of a difference of opinion among them.

The case remained pending before the arbitrators for some months and eventually on May 19, 1934, two awards were filed in Court, one signed by *Rai Bahadur Ram Nath Bhargava* and *B. Basdeo Sahai* dismissing the suit, and the other signed by *B. Mathura Prasad* decreeing the suit. The Court then allowed ten days' time to the parties to file objections to the awards. On May 28, the plaintiff filed an objection against the award of *B. Ram Nath* and *B. Basdeo Sahai*. By her objection she maintained *inter alia* that the award delivered by these two gentlemen was invalid as it was not a unanimous award. The next day, viz., on May 29, the defendants filed an objection against the award of *B. Mathura Prasad*. In this objection it was stated that the award signed by *B. Ram Nath* and *B. Basdeo Sahai* was in fact the unanimous award of all the arbitrators and that after that award was prepared with the consent of all the three arbitrators, *Indrawati* won over *B. Mathura Prasad*

arbitrator and did not let him sign the aforesaid award and that instead she got an award filed by *B. Mathura Prasad* decreeing the suit. It was also alleged in the objections that as a matter of fact the parties had agreed to be bound by the decision of the majority of the arbitrators, but by an oversight and through inadvertence this fact was not mentioned in the application for reference to arbitration.

After these objections were filed, the learned Additional Civil Judge fixed May 30, 1934, for the hearing and disposal of the objections. It is needless to observe that the time allowed to the parties to substantiate their objections was too short and it may be conceded that the order fixing May 30, 1934 for the disposal of the objections was an indefensible order. The defendants alleged—and the allegation appears to be well founded—that they tried their best to produce the two arbitrators who had decided in their favour as witnesses in Court on May 30, and that their attempts were not crowned with success. They even applied on May 30, for further time being allowed to them to substantiate the allegations contained in their objections by producing the two arbitrators, but this application was disallowed by the learned Civil Judge. The Court was closed for the long vacation from June 1 to July 1, 1934, both days inclusive, and on the re-opening of the Court on July 2, the learned Judge passed an order setting aside the two awards filed by the arbitrators and superseding the arbitration. Two of the defendants, viz., *Rai Saheb Govind Das* and *Lachhman Das*, then filed an application in revision in this Court against the order dated July 2, and the revision came up for hearing before a Division Bench of this Court. A preliminary objection was raised on behalf of *Indrawati* to the effect that no "case" was decided by the Civil Judge within the meaning of s. 115, Civil P. O., and as such, this Court had no jurisdiction to revise the order dated July 2. There being some conflict of judicial opinion on the question raised by the preliminary objection, the Division Bench referred the question of the maintainability of the revision to a Full Bench. The Full Bench held that the Court below

"could not be considered to have decided a case within the meaning of s. 115, Civil P. O., where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the Court: *vide Govind Das v. Indrawati* (1)."

(1) A I R 1938 All. 557; 177 Ind. Cas. 981; I L R (1938) All 805; (1938) A L J 813; 11 R A 238; 1938 A L R 804 (F B).

In view of this decision of the Full Bench, the Division Bench dismissed the application in revision filed by the defendants. It is from this order that the defendant-applicants propose to file an appeal to His Majesty in Council. The question sought to be raised in the proposed appeal is about the maintainability or otherwise of the application in revision that was filed in this Court, and it is urged that too narrow an interpretation has been put by the Full Bench on the word "case" used in s. 115, Civil P. O. It is stated in the application that the question to be raised in the proposed appeal is of great general and public importance, and the case is, therefore, a fit one for appeal to His Majesty in Council under s. 109 (c), Civil P. O.

It is clear that cl. (c) of s. 109 applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. The mere fact that the order superseding the arbitration passed by the Court below was an interlocutory order cannot therefore be a bar to the present application for leave to appeal to His Majesty in Council. But before the application can be granted, this Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. It is impossible to give an exhaustive list of cases which may be deemed, apart from the provisions of cls. (a) and (b) of s. 109 and s. 110, Civil P. C., to be fit for appeal to His Majesty in Council, but it may safely be laid down that the discretion vested in this Court by cl. (c) of s. 109 is to be sparingly exercised and that a case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. One of the matters to be taken into consideration in this connection must invariably be whether the permission to appeal is or is not calculated to unduly delay the disposal of the substantive dispute between the parties on its merits. If the interlocutory order, the validity of which is sought to be tested by an appeal to His Majesty in Council, is one that is not calculated to prejudicially affect the right of either party to the litigation to have the substantive matters in dispute in the litigation decided by a competent Court ordinarily leave to appeal ought not to be granted. The scope of s. 109 (c) of the Code formed the subject of consideration by a Division Bench of the Calcutta High Court in *Benoy Krishna Mukherji v. Satish*

Chandra Giri (2). It was laid down by Rankin, J. in that case that

"while interlocutory orders do come under s. 109 (c) Civil P. O., the mere fact of their having some public or private importance that may be taken to be the equivalent of a high money value does not give the party complaining an option to take the matter on appeal to England."

The learned Judge further laid down that "leave for such appeal should be granted only when the case involves practical considerations of a special character such as when the order complained of is oppressive or in its cumulative effect crippling."

It was further observed in that case that "ordinarily interlocutory proceedings should not be protracted by granting leave to appeal from orders passed in them inasmuch as that would make the litigation oppressively expensive and postpone the real elucidation of the facts by a trial of the suit."

In *Iqbal Bahadur v. Ram Sree* (3) it was observed that

"in order to invite the application of s. 109 (c), Civil P. O., the case should be one which raises some question of considerable importance whether public or private for some question which is of wide public importance, even though the subject-matter in dispute cannot be reduced into actual terms of money and that a mere substantial question of law arising between the parties which would have been sufficient if the case had fulfilled the requirements of ss. 110, would obviously not be sufficient for purposes of s. 109 (c)."

Having regard to the observations made in the two cases just cited, we are not satisfied that the case before us is fit for appeal to His Majesty in Council. As stated before, a substantial portion of the oral evidence that the parties proposed to produce was recorded by the trial Judge before the application for reference to arbitration was made and all that now remains for the trial Judge to do is to record some more evidence and then proceed to hear arguments and decide the case. The supersession of the arbitration is, therefore, not calculated to involve the parties in excessive expenditure of money. Further, the omission in the application for reference to arbitration and in the order of reference passed by the Court to make any provision to meet the contingency of there being difference of opinion between the arbitrators, *prima facie* renders the order of reference ineffective and inoperative. We cannot shut our eyes to the fact that two diametrically opposite awards were delivered by the arbitrators concerned, and that both parties were dissatisfied with the awards and preferred objections to the same. It would have been very difficult to substantiate by oral evidence the allega-

(2) 31 O W N 540; 103 Ind. Cas. 561; A I R 1927 Cal. 481.

(3) A I R 1934 All. 58; 147 Ind. Cas. 376; 56 A 277; (1934) A L J 219; 6 R A 465.

tion that prior to the filing of the award in Court, the arbitrators had arrived at a unanimous decision, and as such, the award filed by the two arbitrators should be accepted. Again, *prima facie* the suit by *Mst. Indrawati* is more or less of a representative character and even if the suit was to terminate by an award considerable scope for further litigation by future reversioners would remain and it would not be surprising if a future reversioner in the event of the decision being against *Mst. Indrawati* may file a suit on the allegation that the award was the result of collusion between the parties to the suit. Be that as it may, the decision of the suit by the Court, in the situation that has arisen will be far more desirable and in the interests of the parties concerned. We therefore reject this application with costs. The stay order is discharged.

s.

Application rejected.

PATNA HIGH COURT

Civil Appeal No. 198 of 1938

August 4, '939

ROWLAND AND CHATTERJI, JJ.

RAMDEYAL BABU LAL FIRM—

APPELLANT

versus

LAKHU SAO—RESPONDENT

Provincial Insolvency Act (V of 1920), ss. 35, 27—Ex parte order of adjudication passed on clearance day—Propriety—Civil Procedure Code (Act V of 1908), O. IX—Applicability to insolvency proceedings.

The orders and circulars issued by the High Court should be followed by the lower Courts and the Court should not hear the case *ex parte*, on the last clearance day and pass an order of adjudication.

Having regard to the provisions of s. 5, Pro. Insol. Act, the provisions of O. IX, Civil P. C., may perhaps be held to be applicable to insolvency proceedings. 121 Ind. Cas. 303 (1), relied on.

O. A. from original order of the District Judge, Monghyr, dated May 14, 1938.

Mr. G. P. Sahi, for the Appellant.

Mr. R. S. Ojha for Mr. S. C. Misra, for the Respondent.

Chatterji, J.—This is an appeal against an order refusing an application of creditor No. 1 to set aside an *ex parte* order of adjudication which was passed on April 30, 1938. The debtor having filed an application for adjudication, notices were duly served on the creditors fixing April 23, 1938, as the date of hearing. On that date creditor No. 1 appeared and filed a

petition for time to file objection. His petition was allowed and the case was adjourned to April 30, 1938, for hearing when he was to file his objection, if any. On April 30 he did file his objection, but at the time when the case was actually taken up, he did not respond to repeated calls and the case was heard and disposed of *ex parte*. Thereafter creditor No. 1 made an application for setting aside the *ex parte* order of adjudication. That application was treated by the learned District Judge as an application for review and it has been dismissed. The present appeal is by creditor No. 1 against that order. A preliminary objection is taken on behalf of the respondent on the ground that the order appealed against being an order rejecting an application for review is not appealable. The answer is that though the expression "review" has been used by the learned District Judge, the application really purported to be one under the provisions of O. IX, Civil P. C. Having regard to the provisions of s. 5, Pro. Insol. Act, the provisions of O. IX, Civil P. C. may perhaps be held to be applicable to insolvency proceedings. In *Bhagwan Das v. Chuni Lal*, 121 Ind. Cas. 303 (1), it was held by the Lahore High Court that the provisions of O. IX, Civil P. C., are applicable to proceedings under the Insolvency Act. The case may, however, be looked at from another point of view. Section 35, Pro. Insol. Act, gives the Court power to annul an adjudication if in the opinion of the Court it appears that the order of adjudication should not have been made. We may therefore in this appeal consider the propriety of the *ex parte* order of adjudication that was made on April 30, 1938. In this view the preliminary objection must be overruled.

The contention on behalf of the appellant is that April 30, 1938, being the last Saturday, was a clearance day, and under the circular of the High Court which lays down that no cases should be heard except part-heard Sessions cases and other urgent criminal work, the Court should not have heard the case *ex parte* on that day. The learned District Judge in his order remarks that April 30 was definitely fixed for hearing and the objector had no excuse for not appearing when the case was called on; but it appears from the order-sheet that the case was fixed for hearing in the usual course. Indeed the objector did file

(1) 121 Ind. Cas. 303; A I R 1930 Lah. 993; Ind. Rul. (1930) Lah. 207.

his objection on that date and when that was the date fixed for hearing, he should have waited, but there may be some justification for his leaving the Court-room as it was a clearance day on which judicial work was presumed not to be done. In my opinion the orders and circulars issued by the High Court should be followed by the lower Courts and although I think there was some negligence on the part of the objector, the Court should not have heard the case *ex parte* on the last clearance day. In this view I would allow the appeal, set aside the *ex parte* order of adjudication and direct that the case be disposed of according to law. In the circumstances, there will be no order for costs.

Rowland, J. — I concur in the order.

S.

Appeal allowed.

LAHORE HIGH COURT

Second Appeal No. 95 of 1939

May 4, 1939

SALE, J.

BANWARI LAL—PLAINTIFF—

APPELLANT

versus

Mst. HUSSAINI AND ANOTHER—DEFENDANTS—

RESPONDENTS

Limitation Act (IX of 1908), Art. 139, s. 28—Lease expiring but tenant continuing in possession without paying rent—Possession not shown to be with landlord's assent—Landlord's suit beyond 12 years after expiry held barred, irrespective of effect of s. 116, Evidence Act (I of 1873)—Evidence Act (I of 1873), s. 34—Mere entries in book account unsupported by corroborative evidence, whether sufficient to charge person—Second appeal—Finding of fact based on misconception of nature of contract—High Court, if can be addressed on facts.

After the period of lease has expired, the relationship of landlord and tenant ceases and the tenant becomes a trespasser by the operation of sub-cl. (a) of s. 111, T. P. Act. 146 Ind. Cas. 815 (1), 149 Ind. Cas. 948 (2) and 120 Ind. Cas. 186 (3), relied on [p. 860, col. 1].

Where although the lessee remained in possession after the expiry of the lease, without paying rent, there was nothing to show that the landlord assented to the lessee continuing in possession so as to enable the Court to find under the provisions of s. 116, T. P. Act, that lessee had been holding over:

Held, that the landlord's suit for possession beyond 12 years from expiry of lease must be deemed to be barred by time, irrespective of any denial by the tenant of the landlord's title and under s. 28, Lim. Act, his right to the property extinguished.

[Case-law relied on.]

Under s. 31, Evi. Act, *bahi* entries are evidence, but mere entries in a book account are insufficient to charge a person. It is necessary that there should be corroborative evidence to prove the payment of specific sums. [p. 859, col. 2.]

Where the finding of fact on question of non-payment of rent was itself based on an obvious misconception of the nature of the contract between the parties:

Held, that the High Court in second appeal could be addressed on facts.

S. A. from the decree of the Senior Subordinate Judge, Rohtak, dated November 4, 1938.

Mr. Fakir Chand Mittal, for the Appellant.

Mr. Qabul Chand Mittal, for the Respondents.

Judgment.—This is a second appeal from an appellate decision of the Senior Subordinate Judge, Rohtak, reversing the decision of the Subordinate Judge, who had decreed the plaintiff's claim for rent and ejectment of the defendants. The material facts are that by a mortgage deed dated December 18, 1919, the house in suit was mortgaged with possession by two brothers Ibban and Kura in favour of Banwari Lal, plaintiff, for Rs. 1,200 with interest at 1 per cent. per mensem. It was stipulated that realizations on the property by way of rent were to be credited towards interest of the mortgage. On the same date, Banwari Lal, the mortgagee, by a lease deed, leased this house to the mortgagors Ibban and Kura as tenants on a rental of Rs. 2 per mensem for one year, that is, up to December 17, 1920. The suit was instituted on July 2, 1937, by Banwari Lal against Kura and Mst. Hussaini, widow of Ibban (who had died in the interval) for ejectment and for recovery of Rs. 24 as rent for the year commencing from December 18, 1935. In his pleas Kura pleaded ignorance of the mortgage deed and lease deed, dated December 18, 1919, without any denial or explanation, except the bare allegation that the plaintiff was not entitled to recover rent. Subsequently, it was also pleaded on his behalf that the suit is barred by time. On these pleadings four issues were framed as follows:—

"1. Whether defendant No. 2 and Ibban, deceased, took the house in dispute on rent and executed the rent deed dated December 18, 1919? 2. What rent was agreed upon and what rent is due? 3. Whether the suit is within time and the plaintiff can sue on the rent deed dated December 18, 1919? 4. Whether the relationship of landlord and tenant has ceased between the parties?"

The trial Court found that the defendants had been paying rent from time to time after the expiry of the tenancy and that the suit is within time. The Senior Subordinate Judge in appeal held that there had been no payment of rent for 12 years before the institution of the suit. He then proceeded to reverse the decision and

dismissed the suit for reasons which are confused and not easy to understand. The execution of the mortgage deed and of the lease deed are admitted in second appeal. Counsel for the appellant in arguments sought to contest the finding of fact by the lower Appellate Court (*viz.* that there had been no payment of rent for 12 years before the institution of the suit), on the ground that it is based on an obvious misconception of the agreement between the parties. In his ground of appeal No. 1, he has urged that the judgment of the lower Appellate Court is confused and superficial; and indeed the main difficulty in dealing with this second appeal has been caused by the unsatisfactory judgment of the lower Appellate Court. Respondents' Counsel himself, while seeking to support the finding of the lower Court that there had been no payment of rent within 12 years of the institution of the suit, conceded that he could not support the rest of the lower Appellate Court's judgment but urged that the decision to dismiss the suit can be supported on the short ground that the claim of the plaintiff is time-barred under Art. 139, Lim. Act.

The confusion into which the lower Appellate Court has fallen is indicated in the first place by the fact that in referring to Art. 139, Lim. Act, the Senior Subordinate Judge seems to think that the period of limitation therein prescribed is three years, whereas it is in fact twelve. Secondly, the lower Appellate Court apparently assumed that in this case non-payment of rent is coupled with a denial of the landlord's right to receive rent, from which the Senior Subordinate Judge proceeds to draw a legal inference that the landlord has transferred his right to the tenants. Actually, there was no clear denial of the landlord's title nor is there any question in this case of the landlord transferring his right to the tenants. Lastly, the finding of fact on the question of non-payment of rent by the Senior Subordinate Judge is itself based on an obvious misconception of the nature of the mortgage contract between the parties. The Senior Subordinate Judge in this connection refers to the evidence of P. W. No. 5 that on one occasion Rs. 9 had been received by the plaintiff towards rent. He disbelieves this evidence because the payment is shown as credited to interest and not to rent in the plaintiff's account book, thereby overlooking the stipulation in the mortgage deed, that realization by

way of rent were to be credited to the interest on the mortgage.

In view of these misconceptions, I permitted Counsel to address me on the facts as well as on the law; but it soon became apparent in the course of arguments that the decision of fact, *viz.*, that there had been no payment of rent within 12 years of the institution of the suit, is correct and clearly supported by the evidence, and that the misconception under which the lower Appellate Court laboured as the result of the crediting of the rent to interest account, was immaterial. The trial Court in this connection refers to a number of statements by witnesses, P. Ws. Nos. 5, 7, 8 and 9, who depose to the payment of certain sums by way of rent to the plaintiff at various times and held in favour of the plaintiff on the ground that those witnesses supported the entries in the plaintiff's account book of which transliteration had been filed. It is noticeable that except for the plaintiff's own statement the payments referred to by the other witnesses referred to dates before the period in suit that is during the period between 1920 and 1936 for which no claim is made. The object of this evidence was apparently merely to attract the provisions of Art. 139, Lim. Act; but there is no corroborative evidence to prove payment within the period in suit, except the bare statement of the plaintiff that he produced the transliteration of his *bahi*. No doubt, under s. 34, Evi. Act, these *bahi* entries are evidence, but mere entries in a book account are insufficient to charge the defendant. It is necessary that there should be corroborative evidence to prove the payment of specific sums and there is no such corroborative evidence relating to payments during the period in suit. Moreover, such corroborative evidence, as has been called for the previous period, is patently unconvincing; and I have no hesitation in concurring with the finding of fact by the lower Appellate Court that no payment of rent is proved either for the period in suit or for 12 years prior to the institution of the suit.

Thus for the purposes of this second appeal, it is established that while the defendant-respondents did mortgage the house in suit to the plaintiff on December 18, 1919, and on the same date re-entered into possession as tenants under the mortgagee for one year only, no rent has in fact been paid by them since 1920. Secondly, in resisting this claim, the defendants did not deny the landlord's title but

merely pleaded ignorance. Thirdly, although the defendants as lessees appear to have remained in possession of the property after 1920, there is nothing to show that the plaintiff-landlord assented to the defendants continuing in possession after 1920 so as to enable the Court to find under the provisions of s. 116, T. P. Act, that defendants have been holding over. The decision of this second appeal will turn on the law applicable to these facts and considerations. In regard to this last point, there are authorities of the Lahore High Court to the effect that after the period of lease has expired, the relationship of landlord and tenant ceases and the defendant becomes a trespasser by the operation of sub-cl. (a) of s. 111, T. P. Act: see *Ubedul Rahman v. Darbari Lal* (1), *Kirath Singh v. Kalu Singh* (2) and *Asa Ram v. Kishan Chand* (3) all Division Bench rulings.

Counsel for the appellant contends that, while it is admitted that the lease expired in 1920, the tenancy could not have determined till the possession was restored, or the title of landlord denied. In these circumstances he urges that under s. 109, Evi. Act, the presumption is that the relationship of the landlord and tenant continued; and that under s. 116, Evi. Act, the defendants are estopped from denying the plaintiff's claim and that the plaintiff is therefore entitled to a decree. For the respondents, Mr. Qabul Chand relies on Art. 139, Lim. Act, read with s. 28, Lim. Act, from which it would follow that, because the plaintiff has not sued within the period allowed by law, his right to the property is extinguished. He urges that since 1920 the position of the defendants has been that of mere trespassers and that inasmuch as the suit has not been brought within the 12 years provided by Art. 139, the presumption under s. 109, Evi. Act, and the question of estoppel under s. 116, Evi. Act, do not arise. While conceding that had the suit been brought within 12 years of 1920, the defendants might have been estopped by s. 116, Evi. Act, from denying the plaintiff's title, he urges that the fact that the suit has not been brought within 12 years requires that the claim should be dismissed irrespective of any denial, simply because the plaintiff's right in the property has been extinguished.

(1) A I R 1933 Lah. 509; 146 Ind. Cas. 845; 34 P L R 262; 6 R L 276.

(2) A I R 1934 Lah. 129; 149 Ind. Cas. 948; 35 P L R 24; 6 R L 766.

(3) A I R 1930 Lah. 386; 120 Ind. Cas. 166; Ind. Rul. (1930) Lah. 6.

Although no decision of the Lahore High Court applicable to these facts has been cited before me at the Bar, Mr. Qabul Chand has cited ample authority from the Bombay, Madras and Allahabad High Courts to prove that in these circumstances the claim must be held barred by the provisions of Art. 139, Lim. Act. The authorities cited by Mr. Qabul Chand which appear to me to be on all fours with the facts of this case, are *Purshottam Yeshwant v. Vishnu Gorathe* (4), a Division Bench ruling, which followed *Chandri v. Daji* (5) and *Bhagwan Ramanuj v. Ramkrishna Bose* (6). These authorities, as also *Bisheshar Nath v. Kundan* (7), are conceded by Counsel for the appellant to be against him. But he relies on *Bilas Kunwar v. Des Raj Ranjit Singh* (8) and *Makhan Singh v. Baisakhi Ram Shah* (9), for the proposition, that, by reason of the provisions of ss. 109 and 116, Evi. Act, the defendants are estopped from denying the plaintiff's title. No doubt such was the decision in those two rulings but neither of these authorities referred to the effect of Art. 139, Lim. Act. In fact, it would seem that in both, *Bilas Kunwar v. Des Raj Ranjit Singh* (8) and *Makhan Singh v. Baisakhi Ram Shah* (9) the application of Art. 139 could not have arisen because the suit in each case had been filed within twelve years of the determination of the period of tenancy. *Bilas Kunwar v. Des Raj Ranjit Singh* (8), is specifically distinguished, explained and not followed on this ground in *Bisheshar Nath v. Kundan* (7), which clearly lays down that, where a suit is governed by Art. 139, Lim. Act, the claim must be dismissed irrespective of the effect of s. 116, Evi. Act. In approving *Chandri v. Daji* (5), and in distinguishing the applicability of the ruling of the Privy Council in *Bilas Kunwar v. Des Raj Ranjit Singh* (8), Stuart, J., one of the Division Bench which decided *Bisheshar Nath v. Kundan* (7), observed as follows on p. 586* :

"It only remains to be seen whether there is any-

(4) A I R 1927 Bom. 650; 105 Ind. Cas. 859; 29 Bom L R 1332.

(5) 24 B 504; 2 Bom. L R 491.

(6) A I R 1932 P O 184; 74 Ind. Cas. 581; 26 C W N 722 (P O).

(7) 44 A 583; 75 Ind. Cas. 454; A I R 1922 All. 318; 20 A L J 593.

(8) 37 A 557; 30 Ind. Cas. 299; A I R 1915 P O 96; 42 I A 202; 19 C W N 1207; 29 M L J 335; 2 L W 830; 18 M L T 248; 13 A L J 991; 17 Bom. L R 1006; 23 C L J 516; (1915) M W N 757 (P O).

(9) 123 P R 1919; 50 Ind. Cas. 591; A I R 1919 Lah. 334.

*Page of 44 A—[Bd].

thing in the Privy Council decision which can be invoked to overrule the decision of Jenkins, O. J. (that is *Chandri v. Daji* (5)). Their Lordships of the Privy Council say: 'A tenant who has been let into possession cannot deny his landlords' title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.' That clearly is the law, but does it in any way affect the present case? I think it does not. The defendants cannot be permitted to deny the plaintiff's title. They have foolishly denied it but they cannot be permitted to do so. The plaintiff is undoubtedly the landholder and the defendants are tenants by sufferance, but once having recognized that the tenants are so estopped, the fact still remains that the suit has been instituted beyond the period of limitation allowed by the law."

It is thus clear that in all the authorities cited before me, at the Bar by Mr. Qabul Chand in which the effect of Art. 139, Lim. Act, has been considered, it has been held that the claim must be dismissed as time-barred irrespective of any denial by the tenant of the landlord's title. In none of the rulings supported by Mr. Fakir Chand Mittal for the appellant has the effect of Art. 139 been considered; and indeed in many of them it is apparent that the suits in question were brought within the period of limitation covered by Art. 139. In these circumstances I hold that it was incumbent on the plaintiff to bring his suit within twelve years of the determination of the lease and since he has failed to do so, his claim is barred by Art. 139, Lim. Act, so that under s. 28, Lim. Act, his right to the property is extinguished. I therefore maintain the decision of the lower Appellate Court and dismiss the appeal with costs.

D.

Appeal dismissed.

ALLAHABAD HIGH COURT

First Appeals Nos. 330 and 381 of 1935

August 31, 1939

IQBAL AHMAD AND BAJPAI, JJ.

CHIRANJI LAL AND OTHERS—DEFENDANTS

—APPELLANTS

versus

CHHEDA LAL—PLAINTIFF AND OTHERS—

DEFENDANTS—RESPONDENTS.

Agra Pre-emption Act (XI of 1922), s. 4 (1), (7)—Proprietors of mahal having voice in appointment of lambardar or patwari are co-sharers and not petty proprietors.

Such proprietors of a mahal who have a voice in the appointment of a lambardar or of a patwari do take part in the administration of the affairs of the mahal. The vendees who have a voice in the appointment of the patwari and the lambardar of mahal cannot, therefore, be regarded "petty proprietors" as defined by the Agra Pre-emption Act and they must, therefore, be held to be co-sharers as defined by the Act. [p. 865, col. 2.]

F. As. from the decision of the Civil Judge, Agra, dated March 26, 1935.

Messrs. S. K. Dar and J. Swarup, for the Appellants.

Mr. G. S. Pathak, for the Respondents.

Iqbal Ahmad, J.—This and the connected First Appeal No. 381 of 1935 arise out of two rival pre-emption suits filed in the Court of the Civil Judge of Agra. Both the suits were disposed of by Mr. Raghnath Prasad Trivedi by one judgment and we also propose to decide the two appeals by one judgment. The sale deed sought to be pre-empted was executed on October 9, 1933, by one Shib Sahai in favour of Chiranjil Lal and his four brothers. One of the brothers of Chiranjil Lal is a man named Mangalia Ram. The following four items of property were conveyed by the sale deed: (1) Share in village Jagner Panwar, Mahal Shib Sahai; (2) Share in village Bhawanpura, Mahal Shib Sahai; (3) A decree for arrears of rent for Rs. 125; and (4) arrears of rent of the zamindari share sold with respect to 1312 Fasil.

The consideration entered in the sale deed was a sum of Rs. 8,000. The sale deed was registered on November 24, 1933. On November 14, 1934, Bohra Chheda Lal, who is respondent in First Appeal No. 330, filed a suit for pre-emption (Suit No. 71 of 1934). He claimed pre-emption with respect to the first two items of properties conveyed by the sale deed. He based his right of pre-emption on the allegation that he was a co-sharer in Mahal Chheda Lal in both the villages sold and that the vendees were total strangers. He alleged that the real sale consideration was only Rs. 6,000 and that out of that amount Rs. 500 was the consideration for the transfer of items Nos. 3 and 4 set out above. He accordingly prayed for a decree for pre-emption with respect to items Nos. 1 and 2 of the property sold on payment of Rs. 5,500.

On November 24, 1934, Bohra Shib Singh and his two brothers who are appellants in First Appeal No. 381 of 1935 filed a rival pre-emption suit (Suit No. 12 of 1934). These plaintiffs claimed pre-emption only with respect to item No. 1 of the property conveyed by the sale deed. Their case was that they were co-sharers in Mahal Sukh Lal and Mahal Sukhdeo in village Jagner Brahmanan, and as such, had a preferential right of pre-emption as against the vendees who were strangers to the village. Their case as regards the sale consideration was that only Rs. 6,000 was the real considera-

tion and that out of that amount a sum of Rs. 625 ought to be deducted on account of the consideration of Items Nos. 3 and 4. On these allegations they prayed for a decree for pre-emption with respect to item No. 1 on payment of proportionate price.

The vendees contested both the suits. They alleged that they had made the purchase, in question after the refusal by the plaintiffs of both the suits to purchase the properties in dispute. In support of this contention, the vendees adduced some oral evidence. That evidence was, however, not accepted by the learned Judge of the Court below with the result that this contention of the vendees was overruled. We have read the evidence of the witnesses examined by the vendees on the point and we are satisfied that the conclusion arrived at by the learned Judge of the Court below is correct. Mangalia Ram, one of the vendees, stated that Ohheda Lal and Shib Singh had actively taken interest in getting the price of the *zamindari* in suit settled and that both of them refused to purchase the property. Mangalia Ram was a highly interested witness and his evidence could not be relied upon. Two witnesses, named Pearey Lal and Shib Sahai, were produced by the vendees as regards this part of the case, and their evidence has also for convincing reasons been rejected by the learned Judge of the Court below.

Both Ohheda Lal and Shib Singh denied that they were asked to purchase the property. No notice as required by the Agra Pre-emption Act was, before the sale in favour of the vendees, given to the plaintiffs of either of the suits. The finding of the Court below that the plaintiffs of neither suit were estopped from maintaining the suits was, therefore, correct.

Before we mention the other controversial points in the case, it would be convenient to deal with the question of sale consideration. The Court below held that the entire consideration, *viz.*, Rs. 8,000 entered in the sale deed, was paid to the vendors and that out of this amount a sum of Rs. 131-4-0 was the consideration for the transfer of the rent decree and a sum of Rs. 301-5-6 was the consideration for the transfer of the arrears of rent for 1340 *Fasli*. It therefore concluded that the consideration of the first two items of properties sold was Rs. 7,567-6-6. To this he added a sum of Rs. 200 on account of the costs of execution and registration of the sale deed which was incurred by the vendees and as a result he held that the consideration for the

transfer of the two items of the *zamindari* property was Rs. 7,767-6-6. No exception can be taken to this finding of the learned Judge which is amply borne out from the materials upon the record. The learned Judge also worked out the proportionate price of the two items of the *zamindari* property and the Counsel for the parties are agreed that the proportionate price of item No. 1, *viz.*, share in *Mahal* Shib Sahai of village Jagner Panwar, is Rs. 5,515-0-6 and the proportionate price attributable to the share in *Mahal* Shib Sahai of village Bhawanpura is Rs. 2,252-6-0. The learned Counsel for the vendees in the two appeals contended that in calculating the profits of the two items of the *zamindari* properties with a view to ascertain their respective values, the learned Judge omitted to take into account the *sawai* income of *Mahal* Shib Sahai of village Bhawanpura. We are unable to give effect to this contention. It may be that in some year there may have been some *sawai* income, but there was not sufficient material upon the record to justify the conclusion that in the year 1933, when the sale deed was executed, there was any *sawai* income in the *mahal* in question. The finding of the learned Judge on the question of consideration must therefore be accepted.

The main controversy in the Court below centred round the question whether or not the plaintiffs of either suit were entitled to a decree for pre-emption as regards item No. 1, *viz.*, the share in *Mahal* Shib Sahai of village Jagner Panwar. The vendees contested the plaintiff's claim as regards this item of property on two grounds. Firstly they alleged that they themselves were co-sharers in *Mahal* Ohheda Lal of village Jagner Panwar, and as such, the plaintiff of either suit had not a preferential right as against them. Secondly, they contended that a portion of the area of Jagner Panwar sold to them was part of town area and the plaintiffs had no right to pre-empt the same. They went on to allege that there was no custom of pre-emption applicable to the land within the ambit of the town area.

The Court below held that the vendees were mere petty proprietors in *Mahal* Ohheda Lal of village Jagner and were not co-sharers in the same, and, as such, Bohra Ohheda Lal who was a co-sharer in village Jagner had a preferential right of pre-emption as regards Item No. 1. The Court below also held that Ohheda Lal being a co-sharer in village Bhawanpura had a right of pre-emption. As a result of these findings

the Court below passed a decree in favour of Chheda Lal with respect to the first two items of *zamindari* property conveyed by the sale deed on payment of a sum of Rs. 7,767-0-6 within a certain time. The suit filed by Shib Singh and his brothers was contested by the vendees *inter alia* on the ground that they (the plaintiffs) were not co-sharers in village Jagner Panwar and that they were co-sharers in a totally different village. Shib Singh and his brothers on the other hand maintained that village Jagner Brahmanan was a part of village Jagner Panwar. The Court below held that village Jagner Brahmanan was a village different from village Jagner Panwar and on this ground dismissed the claim of Shib Singh and his brothers with the result that First Appeal No. 381 of 1935 has been filed by them.

At the hearing of these appeals it was stated that Chheda Lal after depositing the purchase money in Court and taking possession over Items Nos. 1 and 2 of the properties, sold the same to Shib Singh during the pendency of this appeal. Chheda Lal is therefore no longer interested in opposing First Appeal No. 330 that has been filed by the vendees. Shib Singh has, however, contested the appeal filed by the vendees. In order to decide the question whether the vendees are or are not co-sharers in *Mahal* Chheda Lal of village Jagner Panwar, it is necessary to state certain facts and in particular to briefly set out the constitution of the village as disclosed by documentary evidence. It is admitted that on May 7, 1928, one *Mst.* Sundar executed a sale deed with respect to a plot of land measuring 2 *bighas*, 15 *biswas* in favour of Ram Lal, the father of the vendees. This plot was then situated in village Jagner Panwar, *Mahal* Guman Kunwar. In the sale deed *Mst.* Sundar described herself as the owner and *haqqivatdar* of the plot and it was mentioned in the sale deed that the plot was assessed to a revenue of Rs. 2.

It is also common ground that on April 10, 1930, one Lalla Ram for self and as guardian of Shyama, minor, sold an area of 1 *bigha*, 8 *biswas* in *Mahal* Guman Kunwar to the vendees. In the sale deed the vendors described themselves as owners and *haqqivatdars* of the land sold.

The vendors of both the sale deeds were mentioned in the revenue papers as *malik farottar*, i. e. under-proprietors. On the basis of these purchases, the vendees maintained that they had become co-sharers in village Jagner, and as such, the plaintiffs

of the two suits had not a preferential right of pre-emption against them. The learned Judge of the Court below, as already stated, held that the vendees by these purchases became owners of specific plots and their position was that of petty proprietors as defined by the Agra Pre-emption Act. The earliest document that is upon the record with respect to village Jagner Panwar is the *wajib-ul-arz* of 1819. This *wajib-ul-arz* was prepared at a time when the Land Revenue Act of 1873 (Act XIX of 1873) was in force. By the rules that were framed by the Board of Revenue under the Act, the *wajib-ul-arzes* to be prepared by Settlement Officers were to consist of four chapters. In Chap. I the constitution of the *mahal* and tenure had to be mentioned. Chap. II was to deal with "the rights of sharers among themselves, founded on a custom or agreement." Chap. III was to be reserved for entries relating to the "rights of subordinate holders." Chap. IV was with respect to the "rights of tenants." Appropriate sub-headings under each chapter were provided for by the rules and the *wajib-ul-arz* of 1879 that is before us faithfully follows the rules framed by the Board of Revenue as regards the preparation of *wajib-ul-arz*. In para. 1 of Chap. I of this *wajib-ul-arz* it is mentioned that "this village is in the form of imperfect *pattidari* tenure divided into two *pattis*" Para. 2 of Chap. I prescribes about the "mode of realization and payment of Govt revenue," and it is stated in this paragraph that the Govt. revenue is to be deposited in the Govt. Treasury in certain instalments "through the *lambar-dar*." Para. 3 deals with the custom regarding the appointment of *patwari* and the following provision is made in that paragraph :

"... A new *patwari* shall be appointed with the consent of the *samindars* of the circle, and in case of the difference of opinion among them, the appointment shall be made according to the opinion of those who have larger shares of property"

Paragraph 2, Chap. II, makes provision about the appointment of *lambar-dars* and lays down *inter alia* that

"a new *lambar-dar* shall be appointed with the consent of the *samindars* and in case of difference of opinion, he will be appointed according to the opinion of those who have a large share of the property"

In Chap. III, para. 2 deals with "persons in possession of resumed *muafi* land." A long list of the resumed *muafi* holders together with the area of the land in their possession is given under that paragraph and it is common ground that the two purchases made of the specific plots of land by the

vendees in the years 1928 and 1930 were from some resumed *muafi* holders specified in this list. It appears that till the year 1898 village Jagner consisted of two *mahals*, viz. *Mahal* Panwar and *Mahal* Brahmanan. In the year 1898 *Mahal* Panwar was further sub-divided into six *mahals*, and one of the newly-formed *mahals* was *Mahal* Guman Kunwar, in which the plots purchased by the vendees were situated. The proceedings for partition are printed at p. 36 of First Appeal No 330. The *khewat* of *Mahal* Guman Kunwar for the year 1912 is upon the record. A reference to this *khewat* shows that village Jagner was a *bigha dham* village and in the *khewat* the area in possession of various proprietors was specified. The *khalsa* land in possession of *Mst* Guman Kunwar was recorded as 1023 *bighas* 17 *biswas*, 10 *biswansis* and the revenue and the cesses payable with respect to this area were entered in the column of revenue and cesses. Thereafter the area in possession of the various inferior proprietors was detailed in the *khewat* and so were the revenue and cesses payable by the inferior proprietors. After these entries the total revenue in respect of the *mahal* was entered at the foot of the *khewat*. It is clear that the purchases made by the vendees in the years 1928 and 1930 were from two of the persons entered as inferior proprietors in this *khewat*.

Lastly, we find that in the year 1930 there were again fresh proceedings for partition of *Mahal* Guman Kunwar and on this occasion *Mahal* Guman Kunwar was sub-divided into two *mahals* called *Mahal* Shib Sahai and *Mahal* Ohheda Lal. It is to be noted that the share in Jagner sought to be pre-empted is situated in *Mahal* Shib Sahai and Ohheda Lal, plaintiff, owns a share in *Mahal* Chheda Lal and the specific plots purchased by the vendees in 1928 and 1930 are also situated in the same *mahal*. The answer to the question whether or not the vendees have become co-sharers in *Mahal* Ohheda Lal by virtue of the purchases made by them depends on the answer to the question whether or not they can be regarded as co-sharers as defined by the Agra Pre-emption Act. Section 4 (1) of the Act provides that "co-sharer" means

"any person, other than a petty proprietor entitled as proprietor to any share or part in a *mahal* or village....."

"Petty proprietor" is defined by s. 4 (7) as meaning

"the proprietor of a specific plot of land in a

mahal, who, as such, is not entitled to any interest in the joint lands of the *mahal*, or to take part in the administration of its affairs."

The fact that the vendees are proprietors of the specific plots of land in *Mahal* Ohheda Lal admits of no doubt and they must, therefore, be taken to be "petty proprietors" unless they are entitled to any interest in the joint lands of the *mahal* or are entitled to take part in the administration of the affairs of the *mahal*. The evidence in the case shows that the vendees fulfilled both the conditions just set out. One of the witnesses examined by Shib Singh, plaintiff, was Sri Chand, the *patwari* of village Jagner Panwar. He deposed that

"there is a small stone hill in village Jagner Panwar. Chiranjil Lal also takes stone from the same. All proprietors of the inferior interest as well as the tenants of the village take stones from the hill. If the inferior interest holder has any waste land or tank, etc., in his *patti*, he uses it just as the full co-sharers of a *patti* use theirs"

It appears from this evidence that the vendees as owners of the specific plots purchased by them took stones from the hill which was joint undivided property in the village, and thus there is no escape from the conclusion that they had an interest in the joint lands of the *mahal*. It is to be noted that this admission was made by one of the plaintiff's witnesses. Mangalia Ram vendee also deposed that

"all the vendees have share in the *shamlati* items, i. e. tanks, waste land, etc., of Jagner Panwar. We take stones from the hills of this village as *samindars*."

In cross-examination he stated:

"I have a share in hills, rivers, weighment dues of the village. I have share in the waste land and *abadi* of the village."

To the same effect is the evidence of another witness produced by the vendees, named Shib Sahai. Chheda Lal, plaintiff, in his evidence made no statement on the point contrary to the statement of Mangalia Ram and Shib Sahai. The evidence on the point is all the one way and is in favour of the vendees and shows that the owners of specific plots of resumed *muafi* have an interest in the joint lands of the *mahal*. That they also have a voice in the administration of the affairs of the *mahal* is put beyond doubt by the documentary evidence in the case. But, before we refer to that evidence, we propose to deal with the question as to what does the phrase "administration of the affairs of the *mahal*" connote. A *lambardar* is appointed in each *mahal*, and he is in certain respect the agent of all the co-sharers of the *mahal*. He is subject to the custom governing particular *mahal*, charged with the duty

of looking after matters connected with the administration of the *mahal*. Similarly, a *patwari* is charged with the duty of maintaining the Record of Rights with respect to the *mahal* of which he is the *patwari*. A *lambardar* and a *patwari*, therefore, are concerned with the affairs of a *mahal*. It may, therefore, be safely laid down that such proprietors of a *mahal* who have a voice in the appointment of a *lambardar* or of a *patwari* do take part in the administration of the affairs of the *mahal* and in the present case we find from the evidence that the vendees had a voice in the appointment of the *patwari* and the *lambardar* of *Mahal Ohheda Lal*.

In the application that was filed in the year 1937 for partition of *Mahal Panwar* all the owners of the resumed *muafi* plots were arrayed as opposite parties and were described as co-sharers in village Jagner. Similarly in the partition suit of 1930 the present vendees, who had by that time become owners of specific plots of resumed *muafi* in *Mahal Ohheda Lal*, and the other owners of resumed *muafi* plots were arrayed as parties and described as co-sharers. This shows that no differentiation was made by the co-sharers of the village as between owners of *khalsa* land and owners of resumed *muafi* plots and that both were put on the same footing and treated as co-sharers in the village. The provision in the *wajib-ul-arz* of 1879 about the appointment of *patwari* and *lambardar* does give to the owners of resumed *muafi* plots a voice in their appointment. It is worthy of note that the relevant paragraphs in the *wajib-ul-arz* give the right of nomination of *patwari* and *lambardar* not to co-sharers (*hissadars*) but to *zamindars* of the village. The fact that the owner of a resumed *muafi* plot is a *zamindar* admits of no doubt. In short, the resumed *muafi* holders are entitled to take part in the administration of the affairs of the *mahal*.

Lastly, we find from the *khewat* of 1930 that in "*mahal* non applicant for partition" which was one of the *mahals* formed out of the original *Mahal Panwar*, one Gokul Prasad who was the owner of a resumed *muafi* plot and was described in the *khewat* as inferior proprietor, was appointed *lambardar* of the *mahal*. A *lambardar* is defined by s. 4 (3), Land Revenue Act (Act III of 1901) as meaning "a co-sharer of a *mahal* appointed under this Act to represent all or any of the co-sharers in that *mahal*." The appointment of Gokul Prasad

as *lambardar* clearly shows that he was regarded as a co-sharer in the *mahal* for the simple reason that none but a co-sharer can be appointed a *lambardar*. As against all this documentary evidence, there is practically no evidence worth the name, on behalf of the plaintiff and the conclusion is, therefore, irresistible that the "inferior proprietors" were entitled to take part in the administration of the affairs of the *mahal*. They cannot, therefore, be regarded "petty proprietors" as defined by the Agra Pre-emption Act and they must, therefore, be held to be co-sharers as defined by the Act. That being so, the vendees were also co-sharers in village Jagner and Ohheda Lal had therefore no right of pre-emption as against the vendees. On this very ground the claim of Shib Singh and his brothers as against the vendees must also fail and their claim was, therefore, rightly dismissed by the Court below.

In the view that we take, it is unnecessary to consider the plea raised by the vendees based on the fact of the inclusion of a portion of Jagner in town area.

The result is that First Appeal No. 330 of 1935 must succeed as regards the share in village Jagner. We accordingly allow First Appeal No. 330 to this extent that we dismiss the plaintiff's claim as regards the share in village Jagner Panwar *Mahal* Shib Sahai. The decree passed by the Court below in favour of Ohheda Lal as regards the share in village Bhawanpura shall stand. The plaintiff of First Appeal No. 330 will be liable to pay on account of Bhawanpura share to the vendees a sum of Rs. 2,252-6-0 and for this we allow two months from today's date. In default of payment of the amount within the time allowed, the suit shall stand dismissed. As the victory has been divided, we direct the parties in First Appeal No. 330 of 1935 to bear their own costs in both the Courts. We dismiss First Appeal No. 381 of 1935 with costs.

s.

Order accordingly.

PATNA HIGH COURT

Appeal No. 120 of 1937

August 28, 1939

VARMA AND MANOHAR LALL, JJ.

Smt. INDU PROVA DEBI—APPELLANT

versus

DURGA CHARAN MITRA AND ANOTHER—RESPONDENTS

Administration—Letters of administration with will annexed obtained by person—Presumption that all legacies have not been paid—Mortgage by legatees

of immovable property before obtaining assent of executor—Validity—Residue, how ascertained—Transferees in possession of property—Remedy of legatee to recover his specific share—Succession Act (XXXIX of 1925), ss. 332, 335 (2)—Executor, if can give assent to legacy before obtaining probate of will—Mortgage executed by executor in his individual capacity as legatee—Money applied for his own use—Inference as to assent to legacy.

The mere fact that a person has obtained letters of administration with will annexed is no evidence to prove that the estate must be assumed to have been still unadministered nor that the Court should presume that all the legacies or at least the legacy in favour of such person has not been paid in accordance with the tenor of the will. 42 Ind. Cas. 233 (1) and 176 Ind. Cas. 200 (2), relied on. [p. 868, col. 1.]

Where a legatee under a will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property can form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words, though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the will. 71 Ind. Cas. 314 (4), relied on. [p. 868, col. 2.]

There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until the costs are paid, the net residue cannot be arrived at, at all. *Trethewy v. Helyar* (7) and *The King v. Commissioners for the special purposes of the Income Tax Acts* (8), relied on. [p. 869, col. 1.]

If the testator left no other property than the property in suit, it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacle by way of limitation or otherwise in his way, by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or the residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees. 71 Ind. Cas. 314 (4), relied on. [p. 869, col. 2; p. 870, col. 1.]

The estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor, under the Probate and Administration Act, even though probate has not been obtained. The executor, therefore, has power to give assent as an executor before he obtains the probate of the will. 136 Ind. Cas. 111 (9), relied on. *Satya Prasad Pal v. Motilal Pal* (10) held overruled. [p. 869, col. 2.]

Where the executor executes a mortgage in his individual capacity as a legatee with respect to the properties bequeathed to him and applies the money to his own use, and not to administer the estate of his testator. The executor assents to the legacy in his own favour on the date he gives the mortgage. [p. 869, cols. 1 & 2.]

A. from the original decree of the Sub-Judge, Deoghar, dated March 31, 1937.

Messrs. S. N. Bose, S. S. Rakshit and S. K. Sarkar, for the Appellant.

Messrs. P. R. Das and S. Mustafi, for the Respondents.

Manohar Lall, J.—This is an appeal by the plaintiff against a decision of the learned Subordinate Judge of Deoghar dismissing the suit of the plaintiff which was instituted by her as a person to whom letters of administration were granted, for recovery of possession of the properties in suit belonging to the estate of the testator (who left a legacy in her favour) which passed to the possession of the respondent in the circumstances narrated below. The case of the plaintiff very briefly stated is this. One Gopal Chandra Chatterji had three sons, namely (1) Kali Prasanna Chatterji, (2) Siva Prasanna Chatterji and (3) Sarda Prasad Chatterji who died leaving the plaintiff as his widow and one Ganesh Chandra Chatterji as their son. Some time before 1923, Siva Prasanna Chatterji, after the death of his father, executed a will regarding his property in favour of his nephew Ganesh Chandra Chatterji and nominated him as his executor. Siva Prasanna died on September 18, 1923. In the same year on December 8, Kali Prasanna Chatterji executed another will in which he left a legacy to the plaintiff for Rs. 2,000 and three other legacies for a total sum of Rs. 4,200. By this will Ganesh was appointed as the executor. Kali Prasanna died on November 13, 1924, leaving the aforesaid will as his last will and testament which is Ex. 1 in this case. In the will he after setting out the specific legacies stated by me just now, bequeathed

"all the rest residue and remainder of my estate after payment of my funeral and testamentary expenses and just debts and the legacies bequeathed unto and to the use of my said nephew Ganesh Chandra Chatterji for his own absolute use and benefit."

In other words Ganesh Chandra Chatterji was both the executor and residuary legatee under this will of his uncle. On September 10, 1925, Ganesh Chandra executed a mortgage (Ex. 2) by which he mortgaged the properties in suit in favour of the Hindustan Co-operative Insurance Society, Ltd., (hereinafter referred to as the society) who is defendant No. 2 and the only contesting respondent before us. The mortgage was to secure an advance of Rs. 1,05,000. The purpose of the loan was to administer the estate of Siva Prasanna who appointed the mortgagor as his executor under the will of September 18, 1923 already referred to. So far as the properties in suit are concerned, the mortgagor expressly stated that he was absolutely seised and possessed of or otherwise well

and sufficiently entitled to them and that he was executing the mortgage in his individual capacity. So far as other properties of Siva Prasanna were included in this mortgage bond, the mortgagor expressly purported to give the mortgage in his own capacity as executor of Siva Prasanna. It was further stipulated in this document that the mortgagor will, within six months, obtain a probate of the will of his uncle Kali Prasanna under which he claimed the properties described in Sch. 3 and will execute a deed in favour of the mortgagees confirming these presents and in case the mortgagor failed to do that within the period of six months, he will re-pay to the mortgagees a sum of Rs. 30,000 out of the principal sum of Rs. 1,05,000 on the said terms. The mortgagor did not carry out this undertaking and the mortgagee instituted a suit in 1927 in the Calcutta High Court to enforce the mortgage of 1925. The society duly obtained a preliminary decree in January 1928, the decree was made final in December 1928. The properties mortgaged were ordered to be put to sale and the date fixed for the sale was June 19, 1931. The properties were accordingly sold and were purchased by defendant No. 1 who subsequently transferred his interest to the society, defendant No. 2. The sale certificate was duly granted on August 5, 1931, to the auction-purchaser. The sale certificate was transferred to the Court of Dumka for delivery of possession on July 23, 1932. An objection by the plaintiff to this delivery of possession was rejected and the delivery of possession was ordered on September 8, 1932. That matter came to this Court and by an order of March 28, 1933 (Ex. F) in Civil Revision No. 619 of 1932, Macpherson, J. affirmed the order of the lower Court but set it aside in so far as the property consisted of the holdings of a *raiyat* or a part thereof on the ground that transfers of this kind of property were invalid under s 27 of Regn. III of 1872.

In the meantime, the plaintiff on June 16, 1931, applied for letters of administration with the will of the late Kali Prasanna annexed before the District Judge of Dumka. A notice was issued to the executor named in the will who renounced his executorship on July 18, 1931. The letters of administration were granted without any opposition on September 21, 1932, and the present suit was instituted on September 5, 1933, asking for reliefs in the form that the plaintiff has a right to hold possession

over the properties in suit as administratrix of the estate of Kali Prasanna Chatterji. She desired possession of those properties from the society after vacating the order of the learned Subordinate Judge which was affirmed by this Court to the extent indicated by the order of March 28, 1933. The events narrated above are strong indications of the correctness of the view that the appellant applied for letters of administration simply with a view to avoid or obstruct the contemplated sale fixed for June 19, 1931; but this consideration is wholly irrelevant. The plaintiff is always entitled to rely upon her rights and if these are established in accordance with law, the Court is bound to give proper relief to her irrespective of the motive which induced her to obtain letters of administration and then to institute the suit.

The real question is whether a legatee, to whom letters of administration with copy of the will annexed have been granted, is entitled to institute a suit for recovery of possession of the estate which has passed out of the possession of the executor as a result of a transaction entered into with the defendants by the executor in his character as the residuary legatee before he renounced the executorship without taking out probate. It is necessary in the first instance to determine whether the estate of Kali Prasanna Chatterji was unadministered on the date of the present suit. The plaintiff alleged in para. 5 of the plaint that the executor Ganesh Chandra Chatterjee did not take any steps for obtaining probate of the will of the testator, nor did he make any payment to the plaintiff and other persons according to the directions in the will and subsequently he openly renounced the executorship. The defendants refused to admit the correctness of these allegations in para. 4 of the written statement and they asserted that no legacies remained to be paid out of the estate of Kali Prasanna Chatterji. In the face of these pleadings, the onus was upon the plaintiff to prove that the estate remained unadministered. No evidence at all was offered by the plaintiff in the present case; it is significant that neither of the three legatees are made parties to this action, nor has any of them, including the executor and the plaintiff, chosen to come forward to give evidence to support the allegation of the plaintiff that the legacies still remained unpaid. But it was argued by the learned Advocate for the appellant, that as soon as it is established that letters of

administration with will annexed have been granted by the Court of the District Judge to the plaintiff, it must be presumed in law that the specific legacies, or at least the legacy in favour of the plaintiff, was still due on the date when the letters of administration were granted on June 16, 1931, and that the same state of affairs should be assumed to continue on September 5 1933, the date when the present suit was filed. The current of authority, however, is against this view. It is enough to refer to two cases of the Calcutta High Court, namely *Adwait Ch. Mondal v. Krishnadhane Sarkar* (1) and *Durgapada Bera v. Atul Chandra Bera* (2). In the former case, it was held that

"where a will has been propounded and proved, the Probate Court should grant probate even though it should appear that there were no debts due to or by the testator and the legatees have been in possession in accordance with the directions of the will for a long time, it being absolutely necessary for the legatees to establish their title by proving the will."

and it was observed by the learned Judges that

"the Probate Court cannot go into the question whether the legatees have acquired independent title by adverse possession."

The case in *Durgapada Bera v. Atul Chandra Bera* (2), expressly follows the case just referred to and it is directly laid down in this case, that

"in cases of testamentary succession, where there is a will and it has never been probated, the question whether the estate has or has not been already fully administered is not relevant and cannot be gone into by the Court in dealing with an application for probate or letters of administration."

In my opinion, therefore, the mere fact that the plaintiff obtained letters of administration with will annexed from the learned District Judge is no evidence to prove that the estate must be assumed to have been still unadministered nor that this Court should presume that all the legacies or at least the legacy in favour of the plaintiff has not been paid in accordance with the tenor of the will. The respondent, as already stated, obtained a title to remain in possession of the lands in suit by virtue of the sale in execution of a mortgage decree obtained on the footing of a mortgage bond which in my view must be taken to be executed by the executor in his personal capacity as a residuary legatee. Mr. P. R. Das relying upon the case in *Doe v. Sturges* (3), argued that it must be held that the mort-

(1) 21 O W N 1129; 42 Ind. Cas. 933; A I R 1918 Cal. 1035.

(2) 41 O W N 1204; 176 Ind. Cas. 200; A I R 1937 Cal. 595; I L R (1938) 1 Cal. 75; 11 R O 63.

(3) 13 E R 87.

gage was executed by the mortgagor in his capacity as an executor; but I am not able to place such a construction upon the mortgage bond as this will involve, apart from straining the language used in the document, the inference that the executor committed a breach of trust. The recitals in the bond are clear that Ganesh Chandra Chatterji was executing the mortgage in order to raise funds not to administer the estate of Kali Prasanna Chatterji but to administer the estate of Shiva Prasanna Chatterji. Unless I am forced to come to the conclusion by the clear words used in the bond, I must hold that no breach of trust was committed by the executor.

It is now well-settled that where a legatee under a will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property could form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words, as pointed out in *Khagendra Nath Mookerjee v. Khetra Nath Pal* (4), at p. 176:

"Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the will."

The question which is relevant to consider in these circumstances is whether the executor assented to the legacy. The facts speak for themselves. A useful illustration of how to determine whether there was an assent by an executor, which may be by conduct, to a legacy is afforded by the case in *Commissioners of Inland Revenue v. Smith* (5). The Master of the Rolls at p. 733 observes:

"All the relevant matters must be taken into consideration and, as Rowlatt, J. says in his judgment in the present case, you may have an assent by conduct: 'When it is said that the executor assents to a bequest, what is meant is not that he assents to the disposition of the testator, but that he assents to its taking effect upon the specific property if the bequest is specific, upon a sum of money if it is pecuniary, or upon the residue brought out by the executor at the end of the administration if it is a residuary bequest. Lord Haldane's exposition in *Attenborough v. Solomon* (6) makes it clear. The assent of the executor, it is important to add, may be infer-

(4) 50 O 171 at p 176; 71 Ind. Cas. 314; A I R 1925 Cal. 21; 36 O L J 21.

(5) (1930) 1 K B 713 at p 733; 99 L J K B 361; 142 L T 517.

(6) (1913) A C 76; 82 L J Ch. 178; 107 L T 833; 51 S J 6, 29 T L R 79.

and, when there is clearly nothing more to be done by way of administration."

The other Lord Justice took the same view. It was faintly argued that until the residue is ascertained, the residuary legatee was not in a position to transfer his rights to the defendants. In the present case it is admitted and proved that all the outgoings, as provided by the testator in the will, had been paid off before the mortgage of 1925, at least there is no evidence to the contrary. The principle applicable is expressed by Sir George Jessel in *Trethewy v. Helyar* (7), at p. 56 where he says :

"It appears to have been long settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. It is the principle.

See also *The King v. Commissioners for the special purposes of the Income Tax Acts* (8). Applying these tests to the present case as I have stated just now, the facts speak for themselves. There is no proof in the present case that any of the specific legacies remained to be paid out. Section 32, Succession Act (Act XXXIX of 1925), provides that the assent of the executor is necessary to complete the legatee's title to his own legacy and by s. 335 it is provided that when the executor is a legatee, his assent to his own legacy is necessary to complete his title to it and his assent may be express or implied. Sub-clause (2) provides that assent shall be implied if in his character of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor. The illustration to the section is of an executor who took the rent of a house or the interest of Govt. securities bequeathed to him and applied it to his own use and this is stated to be an assent. In the present case the mortgage was by the executor in his individual capacity as a legatee with respect to the properties bequeathed to him. He applied the money to his own use, because as I have pointed out already, the loan was taken by him not to administer the estate of his testator Kali Prasanna Chatterji. It follows by applying the principles in the English cases referred to above and also as provided by the sections of the Succession Act referred to above, that the executor assented to the legacy in his own favour on

the date he gave the mortgage to the defendants. It was then argued by Mr. S. N. Bose appearing for the appellant that the executor has no power to give assent as an executor before he obtained the probate of the will, and as in this case no probate was ever obtained, the assent given by the executor to himself as a residuary legatee was no assent in the eye of the law. A short answer to this contention is afforded by the case in *Venkata Subamma v. Ramayya* (9), where their Lordships have authoritatively laid down that

"the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor under the Probate and Administration Act, 1881, even though probate has not been obtained."

In the present case the will has been duly proved before the Probate Court anterior to the suit. Mr. Bose sought to get over the difficulties thus created in his way by arguing that Ganesh Chandra Chatterji, the executor, having renounced his executorship in July, 1931, and he never having taken out any probate, the assent by him would be inoperative to pass any title to the defendants. He relied upon the case in *Satyū Prasad Pal v. Motilal Pal* (10) where the learned Judges made this observation at p. 688 :

"It is only the executors who have obtained probate that can act as representatives of the testator; and we think it but reasonable that an executor who renounces or refuses or is unable to act, should be regarded as if he had never been appointed."

This view seems to have been the older view of the Calcutta High Court but this was negated by their Lordships of the Judicial Committee in the case referred to above. The present suit is not a suit by a legatee to recover his specific legacy from the person in possession of the testator's estate. The learned Subordinate Judge observes that Kāli Prasanna Chatterji left two other houses worth about Rs. 4,000 in Jasidih Bazar. Be that as it may, if the testator left no other property than the property in suit, it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacle by way of limitation or otherwise in his way, by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or

(9) 59 I A 112; 136 Ind. Cas. 111; 9 O. W. N 201; 62 M. L. J. 365; (1931) M. W. N 488; 34 Bom. L. R 764; 55 O. L. J. 263; 36 O. W. N 411; 55 M. 443; (1932) A. L. J. 293; 35 L. W. 532; Ind. Rul. (1932) P. O. 63; A. I. R. 1932 P. O. 92 (P. O.).

(10) 27 O. 683 at p. 688.

(7) (1876) 4 Ch. D. 53 at p. 56; 46 L. J. Ch. 125.

(8) (1920) 1 K. B. 468; 89 L. J. K. B. 194; 123 L. T. 389; 3 T. L. R. 123; 64 S. J. 107.

the residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to repay the specific legatees: see *Khagendra Nath Mookerjee v. Khetra Nath Pal* (4), already referred to. For the reasons given above, I am of opinion that the appeal fails and should be dismissed with costs.

Varma, J.—I agree.

B. Appeal dismissed.

BOMBAY HIGH COURT

Civil Revision Application No. 167 of 1938

March 3, 1939

BHAUMONT, C. J. AND N. J. WADIA, J.

AHMED IBRAHIM SINGAPORI—

APPLICANT

versus

COLLECTOR OF SURAT—OPPONENT

Mussalman Waqf (Bombay Amendment) Act (XVIII of 1935), s. 61—Mutwallis residing within jurisdiction of District Court—Waqf property situate outside jurisdiction of such Court—Such Court, if can call upon mutwallis to contribute under s. 61—Company—Shares—Local situation of.

The jurisdiction of the Court is confined entirely to cases in which the *waqf* property is situate within the limits of its jurisdiction. The only *waqfs*, which can be called upon to make a contribution to the Waqf Administration Fund, are the *waqfs* to which, under the principal Act, the Court directing a contribution to be made has jurisdiction. There is nothing in the Act which extends the jurisdiction of the Court to cases in which the trustees reside within the district, or in which they apply income within the district. The only relevant fact to consider is the place where the *waqf* property is situate, and s. 3 of the Mussalman Waqf Act, 1923, and also s. 6-D of the Amendment Act, make it clear that the property of the *waqf* referred to in the sections is the corpus, and not the income. Where therefore the whole of the *waqf* property consisting of immovable property and shares in companies is situate in Burma but the *mutwallis* of the *waqf* reside within the jurisdiction of the Surat District Court, such Court cannot call upon the *mutwallis* to contribute to the Waqf Administration Fund under s. 61, Mussalman Waqf (Bombay Amendment) Act, 1935.

The general rule is that the local situation of a share is the place where the share can be transferred on the register of the company.

O. R. App. from an order of the District Judge, Surat, in Miscellaneous Application No. 32 of 1937.

Messrs. G. N. Thakor and R. J. Thakor, for the Applicant.

Mr. B. G. Rao, Assistant Government Pleader, for the Opponent.

Beaumont, C. J.—These are a series of civil revision applications, which all

raise the same point and are directed to a single judgment given by the learned District Judge of Surat. The facts are not quite the same in all the applications, but in the first application, which is No. 167 of 1938, the facts are that there is a *waqf*, the *mutwallis* of which reside within the limits of the jurisdiction of the Surat District Court, but the whole of the property of the *waqf*, which consists of immovable property and shares is situate in Burma. The shares are shares in companies registered in Rangoon, and the general rule is that the local situation of a share is the place where the share can be transferred on the register of the company. As far as the evidence goes, there is nothing to suggest that these Rangoon companies have any office within the Surat district at which their shares can be transferred. So that, we deal with the application on the footing that the whole of the corpus of the *waqf* property is situate in Burma, which is now outside British India, though in our opinion, the real question is whether the property is situate within the local limits of the jurisdiction of the Surat District Court, and it does not matter whether property not so situate is situate within or without British India. The question which arises is, as to whether the *mutwallis* of this *waqf* can be called upon to contribute to the Waqf Administration Fund under s. 61, Mussalman Waqf (Bombay Amendment) Act, 1935.

Under s. 3, Mussalman Waqf Act, 1923, which is an All-India Act, it is provided that within six months from the commencement of the Act every *mutwalli* shall furnish to the Court within the local limits of whose jurisdiction the property of the *waqf* of which he is the *mutwalli* is situated, or to any one of two or more such Courts, a statement containing the following particulars, namely: (a) description of the *waqf* property sufficient for the identification thereof; (b) the gross annual income from such property; and other particulars which it is not necessary here to mention. Then, under s. 4, the Court can direct the publication of certain notices, and under s. 5 the *mutwalli* has to furnish the Court with certain statements. In our opinion, throughout the Act "the Court" referred to is the Court mentioned in s. 3, that is the Court within the local limits of whose jurisdiction the *waqf* property is situate.

Under the Bombay Amendment Act of 1935, the main Act is amended in various particulars, but it seems to us that,

throughout the whole of the amendments, "the Court" referred to is the same Court as that referred to in the principal Act. Under s. 61, which is the section in question in the present case, it is provided that every *waqf* shall, for the purpose of meeting the charges and expenses incidental to the registration, superintendence, administration and control of *waqfs*, the maintenance of the registers of *waqfs*, the scrutiny and audit of accounts of *waqfs*, the institution and defence of suits and proceedings relating to *waqfs*, and generally carrying into effect the purposes of the Act, be liable to pay to the Waqf Administration Fund of the District concerned, the contribution therein mentioned. In our opinion, the only *waqfs*, which can be called upon to make a contribution to that Fund, are the *waqfs* to which, under the principal Act, the Court directing a contribution to be made has jurisdiction, and that is in this case the Surat District Court.

The view of the learned District Judge was that, inasmuch as the bulk of the income is spent in Surat or its neighbourhood and the trustees reside there, he had jurisdiction to direct a contribution to the Fund in respect of all *waqfs* which have been registered in the District of Surat. But, in our opinion, there is nothing in the Act which extends the jurisdiction of the Court to cases in which the trustees reside within the district, or in which they apply income within the district. It seems to us that the only relevant fact to consider is the place where the *waqf* property is situate, and s. 3 of the main Act and also s. 6-D of the Amendment Act, in our view, make it clear that the property of the *waqf* referred to in the sections is the corpus, and not the income. No doubt in a case where the trustees of a *waqf* live in a place where the beneficiaries of the *waqf* also live, though the property of the *waqf* is situate elsewhere, and the trustees merely employ an agent to collect the income of the *waqf* property and transmit it to them, there would be some force in the contention that the trustees could be called upon to account at the place where they collect and distribute the income; but we are unable to give that meaning to the Act. It seems to us that the jurisdiction of the Court is confined entirely to cases in which the *waqf* property is situate within the limits of its jurisdiction. In all these cases we think that there will have to be an inquiry under s. 6-C of the Amendment Act to ascertain whether the whole

or any substantial portion of the property of the *waqf* is situate within the jurisdiction of the District Court of Surat, unless in any case the Collector is prepared to admit that no property is so situate. If in fact it be found that no property is so situate, in our view the District Court has no jurisdiction in respect of the *waqf* and cannot call upon the *mutwallis* for any accounts. Probably, in that event, it would be better to amend the register by striking the particular *waqf* off the register in the Surat Court; but, as no application is before us to amend the register, we make no order in that respect. In cases in which some property of the *waqf* is situate within the local limits, contribution in respect of that property can be levied. The cases will have to be referred back to the District Court to be dealt with in accordance with these views. We make no order as to costs.

S.

Case referred back.

CALCUTTA HIGH COURT

Appeal No. 282 of 1938

May 11, 1939

B. K. MUKHERJEE AND LATIFUR

RAHMAN, JJ.

DHIRENDRA NATH DAS—PLAINTIFF—

APPELLANT

versus

INDRA CHANDRA KISRIWALA

AND OTHERS—DEFENDANTS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Onus of proof—Claimant must show that he has right which was denied by adverse order.

Where in a claim proceedings under O. XXI, r. 58, an adverse order is passed against the claimant, the order is conclusive, unless it is displaced by a declaratory suit brought under O. XXI, r. 63. The onus is certainly upon the claimant to show that he has a right which was denied by the order. The burden cannot be discharged merely by pointing to the innocent appearance of the instruments under which the plaintiff claims. He must prove that they are as good as they look and it is not for the defendant to make out that they are collusive. 128 Ind. Cas. 647 (1) and 30 Ind. Cas. 855 (2), *relied on*. 105 Ind. Cas. 788 (3), distinguished. [p. 872, col. 2.]

A. from the appellate decree of the Additional Sub-Judge, Howrah, dated December 18, 1937.

Messrs. Amarendra Nath Bose and Apurba Charan Mukherjee, for the Appellant.

Messrs. Gopendra Nath Das and Kshetra Mohan Chatterjee, for the Respondents.

B. K. Mukherjea, J.—This appeal is on behalf of the plaintiff and the suit was one commenced under O. XXI, r. 63, Civil P. C., for establishing his title to the property in suit. Defendant No. 1 is the decree-holder, who obtained a money decree against defendants Nos. 2—5. This decree was put into execution in Money Execution Case No. 30 of 1935 of the Court of the First Subordinate Judge of Howrah and the property in suit was attached. The plaintiff thereupon preferred a claim under O. XXI, r. 58, Civil P. C. but that claim was refused, and following the adverse decision in the claim proceeding, the present suit was started. The plaintiff's case in substance is that the property in suit belonged to Debendra Nath Sadhukhan, defendant No. 5, who was one of the judgment-debtors, and he made a gift of it in favour of his wife by a document which was executed on May 3, 1930. The plaintiff purchased the property by a *kobala* from Mrinalini on May 9, 1935, for a consideration of Rs. 2,000 only and was in possession of it since the date of his purchase.

The suit was contested by defendant No. 1 alone and his contention was that the property was the joint family property of the Sadukhans of which Debendra was a member and that the deed of gift as well as the subsequent *kobala* in favour of the plaintiff were fictitious transactions entered into for the purpose of shielding the property from the creditors. Both the Courts below have accepted the defence version and have dismissed the plaintiff's suit. It is against these concurrent decrees of dismissal that the present second appeal has been preferred. Mr. Bose, who appears for the appellant, has raised a twofold contention before us. In the first place he has argued that the Courts below in arriving at the decision against the plaintiff had misplaced the onus. In the second place he has contended that the findings arrived at by the lower Appellate Court are not sufficient for the purpose of dismissing the plaintiff's suit.

Now so far as the first point is concerned, Mr. Bose's argument is that as the plaintiff is the ostensible purchaser in whose name the *kobala* admittedly stands, he must be presumed to be the real owner of the property and the burden would be upon the defendants to show the contrary. I do not think that this contention can be sustained. The plaintiff was the unsuccessful claimant in the claim proceeding and an order was

made adversely to him. That order is conclusive unless it is displaced by a declaratory suit brought under the provisions of O. XXI, r. 63, Civil P. C., and the onus is certainly upon the claimant to show that he has a right which was denied by the order *Mohammad Ali Mohammad Khan v. Bismillah Begam* (1). As Sir Lawrence Jenkins put it in *Jamahar Kumari v. Askaran Boid* (2), the burden could not be discharged merely by pointing to the innocent appearance of the instruments under which the plaintiff claims. He must prove that they are as good as they look and it is not for the defendant to make out that they are collusive. Mr. Bose lays stress upon the decision of the Judicial Committee which is to be found reported in *V. E. A. R. M. Firm v. Maung Ba Kyin* (3). In our opinion, this decision cannot be read as laying down any contrary proposition of law regarding the onus in such cases. In this case, the plaintiff was not only the ostensible owner of the property under a registered deed but out of the consideration of Rs. 20,000 the vendor who was a debtor to the father of one of the purchasers, was given a credit for the sum of Rs. 17,000 which he owed to the latter. The only question raised was whether the balance of Rs. 3,000 which was alleged to have been paid in cash, was really paid or not and their Lordships held that even though the evidence regarding the payment of this Rs. 3,000 could not be considered satisfactory, the consideration that was undoubtedly present, namely Rs. 17,000, was quite adequate having regard to the total value of the property and even if Rs. 3,000 was not paid, that was not enough for the purpose of drawing the conclusion that the sale was fraudulent. In fact, Viscount Dunedin was himself a party to the judgment in the later decision pronounced by the Judicial Committee which is to be found reported in *Mohammad Ali Mohammad Khan v. Bismillah Begam* (1) referred to above, and we do not think that their Lordships of the Judicial Committee did intend to say anything different from what was stated in the earlier case. The first contention of Mr. Bose, therefore, must be overruled.

(1) 35 O W N 324; 128 Ind. Cas. 647; A I R 1930 P C 255; 7 O W N 821; 33 Bom. L R 155; 60 M L J 341; 33 L W 397; (1931) M W N 1 (P O).

(2) 22 O L J 27; 30 Ind. Cas. 855; A I R 1916 Cal. 668.

(3) 5 R 852; 105 Ind. Cas. 788; A I R 1927 P C 237; 4 O W N 926; 53 M L J 388; 29 Bom. L R 1481; 32 O W N 28; 46 O L J 249; 27 L W 447 (P O).

Now, on the second point, the question raised by Mr. Bose is undoubtedly a question of fact. He has not been able to point out any misdirection or any error of law committed by the lower Appellate Court. His argument in substance is that although there might be a motive for executing this *benami* document, nevertheless, on the questions of passing of consideration and possession of the property, the lower Appellate Court has not considered the material facts which appear in evidence. On the question of consideration Mr. Bose has drawn our attention to the finding of the lower Appellate Court recorded at p. 56 of the paper-book, according to which a cheque given by the plaintiff was, as a matter of fact, honoured. The facts relevant to this matter stand as follows: The plaintiff drew a bearer cheque on the Allahabad Bank in the name of Mrinalini on April 29, 1935. The sale deed was actually executed much later, on May 9, 1935, and it was presented for registration on the day following. Before the Registrar the cheque was undoubtedly handed over to Mrinalini. The plaintiff's case is that the cheque was subsequently presented to the Shambazar Branch of the Central Bank by Tustu, the son of Mrinalini, and this amount was transferred to his credit. In support of this version, the plaintiff has examined an officer of the Allahabad Bank and also the son of Mrinalini who is said to have got the money transferred to his own account with the Shambazar Branch of the Central Bank of India.

The evidence of the clerk undoubtedly shows that the cheque was honoured and it was debited against the plaintiff. The lower Appellate Court pointed out that had the plaintiff produced his pass-book, it could have been proved as to where the money did eventually go. Speaking for myself, I am not inclined to attach much value to this fact. But the other fact upon which the lower Appellate Court relies seems to me to be very much material. The whole story of the plaintiff was that it was Tustu, the son of Mrinalini, who cashed the cheque or rather had the money transferred to his own account with the Shambazar Branch of the Central Bank. He says in his evidence that he has got his pass-book and he has got the counterfoils of the cheques also. These he did not produce and no explanation is forthcoming for the non-production of these very material papers. For the purpose of showing that he really got the money entered in his own account,

the pass-book would have been the best evidence possible and although he was in possession of the pass-book, he did not care to produce it. There is no other evidence to show that Mrinalini actually got the money, and under these circumstances, it seems to me that the lower Appellate Court was not wrong when it came to the conclusion that, as a matter of fact, only a show of payment was made but really no consideration passed in respect of the transaction. This is undoubtedly fortified by some suspicious circumstances to which reference was made by both the Courts below in their judgments. But as they are questions of fact, it is not necessary for me to refer to them in detail.

As regards the possession of the property, Mr. Bose has drawn our attention to the fact that there was mutation in the name of the plaintiff in the Municipal Register soon after the transaction took place. He has also drawn our attention to the fact that rents were realized by his client and that he did effect some repairs on the structures that stood on the land. On the question of realization of the rent, the finding of the trial Court is undoubtedly against him and the trial Court has pronounced the counterfoils produced by the plaintiff to be forgeries. The mason also was disbelieved by both the Courts below. It is true that the plaintiff had got his name mutated but if really the intention was to secrete the property and place it beyond the reach of the creditors, the show must be kept up and this was not in any way inconsistent with the theory of *benami* which the defendant has put forward. I do not think that it can be said in this case, having regard to the findings concurrently arrived at by both the Courts below, that there was any error of law which vitiated the judgments. Under these circumstances, we agree with the lower Appellate Court and dismiss the appeal. There will be no order as to costs in this appeal.

Latifur Rahman, J.—I agree.

D.

Appeal dismissed.

BOMBAY HIGH COURT

Second Appeal No 492 of 1936

February 10, 1939

BAUMONT, C. J. AND N. J. WADIA, J.
TARABAI SHRINIWAS NAIK GUITAL
AND OTHERS—DEFENDANTS—APPELLANTS

*versus***MURTAACHARYA ANANTACHARYA**

—PLAINTIFF—RESPONDENT

Bombay Hereditary Offices (Amendment) Act (V of 1886), s. 2—Watandar, who is—Person merely acquiring watan property without acquiring office, whether watandar—S 2, if applies.

Watandar means a person having a hereditary interest in a *watan*, i. e., the hereditary office and the property attached thereto, and includes so far as *watan* property is concerned, a person holding *watan* property acquired in the manner set out in the definition. But, a person who merely acquires *watan* property without acquiring the office is not a *watandar*, and to such a person and his family, the special law of inheritance enacted by the Watan Amending Act of 1886 has no application. 94 Ind. Cas. 649 (1), 114 Ind. Cas. 390 (2), 145 Ind. Cas. 262 (3) and 129 Ind. Cas. 391 (4), distinguish- ed. [p. 875, col. 1.]

S. A. from the decision of the Assistant Judge, Dharwar, in Appeal No. 90 of 1935.

Messrs. G. P. Murdeshwar and U. S. Hattiangadi, for the Appellants.

Mr. H. B. Gumaste, for the Respondent.

Beaumont, C. J.—This is a second appeal from a judgment of the Assistant Judge of Dharwar. The plaintiff sued for a declaration that he was the preferential heir to the suit property under the provisions of the Bom. Act V of 1886, which is an Act amending the Bom. Watan Act III of 1874. The trial Judge dismissed the plaintiff's suit, but in appeal the learned Assistant Judge passed a decree in favour of the plaintiff. In the year 1927, the holder of the property was one Wasudevacharya, who died in that year, leaving the three defendants as his daughters, and the plaintiff, as the son of a deceased divided brother. There is no question that under Hindu Law the daughters would succeed as heirs. But s. 2 of Act V of 1886 provides that every female member of a *watan* family other than the widow, mother or paternal grandmother of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any *watan*, or part thereof, or interest therein, devolving by inheritance after the date of the Act, to every male member of the family qualified to inherit such *watan*. The plaintiff claims under that Act to be heir to Wasudevacharya in preference to his daughters.

The material facts, which are not in dispute, and which in any case bind us in second appeal, are these. The suit property was undoubtedly originally *watan* property, that is to say, it was given for services, as to part of it to a Desai and as to the other part to a Deshpande. But before 1818, when the British Govt. acquired authority in the locality of the *watan* property, this property had been alienated by the Desais and the Deshpandes to the ancestors of Wasudevacharya, and it is not disputed that before 1829, when the Regulations of 1827 came into operation, it was lawful to alienate *watan* property apart from the office. The alienees, however, of the Desais and Deshpandes never acquired the hereditary office to which these lands were attached; they acquired the *watan* lands without acquiring the office. In 1863, the services connected with this office were commuted by the Gordon Settlement. It is admitted that if Wasudevacharya was a *watandar*, then the plaintiff and the defendants are members of a *watan* family, an expression which is not defined in the Act V of 1886 or in the principal Act of 1874, and I think that the real question which arises is whether a person in the position of Wasudevacharya who acquires *watan* lands without acquiring the office and without being under any obligation to perform the services attached to the office is a *watandar* within the meaning of the Watan Act of 1874. That Act provides that the *watan* property, if any, and the hereditary office and the rights and privileges attached to them together constitute the *watan*; and "*watan* property" is defined as meaning the movable or immovable property held, acquired or assigned for providing remuneration for the performance of the duty appertaining to an hereditary office. Then we come to the definition of *watandar* and the Act provides that *watandar* means a person having an hereditary interest in a *watan*, and as I have said the *watan* includes both the hereditary office and the *watan* property, if any. Then the definition of *watandar* continues in these terms:

"It includes a person holding *watan* property acquired by him before the introduction of the British Govt. into the locality of the *watan*, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance."

It is argued for the plaintiff, that, inasmuch as his ancestor acquired the *watan* property before the introduction of the British Govt. into the locality, he falls

within the definition of a *watandar*, and accordingly he and the plaintiff are members of a *watan* family, as that expression is used in the Act of 1886. But, in my opinion, the plaintiff's argument is unsound. The primary definition of a *watandar* is that he is a person having an hereditary interest in a *watan*, that is the office and the property, if any. The subsequent words which I have read are merely explanatory of the primary definition, and do not curtail it. In my opinion, the definition amounts to this, that *watandar* means a person having a hereditary interest in a *watan*, i. e. the hereditary office and the property attached thereto, and includes so far as *watan* property is concerned a person holding *watan* property acquired in the manner set out in the definition. But, in my opinion, a person who merely acquires *watan* property without acquiring the office is not a *watandar*, and to such a person and his family the special law of inheritance enacted by the Watan Amending Act of 1886 has no application. It is indeed difficult to see why the special rule of inheritance should be introduced in respect of property which is not connected with the holding of an office or performance of any service, although it may still retain its character of *watan* property. In my judgment, therefore, the trial Court was right in dismissing the plaintiff's suit and the lower Appellate Court was wrong. We have been referred to a good many cases, but none of them, in my judgment, covers the point we have to decide.

In my view it is not necessary for us to consider the further question on which the lower Courts differed as to whether the plaintiff's claim was barred by limitation. The trial Court considered that it was, and the lower Appellate Court considered that it was not. I express no opinion on that question. The appeal will be allowed, the decree of the lower Appellate Court set aside and the plaintiff's suit dismissed with costs throughout.

N. J. Wadia, J.—The suit relates to three lands, Survey No. 87, *pot-hissa* Nos. 1 and 3, Survey No. 41, and Survey No. 32, which admittedly formed part of the Desai and Deshpande *watans* of Kallapur. Some time prior to 1818 the three lands were granted by the original *watandars*, the Desais and Deshpandes, to some ancestor of the plaintiff and the defendants. The lands continue to be shown as part of the Desai and Deshpande *watans* of Kallapur. Bhimacharya, the father of the plaintiff, and

Wasudevacharya, the father of the defendants, had separated some time before Wasudevacharya's death in 1927. On the latter's death, the three defendants as his daughters succeeded to the property, and the plaintiff brought the suit for a declaration that he was the preferential heir to the lands under the provisions of s. 2 of Bom. Act V of 1886 by which every female member of a *watan* family, other than the widow, mother or paternal grandmother of the last male owner, and every person claiming through a female, is to be postponed in the order of succession to a *watan*, or part thereof, or interest therein devolving by succession after the date of the Act, to every male member of the family qualified to inherit such *watan*. No evidence has been led by the plaintiff to show that Wasudevacharya or any ancestor of the plaintiff was ever entered in the *watan* register as a member of the *watan* family of the Desais and Deshpande of Kallapur, and it has been conceded before us that the plaintiff and the defendants have never been entered in the *watan* register as *watandars* of the Desai and Deshpande *watans*. The only grounds on which the plaintiff claims that his family and that of the defendants is governed by the provisions of Act V of 1886 is, that the family holds some property which is admittedly part of the *pargane-watan* property of the Desai and Deshpande *watans*. The question in the appeal therefore is, whether the family of the plaintiff and the defendants can be considered a *watandar* family for the purposes of the Act of 1886.

Watandar is defined in s. 4, Bom. Hereditary Offices Act, 1874, as meaning a person having an hereditary interest in a *watan*, and the section explains that the *watan* property if any and the hereditary office and the rights and privileges attached to them together constitute the *watan*. Read along with this explanation *watandar* must mean a person having an hereditary interest in the *watan* property if any and the hereditary office and the rights and privileges attached to them, and it is clear that so far as the hereditary offices in this case are concerned, namely the offices of Desai and Deshpande, the family of the plaintiff and the defendants has no hereditary interest. The definition of a *watandar* given in the Act says further that *watandar* includes a person holding *watan* property acquired by him before the introduction of the British Govt. into the locality of the *watan*, or legally acquired

subsequent to such introduction, and a person holding such property from him by inheritance. It seems to me that the word "person" must be taken to mean such person, that is a person having an hereditary interest in the *watan* property and in the hereditary office. It cannot mean that any alienee of *watan* lands whose alienation took place before the introduction of the British Govt. into the locality but who has no share whatever in the hereditary office could be treated as a *watandar* for the purposes of the Act. *Watandar* family, therefore, in s. 2 of the Act of 1886 must be taken to mean the family of a person who has an hereditary interest in the property of a *watan* and in the hereditary office and the rights and privileges attached to that office. It is clear, therefore, that the family of the plaintiff and the defendants cannot, merely because they happen to hold part of the *watan* property of the Desais and Deshpandes of Kallapur, claim the benefit of the special rule of succession which is laid down in the Act of 1886. The object of that provision was to keep the property of a *watan* family liable to render service to Govt. as far as possible in the hands of males who would be in a better position to render service. There would be no object in applying the rule of succession laid down in that Act, which is a deviation from the ordinary Hindu Law of succession, to persons who had no interest in the hereditary office for safeguarding the duties of which the Act was intended.

No case has been cited to us in which it has been held that the definition of *watandar* given in s. 4 of the Act of 1874 would include a person who happens to hold *watan* property by alienation or gift but who has no interest in the hereditary office. Mr. Gumaste for the respondent has referred to several cases which he contends support his case. But all of them are, in my opinion, distinguishable. *Bodhrao v. Shrinivas* (1), was a case of lands held by certain persons as *mutaliks* or deputies of the Deshpander. In such a case, clearly the *mutaliks* or deputies would be interested not merely in the *watan* property which they held but also in the hereditary office for the performance of which they were appointed as deputies. In *Anna v. Gojra* (2) the question was one of succession to *watan* property which had

been held by one Rakhma who had succeeded to it as the mother of the last male holder. It had been contended that Rakhma's possession was adverse with regard to the plaintiffs who had claimed the estate as reversioners of Rakhma's son Hari. But it is clear that Rakhma was in that case holding the property as a member of the *watan* family and as representative *watandar*. There was therefore no question of the *watan* property having passed into possession of a stranger to the *watan* family who had no interest in the hereditary office. The case in *Fakirgouda v. Dyamawa* (3) is also clearly distinguishable. The question in that case was of succession to a woman who had inherited the *watan* property from her father prior to the passing of the Act of 1886. Here again although it was held that Sankawa who had inherited the property of her father had passed by marriage into the family of her husband, it was clear that Sankawa had been a member of the original *watan* family and she inherited the *watan* property and the right of service from her father, and her heirs therefore were clearly members of a *watan* family for the purpose of the Act of 1886. In *Hanmant v. Secretary of State* (4) the question was of succession to one Huchava who had succeeded to the *watan* on the death of her mother. There was no question that she was a member of the *watan* family and entitled to the hereditary office. In fact she was entitled as the representative *watandar* of the 8 annas share and the service rights. Clearly therefore her heirs, whoever they were, were members of a *watan* family for the purpose of Act V of 1886. None of these cases therefore can be regarded as in any way supporting the claim made by the respondent-plaintiff.

In *Appaji Bapuji v. Keshav Shamray* (5) a question somewhat similar to the question arising in this appeal came before the Court. The plaintiffs, who were the heirs of one Rudro, brought the suit to recover certain lands which had been sold to the defendants in execution of a decree against Rudro. They contended that the lands in suit, namely the village of Amangi were *watan* property in their hands. It was found that the lands had originally

(1) 28 Bom. L.R. 399; 94 Ind. Cas. 649; A.I.R. 1926 Bom. 259; 50 B.128.

(2) 30 Bom. L.R. 867; 114 Ind. Cas. 390; A.I.R. 1928 Bom. 333; Ind. Rul. (1929) Bom. 246.

(3) 35 Bom. L.R. 418; 145 Ind. Cas. 262; A.I.R. 1933 Bom. 287; 57 B.488; Ind. Rul. (1933) Bom. 66.

(4) 33 Bom. L.R. 155; 129 Ind. Cas. 391; A.I.R. 1930 Bom. 254; 54 B.125; Ind. Rul. (1931) Bom. 167.

(5) 15 B.13.

formed part of the *desyat watan* of the Desais of Wantmuri and the family of the plaintiffs were the *mutalik* Desais of the *watan*. A dispute had been going on between the Wantmuri Desais and the *mutaliks* with regard to the village which the Desais had throughout regarded as still part of their *desyat watan*. Part of the village lands, namely the Chahurat lands, had been entered as *watan* in the name of the *mutalik* Desais, and the rest had been entered as *sarva inam* other than *watan*. It was held that the *mutalik* Desais could be treated as independent *watandars* only in respect of the Chahurat lands, but that they could not be regarded as *watandars* with regard to the rest of the village. The whole village had formed part of the Wantmuri *desyat* and had come into the possession of the *mutalik* Desais from the Wantmuri Desais. The fact that it was nevertheless held that with regard to the portion of the village, other than the Chahurat lands, the *mutalik* Desais were not *watandars* clearly goes against the respondent's contention that alienees or donees of *watan* lands prior to the introduction of the British Govt. into the locality of the *watan* could be regarded as *watandars*, and therefore as members of the *watan* family, even though they had no right to the hereditary office to which the *watan* is attached. I agree, therefore, that the family of the plaintiff and the defendants cannot be regarded as a *watan* family for the purposes of Act V of 1886, and that the appeal must be allowed and the suit dismissed.

s. *Appeal allowed.*

LAHORE HIGH COURT

Execution Second Appeal No. 231 of 1939

June 27, 1939

THE CHAND AND RAM LALL, JJ.

Mahant SALIG RAM—JUDGMENT-DEBTOR—
APPELLANT
versus

CHARAN DASS AND ANOTHER—
DEBTOR-HOLDERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 1—Person obtaining decree for compensation for malicious prosecution dying during execution proceeding—Execution, if abates—Whether can be continued by his heir—Limitation Act (IX of 1908), s. 6—“Sufficient cause”—Delay in filing appeal held could be condoned.

It is true that the right to get compensation for malicious prosecution is personal to the person wronged, and to such a right, the maxim *actio per-*

sonalis moritur cum persona (a personal right of action dies with the person) fully applies. If therefore such person dies before suing the wrong-doer, his heirs, executors or administrators cannot, after his death, maintain an action for the same relief against the wrong-doer. In such a case clearly there is a “discharge of the tort” by the death of the person wronged, and the wrong-doer is released from all liability for his tortious act. It is equally clear that if the injured person had brought a suit in his life-time, but had died before a decree had been passed in his favour, the suit would have abated and his legal representatives could not have continued the suit after his death, for the “right to sue” in such a case being personal to the deceased did not ‘survive’. The position, however, is different when the suit had been decided in the plaintiff's life-time and a decree passed in his favour granting him compensation. On the passing of the decree, there is no longer an *actio personalis* in existence; it has passed into a judgment and become a matter of record (*transit in rem judicatum*). The original personal claim has merged in the decree of the Court, and as such, its character has entirely changed. It has to all intents and purposes, become a part of the “property” of the decree-holder and, on his death, it devolves, as a part of his estate, on his heirs, executors or administrators, and they can execute it in the same manner as he would have done, if alive. 103 Ind. Cas. 297 (6), *Muhammad Hussain v. Khushalo* (7) and 63 Ind. Cas. 540 (8), relied on. [p. 879, col. 2.]

[Case-law referred to.]

Held, Per Din Muhammad, J. (In order of reference) —that the delay in filing appeal could be condoned under s. 5, Lim. Act, as the appellant had sufficient cause for not preferring the appeal within time.

Ex. S. A. from an order of the Senior Sub-Judge, Gurdaspur, dated October 28, 1938.

Order of Reference

Din Mohammad, J.—Three questions fall for determination in this case: (1) whether the appeal is time-barred; (2) whether the plea that the decree cannot be executed is barred by the rule of *res judicata* considering that in a previous application for execution a decision had been given on this point; and (3) if the plea can be raised, whether the decree can be executed seeing that the original decree-holder has died. So far as the question of limitation is concerned, it is contended on behalf of the respondents that the memorandum of appeal was presented on the 91st day instead of the 90th, and even then it was incomplete as it was not accompanied by a copy of the judgment of the first Court. Reliance in this connection has been placed on *Dhanpat Mal v. Mela Mal* (1), *Molu Mal v. Sri Ram* (2), and *Dyala v. Hiru* (3). The authorities no

(1) 67 P R 1917; 41 Ind. Cas. 918; A I R 1917 Lah 436; 133 P W R 1917.

(2) 2 L 227; 63 Ind. Cas. 33; A I R 1931 Lah. 73, 90 P L R 1931.

(3) 3 Lah. L J 255; 67 Ind. Cas. 670.

doubt support the contention raised by the respondents' Counsel but I am disposed to condone the delay as I am satisfied that the appellant had sufficient cause for not preferring the appeal within the prescribed period. The certified copy of the appellate judgment, though ready on January 27, was actually delivered on 28th and if this day is also excluded, the appeal is well within time. Similarly, it is proved on the record that the appellant had put in an application for a copy of the first Court's judgment on the same day as the application for a copy of the appellate judgment was made but somehow or other the Copying Department could not trace the record. This caused some delay and eventually the appellant had to put in a second application for obtaining a copy of the first Court's judgment. According to the endorsement made by the Copying Department that copy could not be made available for about three weeks. There is thus no such default on the part of the appellant as cannot be overlooked. I, accordingly, extend the benefit of s. 5, Lim. Act, to the appellant and admit the appeal although presented after the expiry of the period of limitation. I may frankly confess that my main reason for taking this course is to have an authoritative pronouncement on the principal question involved in the case.

As regards the question of *res judicata*, there is ample authority in support of the proposition that a wrong decision on a question of law does not operate as *res judicata* in subsequent proceedings: see *Taliemand v. Muhammad Din* (4), and *Jwala Debi v. Amir* (5). I am not definite as to whether the decision was right or wrong, and am not therefore prepared to hold that the plea was barred or not by the rule of *res judicata*. I leave it therefore to the Bench disposing of the case to determine this question as well.

The third question, as remarked above, is really the most important question in the case. Counsel for the appellant contends that O. XXII, Civil P. O. as it stands applies to execution cases as well as to original suits and that the only exception that is made in the case of execution proceedings is that contained in r. 12 of O. XXII. Relying therefore on r. 1 of O. XXII, he argues that as the original cause of action could not survive on the

death of the plaintiff, the execution proceedings should also be held to have abated finally on the happening of that contingency. Counsel for the respondents, on the other hand, refers me to *G. I. P. Ry. v. Ram Adhin* (6), where a Division Bench of the Allahabad High Court has observed that as soon as a personal action ends in a decree, the right to execute survives on the death of the decree-holder. This observation is not without force inasmuch as a decree when obtained becomes a part of the personal estate of the deceased, and as such, accrues to the benefit of the legal representatives; but as I am not clear as to whether O. XXII, r. 1, does not apply to execution proceedings in such cases, I consider that a decision by a larger Bench should be obtained in this case. I accordingly forward this case to the Hon'ble the Chief Justice for such action as he deems necessary.

Mr. C. L. Aggarwal, for the Appellant.

Messrs. Shamair Chand and Parkash Chandra, for the Respondents.

Judgment of Division Bench

Tek Chand, J.—The facts of this case are no longer in dispute, and fall within a narrow compass. Kirpa Ram, father of the respondents, instituted a suit against Salig Ram, appellant, for recovery of Rs. 400 as compensation for malicious prosecution. The trial Judge granted Kirpa Ram a decree for Rs. 100. Both parties appealed to the Senior Subordinate Judge, who enhanced the amount of compensation to Rs. 200. On second appeal, this decree was upheld by Jai Lal, J. on November 26, 1936. The decree holder then took out execution of the decree. While the application was pending he died, and his sons (the present respondents) were brought on the record as his legal representatives, on their application made within 90 days of his death. The judgment-debtor raised an objection that the respondents had no right to continue the execution proceedings. He urged that the right to claim compensation for malicious prosecution was personal to Kirpa Ram, that on his death it did not 'survive' to his heirs and therefore the execution proceedings had abated. The executing Court overruled the objection holding that the proceedings to execute the decree had not abated. On appeal, the Senior Subordinate Judge upheld this order, relying upon a decision of the Allahabad High Court reported in (6) AIR 1927 All. 762; 103 Ind. Cas. 297.

(4) 12 L 52; 129 Ind. Cas. 12; A I R 1930 Lah 907; 31 P L R 816; Ind. Rul. (1931) Lah. 92; 12 Lah. L J 240.

(5) A I R 1929 All. 132.

G I P. Ry. v. Ram Adhin (6). The judgment-debtor preferred a second appeal to this Court, which came up for hearing before Din Mohammad, J. sitting in Single Bench. A preliminary objection was raised on behalf of the respondents that the appeal was time-barred, but the learned Judge held that in the circumstances, there was sufficient cause for not presenting the appeal within the prescribed period and he extended the time under s. 5, Lim. Act. He then referred the case to a Division Bench for decision of the main question, as there was no ruling of this Court directly bearing on the point and the correctness of the Allahabad ruling, relied upon by the Senior Subordinate Judge, had been impugned before him.

The contention for the judgment-debtor appellant is that as the original cause of action for a claim for malicious prosecution was personal to Kirpa Ram, which could not have survived to his legal representatives if he had died before the decision of his suit by the trial Court, it follows that the right to execute the decree, obtained by him in his lifetime on the same cause of action, was also personal to him, and that it was extinguished on his death, even though that event occurred after the passing of the decree. The argument is fallacious and I have no hesitation in overruling it.

It is no doubt true that the right to get compensation for malicious prosecution is personal to the person wronged, and to such a right, the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) fully applies. If therefore such person dies before suing the wrong-doer, his heirs, executors or administrators cannot, after his death, maintain an action for the same relief against the wrong-doer. In such a case clearly there is a "discharge of the tort" by the death of the person wronged, and the wrong-doer is released from all liability for his tortious act. It is equally clear that if the injured person had brought a suit in his lifetime, but had died before a decree had been passed in his favour, the suit would have abated and his legal representatives could not have continued the suit after his death, for the "right to sue" in such a case being personal to the deceased did not "survive" (O. XXII, r. 1, Civil P. O.). The position however is different when the suit had been decided in the plaintiff's lifetime and a decree passed in his favour granting him compensation. On the passing of the decree,

there is no longer an *actio personalis* in existence; it has passed into a judgment and become a matter of record (*transit in rem judicatum*). The original personal claim has merged in the decree of the Court and as such its character has entirely changed. The quondam plaintiff, as the decree-holder, has acquired the right to realize the amount decreed from the judgment-debtor, and this is a right of an entirely different character. He may enforce it himself by process of law, or (unlike the original claim) he may assign it to a third party, who can execute the decree. Further the decree itself (also unlike the original claim) is liable to attachment by a creditor of the decree-holder. It has to all intents and purposes, become a part of the "property" of the decree-holder and, on his death, it devolves, as a part of his estate, on his heirs, executors or administrators, and they can execute it in the same manner as he would have done, if alive.

It will be seen that the distinction is real and well-founded on principle and has been recognized in numerous cases in India. In the case relied upon by the lower Appellate Court, *G. I. P. Ry. v. Ram Adhin* (6), a suit for compensation against the railway administration, brought under Act XIII of 1855 (Fatal Accidents Act) by the father of a person, who had been killed in an accident, had been decreed by the trial Court. The railway had appealed and during the pendency of the appeal the decree-holder had died. It was contended on behalf of the railway that the appeal should be accepted and the decree reversed on the short ground that the action was personal to the father (decree holder) and the decree passed in his favour could not enure for the benefit of his sons, who were the brothers of the deceased, and as such, not among the persons entitled to compensation under the Act. This contention was rejected by the Court, on the ground that

"the action having merged into the decree, the benefit of the decree passed to the heirs of the decree-holder on his death."

To the same effect is the decision of a Full Bench of five Judges in *Muhammad Husain v. Khushalo* (7), at p. 134 where it was held that

"in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative."

This case was followed by a Division

(7) 9 A 131 at p 134 (F B).

Bench of this Court in *Ram Koer v. Jiwan Singh* (8), where the facts were similar. The distinction is very well brought out in cases which are the converse of those just referred to. Thus, where the plaintiff's claim for compensation for a personal wrong has been dismissed in its entirety by the Court of first instance and the plaintiff has appealed but has died before the decision by the Appellate Court, there is an abatement of the appeal, as the relief sought in appeal is the enforcement of the original 'right to sue' which had been rejected by the trial Court and had not matured in a decree: *Bhagwant v. Joti Sarup* (9), at pp. 14-15 and *Mani Ram Lala v. Chattibai*, 170 Ind. Cas. 159 (10). This distinction becomes clearer still in cases in which the plaintiff's claim for compensation for a personal wrong is decreed in part, and the defendant appeals praying that the suit should have been dismissed *in toto* while the plaintiff appeals or files cross-objections to enhance the damages, and during the pendency of the appeal, the plaintiff dies. In such cases it has been held that the defendants' appeal to get rid of the partial decree obtained by the plaintiff does not abate, for the decree enures for the benefit of his son; but the cross-appeal or cross-objections for grant of a further sum of damages filed by the plaintiff abate, as to this extent the claim had been refused by the trial Court and the plaintiff's prayer before the Appellate Court for enhancement is based on the original right to sue, which being personal to the plaintiff has abated on his death: *Muzaffar Khan v. Ghulam Muhammad Khan* (11). In *Bhim Sain v. Muhommad Ali* (12), the facts were the same as in the case last cited, except that the defendant (and not the plaintiff) had died during the pendency of the appeal, and it was held that the defendants' appeal could be continued by his sons; but the plaintiff's cross-objections for enhanced damages had abated. See also to the same effect *Paramenchetty v. Sundararaja Naick* (13) and *Thiruvengadachariar v. Swami Tyengar* (14).

(8) 2 L. 189; 63 Ind. Cas. 540; A I R 1921 Lah. 52; 83 P L R 1921.

(9) 4 P R 1897 at pp. 14, 15.

(10) 170 Ind. Cas. 159; A I R 1937 Nag. 216; 10 R N 48.

(11) 62 P R 1915; 28 Ind. Cas. 455; A I R 1915 Lah. 378; 83 P L R 1915.

(12) 11 L J 120 Ind. Cas. 9; A I R 1929 Lah. 807, 31 P L R 134; Ind. Rul. (1929) Lah. 953.

(13) 26 M 499.

(14) 34 M 76; 5 Ind. Cas. 937; 20 M L J 760; 7 M L T 195; (1910) M W N 543.

Reference may also be made to *Gopal v. Ram Chandra* (15), where the identical argument now addressed to us was raised but rejected At p. 607* the case in *Chapman v. Day* (16), was cited, where Pollock, B. said:

"We are not dealing with a right of action. Plaintiff brought his action and succeeded by a judgment of the Court."

Lopes, J. said:

"It is said that the defendant having died, the maxim of *actio personalis moritur cum persona* applies. I think it does not apply in such a case as this. I think 'action' means right of action, and if that is the true way of looking at it, the right of action here had been determined before the death of the defendant."

It was accordingly held that "there was no abatement after judgment." The learned Counsel for the appellant has not been able to support his contention by any valid argument nor cite any case in which the view put forward by him had been taken. The appeal fails and is dismissed with costs.

Ram Lal, J.—I agree and have nothing to add.

D. *Appeal dismissed.*

(15) 26 B 597; 4 Bom. L R 325.

(16) (1883) 48 L T 907.

*Page of 26 B.—[Ed.]

CALCUTTA HIGH COURT

Civil Rules Nos. 1403 and 1465 of 1938

June 21, 1939.

HENDERSON AND KHUNDKAR, JJ.

SRIPAT SINGH DUGAR—PETITIONER

versus

Rani MOHINI SUNDARI AND ANOTHER—

OPPOSITE PARTY

Guardians and Wards Act (VIII of 1890), ss. 8, 31—Person coming within terms of s. 8, if "person interested" within meaning of s. 39.

The term "any person interested" in s. 39, *Guardians and Wards Act*, is very wide. The matter cannot be decided merely with reference to something subjective in the mind of the applicant but some objective meaning must be given to the term. The fact that a person comes within the terms of s. 8 is quite sufficient to make him personally interested within the meaning of s. 39 and would not make him any the less a person interested merely because he is at enmity with the guardian.

O. Rules issued from the order of the District Judge, Murshidabad (Berhampur) dated June 30, 1938.

Messrs. Panchanan Ghose and Paresi Nath Mukherjee (Jr.), for the Petitioner.

Messrs. S. M. Bose and Pramatha Nath Mitra, for the Opposite Party.

Henderson, J.—The short point raised for determination in this Rule is th

interpretation of the words "any person interested" in s. 39, Guardians and Wards Act, and it does not appear that it has ever been raised before. The opposite party was appointed guardian of the properties of two wealthy minors. The petitioner filed an application for her removal under s. 39 of the Act. The District Judge without considering the application on its merits dismissed it as incompetent. In view of a report submitted by an auditor of the accounts it appeared that all was not well with the administration of the estate and the learned Judge proposed to consider the matter on his own motion. The petitioner then obtained this Rule. The term "any person interested" is obviously very wide. Possibly it might be easier to say whom it excludes rather than whom it includes. We do not propose, and in fact the learned Advocate-General did not ask us, to attempt to formulate any definition or to give any comprehensive explanation of the term. We shall merely consider whether on the facts of the present case the petitioner has brought himself within the section. The learned District Judge found the petitioner to be at enmity within the opposite party and on that finding alone he came to the conclusion that the petitioner is not a "person interested." In other words, he has come to a finding as to the motive actuating the petitioner. He did not consider the real point at issue. In our opinion the matter cannot be decided merely with reference to something subjective in the mind of the applicant but some objective meaning must be given to the term. The petitioner is the first cousin once removed, of the minors. He is thus within the terms of s. 8 (b) of the Act and thereby entitled to make an application for the appointment of a guardian. Indeed a special notice was issued on him by the learned Judge himself in connection with the actual appointment. In our opinion the fact that he comes within the terms of s. 8 is quite enough to make him personally interested within the meaning of s. 39 of the Act. We accordingly make the Rule absolute. We set aside the order of the District Judge and direct him to hear and determine the application in accordance with law. We make no order as to costs in this Rule. No order is necessary on the other Rule (No. 1465 of 1938).

Khundkar, J.—I agree.

D.

Rule made absolute.

NAGPUR HIGH COURT

Second Appeal No. 207 of 1937

September 26, 1939

POLLOCK, J.

NANDLAL RAMPRATAP—APPELLANT
versus

DEORAO AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XIV, r. 5—Court cannot make out case for plaintiff that was never put—Hindu Law—Alienation—Alienation by manager—Right of after-born co-parcener to challenge—Limitation—S. 6, Limitation Act (IX of 1908), if can be relied on.

It is not open to a Court to frame an issue on a point that does not arise out of the allegations made by the parties or their Counsel and the contents of documents. The trial Court cannot make out a case for the plaintiff that was never put forward.

Where an alienation is made by the manager without any legal necessity and without the consent of the other co-parceners then living, it will be invalid not only against those co-parceners but also other co-parceners born after the alienation provided that the alienation has not been ratified by the other co-parceners before his birth. Here the period of limitation would run from the date of the sale, and there is only one cause of action which would arise in favour of the other members who had not consented to the sale. Successive causes of action cannot arise as new members are born year after year. Such after-born co-parcener cannot rely on s. 6, Lim. Act and where he claims in his own right and not through his father, his father's insanity is immaterial. 160 Ind. Cas. 198 (1), 83 Ind. Cas. 1052 (2), and 86 Ind. Cas. 249 (3), relied on.

S. A. from the appellate decree of the Court of the Additional District Judge, Basim, dated November 27, 1936.

Messrs. T. L. Sheode and W. W. - Bhole, for the Appellant.

Messrs. V. K. Rajwade and W. K. Sheoray, for Respondent No. 1.

Judgment.—In execution of a decree obtained by the second defendant against the first defendant Abarao, a field, Survey No. 25/2 in mauza Derdi, and a house in mauza Kupta were attached. The present plaintiff filed an objection to the attachment alleging that he had a third share in the house and the field but that objection failed. The plaintiff then instituted the present suit to establish his title to the above property.

The above property admittedly formed at one time part of the joint family estate of Abarao and his three brothers Rustamrao, Sahebrao, and the plaintiff's father, Marutrao. Marutrao became insane in 1906-07 and remained insane until his death in 1916-17. His son, the plaintiff was born on November 10, 1914. On December 16, 1909, the other three brothers

Abarao, Rustamrao and Sahebrao sold the above house and field and another field to one Bahirji Wagji. On December 11, 1916, Abarao and Sahebrao re-purchased the house in suit, and on February 14, 1919, Abarao re-purchased the field in suit. These facts are not disputed.

The plaintiff's case was that there was a partition between the four brothers in 1903 at which a third share in the attached house and field was allotted to his father Marutrao, that the sale in 1909 was a bogus sale which did not affect the rights of the plaintiff's father, and that the plaintiff contributed his share of the money spent on re-purchasing the property. There are findings, which are not now disputed, that the sale of 1909 was a genuine sale for consideration, that the brothers separated after 1909 and before 1916, and that the plaintiff did not contribute towards the re-purchases. On the pleadings then the plaintiff's case clearly failed, but after the case had been concluded and was awaiting judgment, the learned Subordinate Judge thought that the plaintiff could succeed if he pleaded that, though there was no partition before 1909, yet his father's share was not affected by the sale of 1909 because it was not for legal necessity or for the benefit of the family. The learned Subordinate Judge therefore took further statements from Counsel on both sides and framed an issue on the question whether there was legal necessity for the sale of 1909. In the absence of any evidence on that point he decided that there was no legal necessity for the sale and therefore, the sale was not binding on the share of the plaintiff's father. The plaintiff was, therefore, given a decree for a quarter share in the attached house and field. That decision was upheld in appeal.

The trial Court made out a case for the plaintiff that was never put forward. It was open to the plaintiff to take the alternative plea that, even if the property was joint family property in 1909, yet the sale was not binding on him because it was not for legal necessity, but he did not do so, and the question whether the sale was for legal necessity or not would be, partly at least, a question of fact. Under O. XIV, r. 5 of the Civil P. O. the Court has power to amend the issues or to frame additional issues on such terms as it thinks fit, but this power is controlled by r. 3, which provides that the issues are to be framed from the allegations made by the parties

or their Counsel and the contents of documents. It is not open to a Court to frame an issue on a point that does not arise out of such material. Had the plaintiff applied to be allowed to amend his plaint so as to put forward such a case, such an application would probably have been disallowed on the ground that it put forward an entirely different case and had been made at a late stage. In the absence of such an amendment, the plaintiff obviously cannot succeed on the plea that there was no legal necessity. As the burden of proof rests upon the plaintiff, he must at least allege that there was no legal necessity and he has not even done that.

The suit must, in my opinion, also fail on the ground of limitation. At the time of the alienation the plaintiff was not born. It has been held in effect in *Jinwarsa Gangasa v. Gunwantrao* (1), that where an alienation is made by the manager without any legal necessity and without the consent of the other co-parceners then living it will be invalid not only against those co-parceners but also other co-parceners born after the alienation, provided that the alienation has not been ratified by the other co-parceners before his birth. If, therefore, the sale of 1909 was without legal necessity, it would be open to the plaintiff to avoid it on that ground, but he would be entitled to avoid it not as the representative of his father but in his own right. Section 6 of the Lim. Act provides:

"Where a person entitled to institute a suit is, at the time from which the period of limitation is to be reckoned, a minor, he may institute a suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor."

Here the period of limitation would run from the date of the sale, and there was only one cause of action which would arise in favour of the other members who had not consented to the sale. Successive causes of action cannot arise as new members are born year after year: see *Sita Ram Singh v. Chedi Singh* (2). The plaintiff was not in existence at the time from which the period of limitation would be reckoned and therefore he cannot rely on s. 6 of the Lim. Act. As he claims in his own right and not through his father, his father's insanity is immaterial. The decision of the Privy Council in *Ranodip*

(1) 31 N. L. R. 121 Sup.; 160 Ind. Cas. 196; 8 R. N. 157; A. I. R. 1936 Nag. 34.

(2) 46 A 882; 83 Ind. Cas. 1052; 22 A. L. J. 809; A. I. R. 1924 All. 798; L. R. 5 A 634 Civ.

Singh v. Parmeshwar Prasad (3), makes this quite clear. The present suit was brought in 1934 when the plaintiff was aged about 20. The period of limitation would be 12 years from the date of sale and the suit is, therefore, barred by limitation.

The appeal is, therefore, allowed and the plaintiff's suit will stand dismissed with costs throughout. Counsel's fee Rs. 30.

D. *Appeal allowed.*

(3) 47 A 165; 86 Ind. Cas. 249; A I R 1925 P C 33; 48 M L J 29; 21 L W 236; 2 O W N 1; 23 A L J 176; 27 Bom. L R 175; 12 O L J 74; 26 P L R 113; L R 6 A (P O) 47; (1925) M W N 262; 27 O O 343; 29 O W N 666; 52 I A 69 (P O).

RANGOON HIGH COURT

Second Appeal No. 125 of 1939

July 18, 1939

WRIGHT, J.

SINGARAM—APPELLANT

versus

S. P. R. SOMASUNDARAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Appeal by third person on behalf of minor, when there is properly constituted guardian ad litem—Propriety.

Execution proceedings are only a continuation of the regular suit and the guardian *ad litem* appointed in the civil suit continues to be the guardian *ad litem* in execution proceedings and for the purpose of appeal. 178 Ind. Cas. 449 (4) and 171 Ind. Cas. 435 (5), relied on.

Where there is a properly constituted guardian *ad litem*, no one else can represent the minor in appeal, which would be dismissed in his absence. Such dismissal of appeal on the ground that the minor was not properly represented cannot affect the minor's interest as he is bound by it.

Mr. Kalyanwalla, for the Appellant.

Mr. Hay, for the Respondent.

Judgment.—An appeal was filed in the District Court of Bassein which purported to be by Singaram, a minor represented by his next friend Palaniappa Chettyar. The learned District Judge, without going into the merits, dismissed the appeal on the ground that Palaniappa Chettyar had no *locus standi* to appear on behalf of the minor at all as he had never been appointed his guardian *ad litem*. An appeal against this order has been filed by Palaniappa Chettyar purporting to be acting on behalf of the minor Singaram. I think the proceedings show beyond all doubt that Palaniappa Chettyar was never appointed the guardian *ad litem* of the minor Singaram. A decree was passed against Singaram and others in the Chief Court of Pudukkottai in

Civil Regular No. 916 of 1934. That decree was transferred to the Sub-Divisional Court of Kyonpyaw for execution. At that time Singaram was represented by defendant No. 1, judgment-debtor Ramanathan Chettyar, who had been appointed his guardian *ad litem*. It was eventually held that the decree could only be executed against Singaram, and Ramanathan then stated that he refused to continue to act as the guardian *ad litem* of Singaram. An application was then made to the Chief Court of Pudukkottai to have a guardian *ad litem* appointed for Singaram, and subsequently a letter was received from the Registrar of the Chief Court of Pudukkottai stating, among other things, that T. M. Raghunatha Rao, a clerk to that Court, had been appointed guardian *ad litem* of the minor Singaram. In the meanwhile the person who is prosecuting this appeal, Palaniappa, had made an application to the executing Court asking to be appointed the guardian *ad litem* of the minor, but no specific orders were passed on this application. The Sub-Divisional Court, however, appears to have taken no notice of the letter from the Registrar of the Chief Court of Pudukkottai stating that T. M. Raghunatha Rao had been appointed guardian *ad litem*, and continued with the proceeding as though Palaniappa was the guardian *ad litem* of Singaram. On these facts the learned District Judge came to the conclusion that Palaniappa had no right to prosecute the appeal on behalf of Singaram. It seems to me that this decision was obviously correct, and Mr. Kalyanwalla on behalf of the appellant has no good ground for contending that this decision was wrong.

The main point taken on behalf of the appellant is that the learned District Judge should not have dismissed the appeal, but should have taken steps to have the minor properly represented before him. It is suggested that the dismissal of the appeal will adversely affect the interest of the minor and that it is the duty of Courts to protect minors. I do not think that this contention is sustainable. It has been held by the learned District Judge that the minor was not properly represented before him, and it was on this ground, and this ground alone, that the appeal has been dismissed. I am quite unable to see how such an order can affect the minor's interest, because he is not bound by it, *vide* the cases in *Dakeshur Pershad Narain Singh v. Rewat Mehton* (1),

(1) 24 O 25.

and *Bhura Mal v Har Kishen Das* (2). Moreover, under the Civil P. O., O. XXXII, r. 5 (1), every application to a Court which I presume includes an appeal, on behalf of a minor shall be made by his next friend or his guardian *ad litem*. Here where there was a properly constituted guardian *ad litem*, T. M. Raghunatha Rao, no one else could come forward on behalf of the minor and purport to represent him as his next friend.

Mr. Kalyanwalla relies upon the case in *Upendra Nith Das v Daksha Yanti Debya* (3). In that case notice of an appeal was served on a guardian *ad litem* for a minor respondent, but he did not appear, and therefore he was removed and a new guardian *ad litem* was appointed. It is suggested that this procedure ought to have been followed by the learned District Judge. I do not think that there is any difficulty in distinguishing that case from the facts of the case before me. In that case notice had been served on the guardian *ad litem* and he did not appear. In the case before me, no notice has been served on the real guardian *ad litem* Raghunatha Rao. Moreover, in the case before me the District Court was only concerned with matters which arose out of execution proceedings, which were taken out in pursuance of the decree passed by the Chief Court of Pudukkottai. The Chief Court of Pudukkottai is not under the superintendence of this Court, still less under the superintendence of the District Court of Bassein, and it would not appear that either of these Courts would be able to interfere with any order which had been passed by the Chief Court of Pudukkottai with regard to the appointment of a guardian *ad litem* in respect of one of the defendants in the case before that Court. There is ample authority for holding that execution proceedings are only a continuation of the regular suit and that the guardian *ad litem* appointed in the civil suit continues to be the guardian *ad litem* in execution proceedings and for the purpose of appeal. In this connection reference may be made to the cases in *Hem Raj v. Khem Chand* (4), and *Brojendra Kishore Ray v. Shamsher Ali* (5). In such circumstances it seems to me

(2) 24 A 383; A W N 1902, 76 (F B).

(3) 37 O W N 921; 146 Ind. Cas. 824; A I R 1933 Cal. 794; 6 R O 268.

(4) I L R (1938) All. 829; 178 Ind. Cas. 449; A I R 1938 All. 60; (1938) A L J 919; 1938 A L R 855; 11 R A 296.

(5) I L R (1937) 2 Cal. 127; 171 Ind. Cas. 435; A I R 1937 Cal. 259; 41 O W N 531; 10 R O 268.

that the learned District Judge was fully justified in holding that Palaniappa was not entitled to appear and prosecute the appeal on behalf of Singaram, and I cannot see that he was wrong in dismissing the appeal on this ground. Mr. Kalyanwalla takes serious objection to the fact that execution proceedings are going on against the minor's property and that no notice has been issued to the minor's guardian *ad litem*. This matter is not really before me, but I may remark that the executing Court would be well-advised to see that due notice is given to the guardian *ad litem* of Singaram, namely Raghunatha Rao, before action is taken in execution against the minor's property and I would draw attention to the provisions of the Civil P. O., O. XXXII, r. 5 (2). This appeal is dismissed with costs, Advocate's fee three gold mohurs.

D.

Appeal dismissed.

ODDH CHIEF COURT

Civil Miscellaneous Application No. 161 of 1939

December 11, 1939

YORKER, J.

MRS. N. A. ALEXANDER—APPLICANT
versus

M. S. JALIL—PETITIONER AND ANOTHER
—RESPONDENT—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 151, O. XXXII, r. 5—Decree absolute passed in proceedings for dissolution of marriage—Defendant minor but not represented by guardian—Decree, if can be set aside under s. 151 on application of third party—Decree is nullity but declaration to that effect cannot be made on application by third party under s. 151—O. XXXII, r. 5, applicability of.

Where the High Court in proceedings for dissolution of marriage has made not merely a decree nisi but also a decree absolute for dissolution of a marriage, a third party cannot move the High Court to set aside that decree absolute by applying the provisions of s. 151, Civil P. O., and the High Court by the application of that section or any other section has no jurisdiction to set aside its own decree. [p. 883, col. 2.]

It may be the case that material facts have not been brought to the notice of the High Court, and that throughout the proceedings in Court right up to and including the decree absolute, the defendant was a minor, and that will necessarily affect the decree if the appointment of a guardian *ad litem* of the defendant was essential in a suit under the Divorce Act, but that is not by itself any reason for the Court to assume a jurisdiction under s. 151, Civil P. O., on an application by a stranger which it does not possess. 113 Ind. Cas. 511 (1), 86 Ind. Cas. 852 (2) and 130 Ind. Cas. 575 (3), distinguished. 61 Ind. Cas. 454 (4), 66 Ind. Cas. 910 (5) and 63 Ind. Cas. 847 (6), relied on. [p. 886, col. 1.]

Order XXXII, r. 5, Civil P. O., is not applicable except while the proceedings in a suit are still pending. [p. 885, col. 2.]

Obiter.—Section 7, Divorce Act, merely relates to the principles and rules which are to guide the Court in acting and giving relief in suits and proceedings under the Divorce Act. But under s. 45, the provisions of Civil P. O. apply to proceedings under the Divorce Act and as the Code requires that a guardian *ad litem* should be appointed for a minor defendant, it would *prima facie* appear to follow that where no guardian *ad litem* had been appointed, the decree is a nullity, but the declaration that the decree is a nullity cannot be given upon an application by a third party under s. 151, Civil P. O. [p. 888, col. 1.]

C. Misc. App. on an application, praying that the decree for dissolution of marriage passed in Divorce Case No. 9 of 1937, be set aside the following order was passed by this Hon'ble Court:—

Mr. R. I. Wahid, for the Applicant.

Mr. M. L. Saksena, for the Petitioner.

Mr. Ghulam Imam, for the Respondent.

Order.—This is a Civil Misc. Application by Mrs. N. A. Alexander asking me to set aside a final decree for dissolution of marriage between M. S. Jalil and Mrs. M. P. Jalil, daughter of the applicant, on the allegation that throughout the proceedings both for decree *nisi* and decree absolute, Mrs. M. P. Jalil, respondent in the divorce suit was a minor, a fact which was not brought to the notice of the Court by the petitioner M. S. Jalil, with the result that no guardian *ad litem* was ever appointed on behalf of the respondent. No section of the Civil P. O. was mentioned in this application, but learned Counsel has sought to argue it by relying on s. 151 of that Code read with O. XXXII, r. 5.

It was at first found impossible to serve any notice on Mrs. M. P. Jalil who had been treated by the applicant as an opposite party. She was ultimately served by notice in the newspapers, and on the date of argument put in an appearance and was represented by Counsel.

At an earlier stage on May 8, 1939, two issues were framed:—

"(1) Is this application maintainable by the applicant under s. 151 of the Civil P. O. on the facts stated therein?

(2) In the final decree of this Court dated November 23, 1938, a nullity for the reason that the respondent Mrs. M. P. Jalil was a minor and was not represented in the suit by a guardian *ad litem*?"

During my absence on leave, the matter came up before Bennett, J. who passed

an order on September 11, in which he remarked that Mrs. M. P. Jalil would attain the age of 18 on September 15, 1939, and that in these circumstances he thought it desirable that notice should issue to her to elect on or before the next date of hearing whether she wishes to proceed with this application under O. XXXII, r. 12, Civil P. O. Mrs. M. P. Jalil has now appeared and states through her Counsel that she does not wish to proceed with this application herself under the provisions of O. XXXII, r. 12. The application therefore stands before me purely as an application made by a third party relying on s. 151 of the Civil P. O., which it is suggested may be read with r. 5 of O. XXXII. That rule provides that

"Every application to the Court on behalf of a minor, other than an application under r. 10, sub-r. (2), shall be made by his next friend or by his guardian for the suit. (2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the Pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such Pleader."

I am clearly of opinion that O. XXXII, r. 5 is not applicable except while the proceedings in a suit are still pending. That seems to me to follow from the whole scheme of the Order and is clearly indicated by the wording of the large majority of the rules.

This being so, the sole question for decision is whether in the circumstances that now exist, namely that this Court has made not merely a decree *nisi* but also a decree absolute for dissolution of a marriage, a third party can move this Court to set aside that decree absolute by applying the provisions of s. 151 and whether this Court by the application of that section or any other section, has jurisdiction to set aside its own decree. The wording of s. 151 is as follows:—

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

No doubt the wording of the section is very wide and would seem to give very wide powers to the Court, but I am clear that the application of the section of which I am asked to approve goes far beyond the scope of the section. It is true that the section has been used for the purpose of setting aside an *ex parte* decree, but it

is doubtful whether that use of the section was a proper use of it. Speaking generally, once a final decree has been made, that decree can only be set aside by appeal. It is possible, of course, for a person affected by a decree to institute a suit to have it declared that that decree is not binding upon him either because it is vitiated by fraud or because it is in some other way defective or in some subsequent suit a party may plead, that a certain decree has no effect in his case because it is null and void, as for instance, on the specific ground that at the time when the decree was passed the defendant was a minor or a lunatic and was not represented by a guardian *ad litem*. But neither of these methods of getting rid of the effect of a decree result in the setting aside of the decree. The decree still remains, though it may, as a result of those attacks, have lost its force.

Now in the case of suits under the Indian Divorce Act, it is quite clear that there is a stage during which a decree *nisi* can be assailed and the Court which made that decree can reverse the decree *nisi* itself, that is under the provisions of s. 16, which provides that a decree *nisi* shall not be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court, by general or special order from time to time, directs. During that period it is specifically provided that

"any person shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree (*nisi*) should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court."

This enables a third party in India to approach the Court in the same manner as a Court is moved in England by the King's Proctor. There is no provision under the Indian Divorce Act for a decree which has been made absolute being assailed by application in the manner in which a decree *nisi* can be assailed under s. 16. It may be the case that material facts have not been brought to the notice of this Court, and that throughout the proceedings in this Court right up to and including the decree absolute, the defendant Mrs. M. P. Jalil was a minor, and that will necessarily affect the decree if the appointment of a guardian *ad litem* of the respondent was essential in a suit under the Indian Divorce Act, but that is not by itself any reason for the Court to assume a jurisdiction which it does not possess.

Learned Counsel has sought to rely on three reported cases; none of them by any means on all fours with the present case: *J. U. E. Maung v. Chettyar Firm* (A. I. R. 192 Rangoon, 273) (1) it was held that "although a Court may have no power under s. 15 to set aside an *ex parte* decree against a party to suit unable to comply with the provisions of O. IX, r. 13, and the law of limitation, still a Court can under s. 151 set aside an *ex parte* decree at the instance of a person not a party to the original suit under peculiar circumstances and make him a defendant and allow him to defend the suit. There is a clear distinction between a case in which an *ex parte* decree is set aside in order to allow a third person to be made a defendant and defend the original suit and a case where the third person who has made the application could not, even if successful, be made a defendant and allowed to defend the suit".

The case quoted from A. I. R. 192 Calcutta, 1145 (*Rash Behari Mazumdar v. Kasum Kumari Guha*) (2) appears to me to have no application whatever to the circumstances of the present case. In *Samaresh Chakravarti v. Jalpaiguri Banking and Trading Corporation, Ltd.* (A. I. R. 1931 Cal., 168) (3) a plaintiff who had obtained an *ex parte* decree received information that on the date of the suit, the defendant was lunatic and that fact was confirmed by proceedings in lunacy and declaration to that effect. The defendant then died and the decree was sought to be executed against the legal representatives, against which the legal representatives by an affidavit set up an objection that the decree was a nullity on account of the defendant's lunacy. The plaintiff thereupon took out a summons to the effect that the decree should be set aside and the suit after certain amendments in the plaint should be re-constituted as a suit against the legal representatives, and it was held that the order allowing such summons and amendment could be made. Their Lordships seem to have taken the view that it was quite possible to make an order that the summons be treated as a memorandum of review. I do not think that it could, by any means, be possible for a third party to move an application in review. In any case this decision can be no support for the proposition put forward on behalf of the applicant that under s. 151, a Court should make such an order as is sought at the instance of a third party.

(1) A I R 1928 Rang. 273; 113 Ind. Cas. 811; 6 R 694.

(2) A I R 1925 Cal. 1145; 86 Ind. Cas. 583.

(3) A I R 1931 Cal. 168; 130 Ind. Cas. 878; 34 O W N 969; Ind. Rul. (1931) Cal. 398.

On behalf of the respondent or opposite party Mr. M. S. Jalil, reliance has been placed on several rulings which seem to me to be of much clearer applicability. In *Lala Ajodhya Prasad v. Mst. Katori*, (61 Ind. Cas 484) (4) it was held by a Bench of the Allahabad High Court that a Court has no jurisdiction to set aside an *ex parte* decree, and order the whole case to be re-opened at the instance of a person not in any way interested in the decision of the case and who has been expressly exempted from the decree. In that case certain persons who had been made *pro forma* defendants and had absented themselves, from the hearing, made an application after the passing of a decree under O. XXXIV, r. 4, to set aside that decree on the ground that they had not been duly served with notice. The application was apparently under the provisions of O. IX, r. 13. The decree-holder thereupon applied to the Court stating that these two persons had only been made *pro forma* defendants and that no relief was sought against them, and formally exempted them from the decree. By this act of the decree-holder the applicants became third parties not interested in the decision of the case, and O. IX, r. 13, ceased to be applicable to them. The trial Court, however, having re-opened the case, it was held by the High Court that trial Court had no jurisdiction to make the order, it being an order which could clearly not have been made by the trial Court by the application of any section except s. 151.

In *Perumal Moopan v. M. K. Venkatachariar* (68 Ind. Cas. 910) (5) it was held by a Single Judge of the Madras High Court that

"the language of s. 151 of the Civil P. O. is wide and refers to inherent powers of a Court to make such orders as may be necessary for the sake of justice. A stranger to a litigation, however, cannot intervene after a suit or proceeding is disposed of, and claim the protection of s. 151 of the Code or appeal to the inherent powers of the Court to do justice."

The matter was discussed at some length in *Neelaveni v. Narayana Reddi*, (I. L. R. 43 Madras, 91) (6), in which it was held by a Full Bench of the same High Court that a Court has no power, apart from the provisions of O. IX, r. 13 of the Civil P. O., to set aside an *ex parte* decree passed by

itself." In this case one of the learned Judges remarked:

"moreover, I am clear that s. 151 must be construed not as empowering a Court to exercise power which it never possessed, but as preserving to it those powers which it has been in the habit of exercising and which by an oversight or by failure to specify have not been particularized in the statute. Section 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of Justice is competent to exercise; and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided for in the Code."

It has never been held, so far as I am aware, that a Court has an inherent power to set aside at the instance of a stranger, a decree which has been passed by it. The power to set aside such a decree at the instance of the party directly affected is contained in O. IX, r. 13. Section 151 cannot, in my opinion, be invoked for the purpose of enabling a Court to set aside an *ex parte* decree at the instance of a stranger. It follows that, in my opinion, the only possible finding on Issue No. 1 is that this application is not maintainable by the applicant under s. 151 of the Civil P. O., on the facts stated therein.

In these circumstances the question set out in the second issue framed by me, namely:

"Is the final decree of this Court dated November 23, 1938, a nullity for the reason that the respondent Mrs. M. P. Jalil was a minor and was not represented in the suit by a guardian *ad litem* does not really arise for decision. Learned Counsel for the respondent Mr. Jalil has contended that it was not necessary under the rules of the Code followed in England in Divorce suits for a minor respondent to be represented by a guardian *ad litem*. He refers to a passage in Rattigan on Divorce (Second Edition) p. 521 in which it is said, "It will be noticed that under r. 103" (of the Rules and Regulations of the English Divorce Court)

"it is not necessary for a minor co-respondent to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence. But in view of the wide terms of O. XXXII, r. 5, cl. (2), Civil P. O. it is submitted that a co-respondent who is a minor must in suits under the Indian Divorce Act be represented by a guardian *ad litem*. Moreover, a co-respondent is a 'defendant', and O. XXIII, r. 3 of the Code is as applicable to him as to a respondent."

On p. 519 it is remarked, "s. 49 of the Divorce Act makes no provision for the case of a minor respondent or co-respondent". Section 49 provides that a minor petitioner shall sue by his or her next friend to be approved by the Court. The

(4) 61 Ind. Cas 484; 3 U P L R (A) 29.

(5) 68 Ind. Cas. 910; 15 L W 585; 42 M L J 563; (1922) M W N 268; 31 M L T 35; A I R 1922 Mad. 193.

(6) 43 M 94; 53 Ind. Cas. 847; 37 M L J 599; 26 M L T 377; 10 L W 606; (1920) M W N 19 (F B).

Commentator, however, goes on to refer to O. XXXII, r. 3, and it is quite clear that he is of the opinion that a guardian *ad litem* must be appointed for a minor respondent. At the top of p. 521 he remarks: "The effect of this section" (referring to O. XXXII, r. 5 (2))

"is that no order by which a minor may in any way be concerned or affected can legally be made without his being represented by a next friend or guardian for the suit (*Aminchand v. Collector of Sholapur*, 13 Bom. 234) (7)"

Learned Counsel suggests that s. 7 which provides that the Courts are to act on the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief, would bring in the application of the passage quoted from p. 521 referring to the election of a guardian by a minor co-respondent. It does not appear to me that s. 7 has any application in the matter at all. That section merely relates to the principles and rules which are to guide the Court in acting and giving relief in suits and proceedings under the Indian Divorce Act. Section 45 provides that

"Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Civil P. O."

That Code requires that a guardian *ad litem* should be appointed for a minor defendant. It would *prima facie* appear to follow that where no guardian *ad litem* had been appointed, the decree is a nullity, but this is not the stage at which such a declaration can be given, nor as I have already said can such a declaration be made on a mere application by a third party. It may be wise for the petitioner Mr. M. S. Jalil to act in future on the supposition that the decree which he has obtained is a nullity, but the question whether it really is or is not a nullity is one which could only arise for decision in some future case in which the nullity or otherwise of the decree *nisi* and final decree for dissolution of the marriage is a matter in issue, as it might be, for example, in a Criminal Court in which Mr. Jalil was charged with bigamy or in a civil suit in which other matters depend on the validity or otherwise of the decree. I do not think it would be proper to make a pronouncement on that question on a miscellaneous application of this kind by a third party who is entitled to no relief in this application and no such decision.

On my findings above, I hold that there is no force whatever in the present appli-

(7) 13 B 234.

cation which accordingly fails and is dismissed with costs. The only certificate of Pleader's fees incurred by either of the respondents on the record is that of Mr. Saksena representing Mr. Jalil for Rs. 85 which is by no means unreasonable, and is accordingly admitted under the provisions of rule XI, Chap. XIX of the Chief Court Rules for taxation as Pleader's fee.

Special costs were asked on behalf of the respondent Mr. Jalil, but I find no ground for awarding any special costs in this case.

s.

Application dismissed.

NAGPUR HIGH COURT

Civil Revision No. 436 of 1938

August 4, 1939

GRUBB, J.

JANBA—JUDGMENT-DEBTOR—APPLICANT

versus

MANNO—DECREE-HOLDER—OPPOSITE PARTY
O. P. Debt Conciliation Act (II of 1933), ss. 16 (b), 15—Decree-holder alleging before Board that debt was bogus—Board holding it genuine—Question, if can be re-agitated in Civil Court.

The intention of the Legislature in s. 16, O. P. Debt Conciliation Act, was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under s. 15. It may be that if fraud was practised on the Board without the knowledge of the Board, the Civil Courts could set the matters right: but where the decree-holder did allege to the Board that the other debt was bogus, but in spite of that the Board accepted it as a genuine one, the decree-holder is not entitled to re-agitate the question of fraud in the Civil Court.

App. for revision of the order of the Court of Small Causes Judge, Ramtek, dated April 29, 1939.

Mr. G. R. Pradhan, for the Applicant.

Mr. N. B. Chandurkar, for the Opposite Party.

Order—The applicant judgment-debtor obtained from the Debt Conciliation Board a certificate under s. 15 of the Debt Conciliation Act, but the lower Court has refused to give effect to it and has ordered execution to proceed. Only two creditors were named before the Board, the present decree-holder and one Imratlal. In the Civil Court, the non-applicant decree-holder Manno took the plea that Imratlal's debt was fictitious and so there is no debt for the settlement of which this decree-holder can be postponed under s. 15 (3). After

recording evidence, the Subordinate Judge found that the debt of Imratlal is fictitious. The point now to be decided in revision is whether the Judge had jurisdiction to go into this question at all.

The applicant relies on s. 16 (b) of the Act which says that no Civil Court shall entertain any application to execute the decree, the execution of which is suspended under sub-s. 3 of s. 15. On the other hand it is argued that Civil Courts have full power to enquire into the facts necessary for the issue of a certificate especially where fraud was alleged. Reference was made to *Sadasheo Rao v. Roopchand* (1) in which it was held that where there was a miscalculation by the Board about the 40 per cent. of the debts due to the creditors, the Civil Courts could find that the Board had acted without jurisdiction in issuing a certificate under s. 15 against a creditor who did not agree to conciliation. That involved not a question of initial jurisdiction to effect a settlement to which s. 7-A is applicable but a question of jurisdiction to issue a certificate. Interference may have been justified as the error of the Board was approved on the face of the record. But with all due respect I find it a little difficult to reconcile that decision with the remarks of their Lordships in the published case of *Shivdin v. Ram Ratan* (2):

"If the Board had jurisdiction to attempt to effect a settlement, then the Civil Courts would not have jurisdiction to inquire whether that jurisdiction was properly exercised, and the legality or validity of any orders passed in the exercise of the Board's jurisdiction could not be questioned in any Civil Courts on any ground except perhaps fraud."

These remarks have my respectful concurrence as I think that the intention of the legislature in s. 16 was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under s. 15. It may be that if fraud was practised on the Board without the knowledge of the Board, the Civil Courts could set the matters right; but that was not the case here. The decree-holder did allege to the Board that the other debt was bogus, but in spite of that the Board accepted it as a genuine one. Neither side has filed copies of the proceedings to show how the Board arrived at that conclusion, but that is immaterial.

(1) 1939 N L J 143; 184 Ind. Cas. 719; A I R 1939 Nag 136; 12 R N 121.

(2) I L R (1938) Nag. 489 at p. 495; 170 Ind. Cas. 305; 20 N L J 57; 10 R N 85; A I R 1937 Nag. 259.

The point was decided by them. The decree-holder could have applied promptly for a review of the decision but he did not. I am of opinion that he was not entitled to have the question of fraud re-agitated in the Civil Court. To hold otherwise would open the way to frivolous applications and lead to Courts being called upon to decide about the existence or validity of debts of persons who are not parties to the suits before them.

I hold that the Civil Court acted without jurisdiction in making this inquiry. Its order is set aside, and effect must be given to the certificate issued against the non-applicant decree-holder. Costs of this application on the non-applicant. Counsel's fee Rs. 15.

D.

Revision allowed.

OUDH CHIEF COURT

Civil Revision Application No. 153 of 1936

December 1, 1939

ZIA-UL-HASAN AND YORKE, JJ.

LYALLPUR BANK, LTD (IN LIQUIDATION)

APPLICANT

versus

RAMJI DAS AND OTHERS—

OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 73, 115—Order under s. 73, whether revisable under s. 115—Order under s. 186, Companies Act (VII of 1913), if decree within meaning of s. 73—Custody Court holding money under O. XXI, r. 52, becoming execution Court by reason of various applications for execution being filed in it—Order passed by such Court under s. 73—Competency.

An order passed by a Court under s. 73, Civil P. O., though in nature administrative one, is yet a judicial order so as to be subject to revision under s. 115. 104 Ind. Cas. 735 (2), relied on, *Shankar Sarup v. Mejo Mal* (1), distinguished.

It is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to the party, for there is no warrant for this either in s. 115 or in any other provision of the Civil P. O. Hence an order under s. 73, Civil P. O., is revisable under s. 115 even though the applicant has got a remedy by way of suit under s. 73 (2). [p. 891, col. 2.]

(Case-law relied on.)

An order under s. 186 of the Companies Act, cannot be regarded as a decree within the meaning of s. 73, Civil P. O. 160 Ind. Cas. 346 (17), *A Reference under s. 28 of Act No. VII of 1870* (18) and 151 Ind. Cas. 1027 (19), relied on, 100 Ind. Cas. 744 (15) and 47 Ind. Cas. 997 (16), distinguished. [p. 892, col. 1.]

Although the custody Court which holds money under O. XXI, r. 52, Civil P. O., cannot proceed under s. 73 of the Code, yet, where, long before the date on which the order under s. 73 was passed by the custody Court, that Court had ceased to be a custody Court under r. 52 and had become an execution Court by reason of various applications for execution being filed in it, it is perfectly compe-

tent to that Court to award rateable distribution. [p. 893, col. 1.]

O. R. App. of an order of the District Judge of Unao, dated August 6, 1936.

Mr. Ram Bharosey Lal, for the Applicant.

Messrs. M. Wasim, K. P. Saksena, L. S. Misra, Mahabir Prasad, M. M. Gaur and H. K. Ghose, for the Opposite Party.

Judgment.—These are applications for revision under s. 115, Civil P. O. against an order of the learned District Judge of Unao, dated August 6, 1936, awarding rateable distribution of assets under s. 73, Civil P. O.

The facts leading up to the present applications are as follows:

Jai Ram Das, father of Shanti Lal, opposite party No. 19 in application No. 153, obtained a decree for profits of a Sugar Mill against Jagannath Prasad and Nihal Chand from the Court of the Civil Judge of Unao on March 28, 1933. In 1934, his son Shanti Lal sued the same persons for profits of the mill relating to subsequent years. This suit was referred to certain arbitrators residing in the Punjab who were given authority to go behind the previous decree obtained by Jai Ram Das and to decide the disputes between the parties afresh. On December 4, 1935, the arbitrators delivered their award holding that if the defendants deposit to the credit of Shanti Lal a sum of Rs. 49,166 in Court on or before January 15, 1936, they would be relieved of interest and costs of Shanti Lal. This amount was tendered to the Court of the Civil Judge, Unao, on January 15, 1936, but as on that date the learned Civil Judge was on leave, the money was deposited in the Court of the District Judge. On the same date the award of the arbitrators was made a rule of Court.

It appears that Jai Ram Das was indebted to various persons under decrees and orders of different Courts. One of his creditors was the Lyallpur Bank, Ltd. (in liquidation), applicant in application No. 153 of 1936, and another was Ramji Das, applicant in application No. 191, who is now dead and is represented by Dwarka Das and four others. The other creditors to whom rateable assets were awarded by the learned District Judge, are opposite parties in the applications before us. As one of the creditors of Jai Ram Das was the Secretary of State for India in Council, the

learned District Judge held that his debt had priority over all the other debts. He ordered that after the claim of the Secretary of State was fully satisfied out of the amount in deposit, the balance should be rateably distributed among the various creditors excluding the Lyallpur Bank. With regard to the Bank he held that as the Bank held only an order under s. 186 of the Indian Companies Act, it could not be said to hold a decree within the meaning of s. 73 of Civil P. O. Ramji Das claimed to be entitled to have the entire amount of his decree paid out of the deposit but this claim was overruled by the learned Judge who held him entitled only to a rateable share.

Application No. 153 has been brought by the Lyallpur Bank against the dismissal of its claim and application No. 191 has been filed by Ramji Das against the finding of the learned Judge that he is entitled only to a rateable share of the assets. The other creditors have submitted to the order of the learned Judge.

The learned Counsel for Messrs. Bird & Co. opposite party No. 13 in the Lyallpur Bank's application has raised a preliminary objection against both the applications on the ground that no revision lies against the order in question.

His first ground is that the order passed by the learned District Judge is an administrative and not a judicial order so as to be subject to revision under s. 115, Civil P. O. for this proposition learned Counsel relies on the case of *Shankar Sarup v. Mejo Mal* (L. R. 23 I. A. 203) (1) but all that was held in that case was that an order under s. 295 of the (old) Civil P. O. for the distribution of the price of property sold in execution amongst the decree-holders is a step in an execution proceeding and does not import a conclusive adjudication as to rights of priority. The learned Counsel relies on the following remark of their Lordships at p. 209*:

"The scheme of s. 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seem at the time to be the rights of parties, without this distribution importing a conclusive adjudication on those rights which may be subsequently readjusted by a suit such as the present."

This does not, in our opinion, mean that an order passed by a Court under s. 73, Civil P. O. is not a judicial order and we entirely agree with the remark of Ramesam,

(1) 28 I. A. 203; 23 A. 313; 3 Bom. L. R. 713; 8 Sar. 72; 5 O. W. N. 649 (P. O.).

J. in Salai Muhammad Haji Ibrahim & Co. v. Ayja Nadar (A. I. R. 1927 Mad. 944) (2) that :

"There is a fallacy in passing from the noun to the adjective in this manner."

As pointed out by the learned Judge, all the orders of Courts under the Indian Succession Act, the Probate and Administration Act, etc., relating to the administration of the assets of deceased persons are in a sense administrative but it cannot reasonably be contended that they are not judicial orders. We are supported in this view by *S. A. S. Chettyar Firm v. S. A. R. A. M. Firm* 6 Rangoon 582 (3) also.

The next contention of the learned Counsel is that there was no failure on the part of the District Judge to exercise jurisdiction vested in him by law nor the exercise of that jurisdiction in an illegal or irregular manner and he has referred us to some cases in which it was held that a High Court is not justified in exercising its revisional powers merely on the ground that the order passed by the Court below seems to be erroneous. We think, however, that so far at least as the Lyallpur Bank is concerned, if it be held that the Bank is entitled to a rateable share of the assets, it must also be held that the learned Judge failed to exercise jurisdiction that was vested in him by law.

The third argument is that this Court's jurisdiction under s. 115 Civil P. O. is discretionary and that it should not be exercised in favour of persons who have under s. 73 (2), Civil P. O. a remedy by way of suit. In support of the contention that revision should not be allowed where there is another remedy open to the applicant, reliance has been placed on the cases of *Har Narain Sethi v. Bird & Co.* (1936 O. W. N. 116), (4), *Birendra Bikram Singh v. Basdeo* (1936 O. W. N. 262), (5), *Mst. Burmoori Begam v. Mst. Aysha* (5 Patna Law Journal 415) (6), *Chivarkula Sheetharamayya v. Mulpuru Rathamma* (A. I. R. 1935 Mad. 399) (7), *Venkataraman v. Mahalingayyan* (I. L. R. 9 Mad. 508) (8), *Ram*

Saran Das v. Amar Nath (A. I. R. 1935 Lahore, 971) (9) and *Behari Lal v. Ale Nahi* (1936 A. I. J. 559) (10). These cases no doubt support the learned Counsel's contention to a certain extent, but with all respect we think that it is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to the party, for there seems to be no warrant for this either in s. 115 or in any other provision of the Civil P. O. In *Lila v. Mahange* (I. L. R. 54 All. 183) (11) it was held that it cannot be laid down as a general proposition that the High Court has no power of interference at all and should not interfere where there is another remedy by way of a suit open to the applicant. In *Mst. Bhacwanti v. Sant Singh* (A. I. R. 1939 Lahore 52) (12) the Lahore High Court also held that there is no inflexible rule that the High Court will not interfere in revision when other remedy is open by way of a suit and that the High Court even in such cases can interfere in revision to avoid multiplicity of a litigation and hardship to the parties. In the case of *Bachu Lal v. Ram Din* (1938 A. L. J. 1118) (13) the High Court at Allahabad again held that the power of the High Court to interfere in revision with an order passed under O. XXI, r. 58, Civil P. O. is not precluded by the fact that a remedy by way of a suit is open to the applicant under r. 63. The case of *Konchadu Dalayya v. Malla Sundara Narayana* (I. L. R. 59 Mad. 303) (14) was a case under s. 73, Civil P. O. and it was held that where the High Court is satisfied that the lower Court has proceeded on a clear misapprehension of s. 73 of the Code, it is not justified in driving the petitioner to a separate suit merely on the ground that that remedy is also open to him. We are, therefore, of opinion that the mere fact that a remedy by way of a suit is open to the applicants in the present case should not lead us to hold that the applications for revision

(9) A I R 1935 Lah. 971; 160 Ind. Cas. 521; 8 R L 551 (2).

(10) (1936) A L J 559; 162 Ind. Cas. 349; 1936 A L R 429; 8 R A 866; A I R 1936 All. 626.

(11) 54 A 183; 137 Ind. Cas. 634; A I R 1931 All. 632; (1931) A L J 974; Ind. Rul. (1932) All. 347 (F B).

(12) A I R 1939 Lah. 52; 182 Ind. Cas. 560; 41 P L R 374; 12 R L 58.

(13) (1938) A L J 1118; 180 Ind. Cas. 349; A I R 1939 All. 117; 11 R A 447.

(14) 59 M 303; 161 Ind. Cas. 93; (1935) M W N 1300; 69 M L J 908; 43 L W 40; A I R 1936 Mad. 91; 8 R M 774.

(2) A I R 1927 Mad. 944; 104 Ind. Cas. 735; 39 M L T 609.

(3) 6 R 582; 113 Ind. Cas. 815; A I R 1928 Rang. 163.

(4) (1936) O W N 116; 160 Ind. Cas. 36; 1936 O L R 35; 8 R O 240; A I R 1936 Oudh 137.

(5) (1936) O W N 262; 160 Ind. Cas. 814; 1936 O L R 109; 8 R O 281; A I R 1936 Oudh 185.

(6) 5 P L J 415; 57 Ind. Cas. 421; 1 P L T 296; (1921) Pat. 704; A I R 1921 Pat. 401.

(7) A I R 1935 Mad. 399; 156 Ind. Cas. 631; (1935) M W N 294; 41 L W 490; 8 R M 28.

(8) 9 M 508

are not entertainable. We accordingly overrule the preliminary objection.

Coming now to the merits of the applications, we take up the application of the Lyallpur Bank first. It appears that an order under s. 186 of the Indian Companies Act was obtained against Jai Ram Das by the Lyallpur Bank from the Court of the District Judge, Lahore, on March 27, 1935. On January 10, 1936, an application for execution of the order was made to the District Judge, Lahore, and proceedings were subsequently transferred to Unao in this province. The learned District Judge was of opinion that an order under s. 186 of the Indian Companies Act, cannot be regarded as a decree within the meaning of s. 73, Civil P. O. We have carefully considered the arguments advanced on behalf of the Lyallpur Bank against this finding but are unable to hold that the finding of the learned Judge was wrong. The learned Counsel has relied on the cases of *In the matter of the Indian Companies Act* (A. I. R. 1927 Mad. 271) (15) and *Tharya Ram v. Popat Ram* (47 Ind. Cas. 997) (16) but neither of these cases supports the contention that an order passed under s. 186 of the Indian Companies Act can be deemed to be a decree within the meaning of s. 73, Civil P. O. In the first of these cases the Official Liquidator had applied directly to the District Court in Madras within whose jurisdiction the property against which the enforcement of the order was sought was situated though the order under s. 186 of the Indian Companies Act had been passed by the Bombay High Court. All that was decided was that the proper procedure under ss. 199 and 200 of the Companies Act was that the order should be filed in the High Court and the High Court should treat it in the same manner as a decree passed by itself and transfer it for execution to the District Court. In the latter case the question was whether the assignee of an order under s. 186 of the Companies Act can enforce the order in his favour without complying with the requirements of O. XXI, r. 16, Civil P. O. and it was held that ss. 199 and 200 of the Companies Act do not override the provisions of the Civil P. O. No question under s. 73, Civil P. O. arose in either of these cases and they are, therefore, no authority for the proposition that a person

holding an order under s. 186 of the Companies Act can be given rateable distribution under s. 73 of the Code. On the other hand Courts in India have taken the view that an order under the Companies Act is not a decree as defined in the Civil P. O. In *Modern Chemical Works, Ltd. v. Manmohan Nath Dar* (A. I. R. 1935 Lahore, 975) (17) it was clearly laid down that an order made by a liquidation Court is not a decree though it is enforceable in the same manner as if it were a decree. In *A Reference under Section 28 of Act No. VII of 1870* (I. L. R. 17 All. 238) (18) also it was held that an order under s. 214 of the Indian Companies Act of 1882 is not a decree or an order having the force of a decree. The case of *Mohan Lal Lal Chand v. Bhivraj Devchand* (A. I. R. 1934 Nagpur 243) (19) is still stronger and was a case under s. 73, Civil P. O. It was held in that case that s. 73 only permits application for rateable distribution by persons who have made application to the Court for the execution of decrees for the payment of money and not by persons who have obtained orders for payment of money which are capable of being executed, and that persons in whose favour orders for payment of money are passed, do not stand on the same footing as persons who have obtained "decrees" for the payment of money so as to entitle them to the benefit of s. 73, Civil P. O.

We are therefore, of opinion that the learned District Judge was right in holding that the Lyallpur Bank is not entitled to rateable distribution in the present case. The application of the Lyallpur Bank, therefore, fails and is dismissed with costs.

We now take up the application of the representatives-in-interest of Ramji Das, applicant-deceased.

Ramji Das obtained a decree for Rs. 35,400 and costs from the Court of the Subordinate Judge of Lahore against Jai Ram Das on February 2, 1928. On November 25, 1935, he applied for issue of a precept to the Subordinate Judge of Unao for attachment of the decree standing in favour of Jai Ram Das on the basis of the award dated December 4, 1935, referred to above. On January 15, 1936, application was made by Ramji Das to the Subordi-

(15) A I R 1927 Mad. 271; 100 Ind. Cas. 744; 25 L. W 113; 38 M. L. T 377.

(16) 47 Ind. Cas. 997; 92 P. R 1918; 168 P. W. R. 1918; A. I. R. 1918 Lah. 211.

(17) A I R 1935 Lah. 975; 160 Ind. Cas. 316; 8 R. L. 528; 17 L. 341; 36 P. L. R. 662.

(18) 17 A. 238; A. W. N. 1895, 56.

(19) A I R 1934 Nag. 243; 151 Ind. Cas. 1027; 17 N. L. J. 146; 7 R. N. 76.

nate Judge of Unao for execution. The learned Subordinate Judge on return from leave on January 17, 1936, made an order of attachment of the money deposited in the District Judge's Court. On February 3, 1936, the Subordinate Judge passed an order that the money attached be sent for from the Court of the District Judge but as in the meantime various decree-holders had applied to the District Judge for execution of their decrees against Jai Ram Das, the learned District Judge refused to send the money to the Subordinate Judge's Court on that ground. It appears from the report put up by the office of the District Judge on February 4, 1936, that the money in his Court had already been attached in another case of the Subordinate Judge's Court and in two cases of the District Judge's own Court.

The learned Counsel for the applicants in application No. 191 has challenged the learned District Judge's order on the ground that he had no jurisdiction to make an order of rateable distribution under s. 73, Civil P. O. and the cases of *Kamini Kumar Chowdhury v. Sasanka Sekhar Chowdhury* (37 O. W. N. 820) (20) and *E. M. Visvanadhan Chetty v. Arunchelam Chetti*, (I. L. R. 44 Mad. 100) (21) have been relied on in support of this contention. No doubt these cases hold that the custody Court which holds money under O. XXI, r. 52, Civil P. O. cannot proceed under s. 73 of the Code, but long before the date on which the present order was passed by the learned District Judge, viz., August 6, 1936, his Court had ceased to be a custody Court under r. 52 and had become an execution Court by reason of various applications for execution being filed in it. He was, therefore, perfectly competent to award rateable distribution.

The learned Counsel argues that as Ramji Das was the first to apply for execution of his decree, he was entitled to full satisfaction of his decree and that the balance, if any, should have been distributed to the other decree-holders. We see no force in this argument. The Court of the District Judge became vested with powers under s. 73 as soon as it became an execution Court by an application for execution being presented to it. Ramji Das's application was transferred by the Subordinate Judge to the

District Judge for execution on March 20, 1936, but we have seen that applications for execution were presented to the District Judge before February 5, 1936, in fact, in view of this fact we doubt if Ramji Das was entitled at all to a share in the assets held by the District Judge; but as none of the parties has contested the learned District Judge's order awarding a rateable share to Ramji Das, we are not called upon to interfere with the order passed in his favour. What is perfectly certain is that Ramji Das was not entitled to get his decree fully satisfied out of the assets. His application also, therefore, fails and is dismissed with costs.

e.

Application dismissed.

NAGPUR HIGH COURT

Miscellaneous Appeal No. 81 of 1935

August 30, 1935

POLLOCK, J.

SECRETARY, MUNICIPAL COMMITTEE,
NAGPUR—APPELLANT

versus

RAMOHANDRA—RESPONDENT

*C. P. Municipalities Act (II of 1922), s. 84 (3)—
Suit in Civil Court for refund of taxes paid, when
barred.*

It is the duty of the Municipal Committee to assess each house, to decide who is the owner or occupier liable to assessment, and to recover that assessment. Whether that assessment has been correctly calculated or not or whether it is being levied on the right person is a matter for the Municipal Committee to decide, and it cannot be said that its action is *ultra vires* if it decides it wrongly. An assessee has a right of appeal under s. 83 of the C. P. Municipalities Act, and under s. 84 (3) no objection shall be taken to any assessment or levy nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act. According to s. 85 (4), no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of the Act and the rules made thereunder. Unless the allegations in the plaint show that the action of the Committee was *ultra vires*, no civil suit will lie for a refund of the taxes paid. 18 Ind. Cas. 449 (1) and 65 Ind. Cas. 332 (2), distinguished.

Misc. A. from an order of the Court of the Third Additional District Judge, Nagpur, dated January 26, 1938.

Dr. W. S. Barlinge, for the Appellant.

Mr. N. R. Deopujary, for the Respondent.

Order.—This is an appeal by the Municipal Committee of Nagpur arising out of a suit brought by the plaintiff to recover certain money which he alleges was illegally recovered from him as taxes by the Committee. The plaint alleges that

(20) 37 O W N 820; 146 Ind. Cas. 791 (1); A I R 1933 Cal. 814; 6 R O 265 (1).

(21) 44 M 100; 60 Ind. Cas. 302; 39 M L J 698; 12 L W 744; 28 M L T 412; (1921) M W N 14 (F B).

the plaintiff is the owner of house No. 16 and he paid the municipal taxes assessed on it up to 1935 but in spite of this, an additional sum of Rs. 86 was recovered from him on this account on February 21, 1935. The plaintiff further alleges that Rs. 118-12-3 was recovered from him, apparently on the same date, as taxes assessed on house Nos. 253-1, 254-1, 254-2 and 254-4 which he never owned. Subsequently the defendant admitted that he was the owner of houses Nos. 253-1, 254-1 and 254-2 and alleged that he had paid the taxes due on these houses but denied that he was the owner of house No. 254-4 and alleged that Rs. 118-12-3 had been recovered as a tax on this latter house. The pleadings show that what the plaintiff alleges was a double recovery was in fact a recovery of the balance due on account of re-assessment. The trial Court held that the jurisdiction of the Civil Courts was barred by s. 84 (3) of the C. P. Municipalities Act. The lower Appellate Court has held that the jurisdiction is not barred. Against that decision the Municipal Committee has appealed.

I have been referred to the decisions in *G. I. P. Ry. Company v. Amraoti Municipality* (1) and *Municipal Committee, Malkapur v. A. W. Dalal* (2). In the first of these cases, the plaintiffs sought to recover a sum which they said was illegally levied from them by the defendants as a tax on their trade as a carrier. Stanyon, A. J. O. pointed out that the first point to be decided was whether on the allegations of the plaintiffs the Civil Court had jurisdiction to entertain the suit and he held that, as it was alleged that the action of the Municipal Committee was *ultra vires*, the Civil Courts had jurisdiction to try that issue. In the second case there was an allegation that the Municipal Committee had levied a tax on a professional income arising outside the municipal limits which was contrary to law. The facts in the present case are entirely different. It is the duty of the Municipal Committee to assess each house, to decide who is the owner or occupier liable to assessment, and to recover that assessment. Whether that assessment has been correctly calculated or not or whether it is being levied on the right person is a matter for the Municipal Committee to decide, and it cannot be said that its action is *ultra vires*.

(1) 8 N. L. R. 107; 16 Ind. Cas. 449.

(2) 18 N. L. R. 121; 65 Ind. Cas. 532; A. I. R. 1922 Nag, 10.

if it decides it wrongly. An assessee has a right of appeal under s. 83 of the Act, and under s. 84 (3), no objection shall be taken to any assessment or levy nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act. Section 85 (2) provides that no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of the Act and the rules made thereunder. There were no allegations in the pleadings to show that the Municipal Committee was acting *ultra vires*, and therefore no civil suit will lie for a refund of the taxes paid.

The appeal is allowed and the suit will stand dismissed with costs throughout. Counsel's fee Rs. 20.

D.

Appeal allowed.

LAHORE HIGH COURT

Second Appeal No. 988 of 1938.

April 12, 1939

DALIP SINGH, J.

SARDAR KHAN—DEFENDANT—APPELLANT
versus

MOHAMMAD AKRAM KHAN—PLAINTIFF
—RESPONDENT

Custom (Punjab)—Jalaps—Succession—Batadar son, whether can succeed with ordinary sons collaterally.

Among Jalaps, a *Batadar* son, that is, a son by a mother of an inferior tribe can succeed equally with ordinary sons collaterally, although such a son does not succeed equally in the case of paternal inheritance.

S. A. from the decree of the District Judge, Jhelum, dated April 11, 1938.

Mr. Asad Ullah Khan, for the Appellant.

Mr. Mohsin Shah, for the Respondent.

Judgment.—The question of custom arising for decision in this appeal is whether among Jalaps a *batadar* son, that is, a son by a mother of an inferior tribe would succeed equally with ordinary sons collaterally. It is clear enough according to the *riwaj-i-am*, that in this tribe a *batadar* son does not succeed equally in the case of paternal inheritance. The Courts below, however, refused to extend the disadvantage of the *batadar* son in the paternal inheritance beyond the paternal inheritance and have allowed him to succeed equally in the case of collateral succession. A certificate has been given by the learned District Judge.

The evidence is only oral on the side of

the appellants and curiously enough none of the witnesses could produce any instance of a *batadar* son having been excluded from collateral succession. The learned Counsel for the respondent, however, has drawn my attention to the answer to question No. 65 as given in the vernacular record upon which the English record is admittedly based, as stated in the preface. In question No. 65 the point was whether there was any difference in succession to brothers based on uterine descent. Some of the tribes, who recognized this *batadari* custom, appeared to have continued it in the case of succession to brothers to varying degrees. No specific mention is made of the Jalap tribe but the last answer is *baqi bashara gaum Jat*. The *baqi*, in my opinion, clearly applies to all the tribes that are not specifically mentioned above and the answer of the Jats is that there is no difference made between various brothers. It would therefore follow that the *riwaj-i-am* is in favour of the *batadar* son on the question of succession to brothers. I am unable to see any difference between that succession and collateral succession to more distant kindred. In fact the case of brothers is only a specific instance of collateral succession. It would follow, therefore, that the onus lay on the defendants to prove that the *batadar* son was excluded from collateral succession. I consider that they have failed to do so and I therefore uphold the judgment of the Courts below and dismiss this appeal with costs.

D. *Appeal dismissed.*

OUDH CHIEF COURT

First Civil Appeal No. 20 of 1938

December 21, 1939

THOMAS, O. J. AND RADHA KRISHNA, J.

B. BHAWANI SHANKAR AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

Mirza MOHAMMAD HASAN AND ANOTHER

—DEFENDANTS—RESPONDENTS

Court Fees Act (VII of 1870), Sch. I, Art. 1—“Value of subject-matter in dispute,” meaning of—Appeal on merits also challenging order of costs independently—Value of subject-matter of appeal is total amount of value of subject-matter in suit and amount of costs challenged.

The words “value of the subject-matter in dispute” in Art. 1, Sch. I, Court Fees Act refer, where the Court is concerned with a suit, to the value of the subject-matter of the suit, and where it is concerned with an appeal then these words refer to the value of the subject-matter in dispute in appeal. The subject-matter of the suit and the subject-matter

of the appeal may not be the same. Where the appellant appeals against the decree in a suit on merits and also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount consisting of the value of the subject-matter in the suit and the amount of costs challenged. *Doorga Doss Chowdhury v. Ramanauth Chowdhury* (1), distinguished, *Debendro Mohan Rai v. Sona Kuar* (3), *In re Makki* (4) and 3 Ind. Cas. 534 (5), relied on.

F. O. A. against the order of the Sessions and Civil Judge, Lucknow, dated December 13, 1937.

Mr. Bijay Shankar, for the Appellants.

Mr. K. L. Nigam, for the Respondents.

Judgment.—In this appeal the appellants valued the appeal at Rs. 5,100, and as the reliefs claimed in the trial Court were of a declaratory nature, they paid the court-fee of Rs. 30. In ground No. 11 of their appeal, the appellants took an independent objection as regards costs which had been awarded against them personally. Their contention in appeal is that the costs should have come out of the estate. The Chief Inspector of Stamps has reported that the appellants must pay court-fee under Art. 1 of Sch. I of the Court Fees Act at the amount of costs-challenged, i.e., a sum of Rs. 550-11-0. He has reported that there is a deficiency of Rs. 52-3-0 which the appellants must make good.

This report is contested by the learned Counsel for the appellants. His contention is that under Sch. I, Art. 1, the subject-matter in dispute means the subject-matter of dispute in the suit itself and does not include the costs. Reliance has been placed for this proposition upon *Doorga Doss Chowdhury v. Ramanauth Chowdhury*, reported in 8 Moore's Indian Appeals 262 (1). Their Lordships in that case were concerned with a different provision of law altogether. They held that in order to reach the appealable value for an appeal to the Privy Council, costs awarded to the successful party cannot be included in the value of the subject-matter of the appeal. The judgment of their Lordships of the Privy Council, shows that there was no specific ground of appeal attacking the order of costs and the appellant wanted to add the costs only for the purpose of making up the appealable value. In our opinion this case has absolutely no application to the facts of this case. In our opinion, the words “value of the subject-matter in dispute” in Art. 1 refer, where we are concerned with a

(1) 8 M I A 262; 1 Sar. 772 (P O).

suit, to the value of the subject-matter of the suit, and where we are concerned with an appeal, then these words refer to the value of the subject-matter in dispute in appeal. The subject-matter of the suit and the subject-matter of the appeal may not be the same. Where the appellant appeals against the decree in a suit on merits and also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount consisting of the value of the subject-matter in the suit and the amount of costs challenged.

The learned Counsel for the appellants has further relied upon a decision of the Calcutta High Court in *Kamal Kumari Debi v. Rangpur North Bengal Bank, Ltd.* (A. I. R. 1921 Cal. 55) (2). In this case the learned Judge seems to have gone entirely upon the decision of their Lordships of the Privy Council referred to above, which, in our opinion, has no application to the facts of the present case. The learned Judge has not followed the cases in *Debendro Mohan Rai v. Sona Kuar*, (1901 All. W. N. 21) (3) and *In re Makki*, (I. L. R. 19 Madras, 350) (4), on the ground that they were not well-considered judgments. The cases of the Allahabad

and Madras High Courts referred to above accord with our view which we have taken of the meaning of Sch. I, Art. 1 of the Court Fees Act.

We were referred particularly to a decision of this Court in *Kewal Singh v. Makrand Singh*, (reported in 12 Oudh Cases, 171) (5), in which it was held that where apart from and independently of any other relief which the appellant seeks, he seeks distinct relief on the ground that the costs of the parties have not been properly assessed or apportioned, then the value of that distinct relief should be reckoned as part of the subject-matter in dispute for the purpose of the First Schedule of the Court Fees Act. The learned Counsel for the appellants has sought to distinguish this case on the ground that the appeal in the case related to costs only. In our opinion the principle of that case supports the report of the Chief Inspector of Stamps and the distinction sought to be made by the learned Counsel for the appellants is immaterial. We, therefore, accept the report of the Chief Inspector of Stamps and order the appellants to make good the deficiency of Rs. 52-8-0 within three weeks from to-day.

(2) A I R 1921 Cal. 55; 64 Ind. Cas. 606; 25 O W N 934.

(3) A W N 1801, 21.

(4) 19 M 350

S.

Order accordingly.

(5) 12 O O 171; 3 Ind. Cas. 584.

GENERAL INDEX

VOLUME 185—1940

REPORTS SECTION.

Abandonment. SEE Landlord and tenant

250, 467
Abatement—Partial—Appeal—Partition suit decreed—Appeal by all defendants—Decree and grounds of appeal proceeding on grounds common to all—Death of one appellant—Others can continue appeal under O. XLI, r. 4, Civil Procedure Code (Act V of 1908).

In a partition suit no effective decree can be made unless all the co-sharers are before the Court. It does not, however, follow that a suit for partition cannot be dismissed against an absent defendant. In an appeal from a decree which proceeds on grounds common to all the appellants if there is partial abatement owing to the death of some of them, the surviving appellants may continue the whole appeal. Where the decree appealed from is of such a nature that the hearing of the appeal after partial abatement may result in the passing of two inconsistent decrees, the whole appeal must fail.

Where a decree in a partition suit is challenged in appeal by all the defendants and the decree proceeds on grounds common to them all and so also are their grounds of appeal, on the death of one of the appellants, the survivors are entitled to the benefit of O. XLI, r. 4, Civil P. C., and can continue the appeal without the legal representative of the deceased being substituted. PRAHLAD CHANDRA SINGH v. BHIM MAHATO Pat. 685

Acquiescence. SEE Estoppel

467

Acts—General.

- Act 1860—XLV. SEE PENAL CODE.
- 1869—IV. SEE DIVORCE ACT.
- 1870—VII. SEE COURT FEES ACT.
- 1871—XXIII. SEE PENSIONS ACT.
- 1872—I. SEE EVIDENCE ACT.
- 1872—IX. SEE CONTRACT ACT.
- 1873—X. SEE OATHS ACT.
- 1877—I. SEE SPECIFIC RELIEF ACT.
- 1882—IV. SEE TRANSFER OF PROPERTY ACT.
- 1882—V. SEE EASEMENTS ACT.
- 1887—VII. SEE SUITS VALUATION ACT.
- 1887—IX. SEE PROVINCIAL SMALL CAUSE COURTS ACT.
- 1890—VIII. SEE GUARDIANS AND WARDS ACT.
- 1890—IX. SEE RAILWAYS ACT.
- 1897—X. SEE GENERAL CLAUSES ACT.
- 1898—V. SEE CRIMINAL PROCEDURE CODE.
- 1899—II. SEE STAMP ACT.
- 1903—XV. SEE EXTRADITION ACT.
- 1908—V. SEE CIVIL PROCEDURE CODE.
- 1908—IX. SEE LIMITATION ACT.
- 1908—XVI. SEE REGISTRATION ACT.
- 1909—III. SEE PRESIDENCY TOWNS INSOLVENCY ACT.
- 1910—IX. SEE ELECTRICITY ACT.
- 1912—II. SEE CO-OPERATIVE SOCIETIES ACT.

185—G. I.—I

Acts—General—consolid.

- Act 1913—VII. SEE COMPANIES ACT.
- 1920—V. SEE PROVINCIAL INSOLVENCY ACT.
- 1920—X. SEE SECURITIES ACT.
- 1920—XIV. SEE CHARITABLE AND RELIGIOUS TRUSTS ACT.
- 1922—XI. SEE INCOME TAX ACT.
- 1923—VIII. SEE WORKMEN'S COMPENSATION ACT.
- 1925—XXVI. SEE CARRIAGE OF GOODS BY SEA ACT.
- 1925—XXXIX. SEE SUCCESSION ACT.
- 1926—XII. SEE CONTEMPT OF COURTS ACT.
- 1926—XVI. SEE TRADE UNIONS ACT.
- 1930—III. SEE SALE OF GOODS ACT.
- 1932—IX. SEE PARTNERSHIP ACT.
- 1933—XXIV. SEE INDIA TEA CONTROL ACT.
- 1934—XXV. SEE FACTORIES ACT.
- 1935—XVIII. SEE MUSSALMAN WAKF (BOMBAY AMENDMENT) ACT.
- 1937—XVIII. SEE HINDU WOMEN'S RIGHT TO PROPERTY ACT.

Acts—Bengal.

- Act 1870—VI. SEE BENGAL VILLAGE CHAUKIDARI ACT.
- 1876—VII. SEE BENGAL LAND REGISTRATION ACT.
- 1885—III. SEE BENGAL LOCAL SELF GOVERNMENT ACT.
- 1885—VIII. SEE BENGAL TENANCY ACT.
- 1923—III. SEE CALCUTTA MUNICIPAL ACT.
- 1934—XIII. SEE BENGAL WAKF ACT.
- 1936—VII. SEE BENGAL AGRICULTURAL DEBTORS' ACT.

Acts—Bihar.

- Act 1934—VIII. SEE BIHAR TENANCY ACT.
- 1938—III. SEE BIHAR MONEY-LENDERS ACT.
- 1938—IX. SEE BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT.
- 1939—VII. SEE BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT.

Acts—Bihar and Orissa.

- Act 1908—VI. SEE CHOTA NAGPUR TENANCY ACT.
- 1922—III. SEE BIHAR AND ORISSA VILLAGE ADMINISTRATION ACT.
- 1922—VII. SEE BIHAR AND ORISSA MUNICIPAL ACT.
- 1935—VI. SEE BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT.

Acts—Bombay.

- Act 1869—XIV. SEE BOMBAY CIVIL COURT ACT.
- 1876—X. SEE BOMBAY REVENUE JURISDICTION ACT.
- 1879—V. SEE BOMBAY LAND REVENUE CODE.

Acts—Bombay—consolid.

- Act 1879—XVII. SEE DEKKHAN AGRICULTURISTS' RELIEF ACT.
 — 1886—V. SEE BOMBAY HEREDITARY OFFICERS (AMENDMENT) ACT.
 — 1887—IV. SEE BOMBAY PREVENTION OF GAMBLING ACT.
 — 1890—IV. SEE BOMBAY DISTRICT POLICE ACT.
 — 1925—V. SEE BOMBAY PREVENTION OF ADULTERATION ACT.
 — 1925—XVIII. SEE BOMBAY MUNICIPAL BOROUGHS ACT.
 — 1929—XVIII. SEE BOMBAY BORSTAL SCHOOLS ACT.
 — 1932—XV. SEE BOMBAY WEIGHTS AND MEASURE ACT AS AMENDED IN 1937.

Act—Burma.

- Act 1898—III. SEE BURMA MUNICIPAL ACT.

Acts—C. P.

- Act 1881—XVIII. SEE C. P. LAND REVENUE ACT.
 — 1917—II. SEE C. P. LAND REVENUE ACT.
 — 1922—II. SEE C. P. MUNICIPALITIES ACT.
 — 1933—II. SEE C. P. DEBT CONCILIATION ACT.
 — 1937—IV. SEE C. P. PROTECTION OF DEBTORS ACT.

Acts—Madras.

- Act 1908—I. SEE MADRAS ESTATES LAND ACT.
 — 1918—III. SEE MADRAS PREVENTION OF ADULTERATION ACT.
 — 1922—III. SEE MADRAS CITY TENANTS' PROTECTION ACT.
 — 1927—II. SEE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT AS AMENDED BY ACT XII OF 1935.
 — 1930—III. SEE MADRAS GAMING ACT.

Acts—Punjab.

- Act 1913—I. SEE PUNJAB PRE-EMPTION ACT.
 — 1936—II. SEE PUNJAB DEBTORS' PROTECTION ACT.

Acts—U. P.

- Act 1867—III. SEE U. P. PUBLIC GAMBLING ACT.
 — 1876—XVII. SEE OUDH LAND REVENUE ACT.
 — 1876—XVIII. SEE OUDH LAWS ACT.
 — 1896—XXII. SEE OUDH RENT ACT.
 — 1901—III. SEE U. P. LAND REVENUE ACT.
 — 1912—IV. SEE U. P. COURT OF WARDS ACT.
 — 1912—VI. SEE U. P. PREVENTION OF ADULTERATION ACT.
 — 1916—II. SEE U. P. MUNICIPALITIES ACT.
 — 1922—XI. SEE AGRA PRE-EMPTION ACT.
 — 1926—III. SEE AGRA TENANCY ACT.
 — 1934—XXV. SEE U. P. ENCUMBERED ESTATES ACT.
 — 1934—XXVI. SEE U. P. REGULATION OF SALES ACT.
 — 1934—XXVII. SEE U. P. AGRICULTURISTS' RELIEF ACT.

Ordinance.

- Ord. 1931. SEE CRIMINAL APPEAL ORDINANCE OF TRINIDAD AND TOBAGO.

Statutes.

- Stat. 1919 (9 & 10 GEO. V, CH. 101). SEE GOVERNMENT OF INDIA ACT.
 — 1935 (25 & 26 GEO. V, CH. 42). SEE GOVERNMENT OF INDIA ACT.

Administration—Letters of administration will annexed obtained by person—Presumption that all legacies have not been paid.

a The mere fact that a person has obtained letters of administration with will annexed is no evidence to prove that the estate must be assumed to have been still unadministered nor that the Court should presume that all the legacies or at least the legacy in favour of such person has not been paid in accordance with the tenor of the will. *INDU PROVA DEBI* Pat. 86

Mortgage by legatee of immovable property before obtaining assent of executor—Validity.

Where a legatee under a will mortgages an immovable property left to him by the testator before obtaining the assent of the executor to the legacy, the property can form the subject-matter of a valid mortgage, and the mortgagee is entitled to cut off the equity of redemption. The reason for the rule is that although the legatees have no property in the legacies by the devise until the assent of the executor is obtained, they have an interest in them which is capable of being transferred. In other words, though on the assent of the executor, the full title passes to the legatee, the assent creates no new title; it merely perfects the title acquired under the will. *INDU PROVA DEBI v. DURGA CHARAN MITRA* Pat. 86.

Residue, how ascertained.

There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore until the costs are paid, the net residue cannot be arrived at, at all. *INDU PROVA DEBI v. DURGA CHARAN MITRA* Pat. 86.

Transferees in possession of property—Remedy of legatee to recover his specific share.

If the testator left no other property than the property in suit, it is always open to the legatee to recover his specific legacy, if he brings an appropriate action and there is no other obstacle by way of limitation or otherwise in his way, by suing for the amount from the persons in possession of the property of the testator as transferees. The transferees of the residuary legatee or the residuary legatees are always liable to have the property in their possession reduced to a proper extent in order to re-pay the specific legatees. *INDU PROVA DEBI v. DURGA CHARAN MITRA* Pat. 86.

Adverse possession—Co-sharers—Essentials.

To constitute a title by adverse possession in or co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the one of other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent, to show that it is possession adverse to the competitor. *MANGAI MAL AGANMAL v. MOSAMMAD USIF BORO* Sind 1

Plea of—If can be entertained in appeal.

Where the question of adverse possession was not pleaded nor decided in the Court below, depending as it does on questions of facts, it cannot be entertained in appeal. *KUMAR RAGHAVA SURENDRA SAE v. BABUL LACHMI KOER* Pat. 17

Possession of wrong-doer, nature of—Hypothetical right, whether heritable and transferable—Possession after his death by heir, if on behalf of all heirs.

The possession of a wrong-doer held for a term less than the period of limitation is a good title against the whole world with the exception of the true owner. This possessory right even though has not ripened into ownership by lapse of time.

Adverse possession—conold.

statutory period, is a right in immovable property which is heritable and transmissible according to *w.* The possession continued by some of his heirs could be regarded as possession on behalf of the whole unless and until it is shown that there is an collusion or ouster of the other co-sharers. Mere exclusive possession by a co-sharer is not sufficient to extinguish the rights of the other co-sharers unless and until definite ouster is found. *KIRABALI ANIL BHARY DUTTA* Cal. 408

—Widow—Adverse possession against widow, whether affects reversioner's rights

The adverse possession, howsoever long held, cannot impair the right of a person who was not, during the continuance of that adverse possession, entitled to possession. The right of the reversioner is *spes successionis* and his reversionary estate falls into possession only on the death of the intermediate owner, namely, the widow. Consequently the adverse possession against the widow can hardly be recorded as hostile to the reversioners whose right was until the widow's death only an expectancy. *PANNALAL v. SUMANLAL* Nag. 108

Agra Pre-emption Act (XI of 1922), s. 4 (1), (7)
—Proprietors of mahal having voice in appointment of lambardar or patwari are co-sharers and not petty proprietors.

Such proprietors of a *mahal* who have a voice in the appointment of a *lambardar* or of a *patwari* do take part in the administration of the affairs of the *mahal*. The vendees who have a voice in the appointment of the *patwari* and the *lambardar* of *mahal* cannot, therefore, be regarded "petty proprietors" as defined by the Agra Pre-emption Act and they must, therefore, be held to be co-sharers as defined by the Act. *CHIRANJI LAL v. CHHEDA LAL* All. 861

Agra Tenancy Act (III of 1926), ss. 3 (14), 249
—Second appeal, if lies from appellate order of Revenue Court in execution proceedings—Civil Procedure Code (Act V of 1908), s. 100.

The provision of the Civil P. C., by which orders passed under s. 47 amount to decrees is not applicable to proceedings in the Revenue Courts under the Agra Tenancy Act. No second appeal, therefore, lies against an appellate order passed in execution proceedings by a Revenue Court. *JANNATUN-NISSA BEGAM v. PARSHADI* All. 808

—ss. 44, 242 (3) (a)—Suit under s. 41 by person alleging himself to be zemindar—Defendant admitting plaintiff to be proprietor and himself to be thekadar—Question of proprietary rights, whether in issue in suit—Appeal, whether lies to Commissioner or to District Judge.

Under the Agra Tenancy Act, a lease is hardly a transfer of proprietary interest in land, for the Act speaks of leases by landholders to tenants and by tenants to sub-tenants. Even a *thekadar* has been defined as a farmer or other lessee of proprietary rights and not as a transferee of proprietary rights in some form or another. Although a *thekadar* is not expressly included in the definition of tenant, the provisions relating to tenants apply in the majority of cases to *thekadars* as well. It will, therefore, be inappropriate to say that, when in a suit under s. 41 a defendant admits that the plaintiff is the proprietor of the holding and the defendant is a *thekadar*, a question of proprietary right is in issue between the plaintiff and the defendant claiming such right. Hence an appeal from the decision in the suit lies to the Commissioner

Agra Tenancy Act—conold.

and not to the District Judge. *BHAIRAO KUMAR v. MARKANDE GIE* All. 767

—s. 227—Collecting co-sharer can only deduct amount proportionate to his share in khewat—Collecting co-sharer not acting as agent of other co-sharer—Right conferred by s. 227, if affected—His liability to account, whether depends on it.

The collecting co-sharer is entitled to retain out of what he has collected from a tenant only a share proportionate to his share in the *khewat*. He is only entitled to appropriate from his realizations an amount proportionate to his share in the *khewat*.

The right conferred by s. 227, Agra Tenancy Act, is not affected by the fact that the co-sharer who has collected has not acted as the agent of the co-sharer who is seeking to recover his share of the profits. The co-sharer who has collected is liable to account and the extent of his liability is not dependent upon whether he acted in his individual capacity or as agent in making collections. *MAN SINGH v. BAIJI NATH SAHAI* All. 668

—s. 227—Co-sharer making collections on behalf of himself and also as guardian of other minor co-sharer—Whether entitled to deduct on account of his share as well as that of his ward.

Where a co-sharer has made collections on his own behalf and also on behalf of a minor co-sharer, as his guardian, the collections can be credited both towards his own account and also that of his ward and he is entitled to deduct not only the amount payable to him on account of his share but also on account of the share of his ward. *MAN SINGH v. BAIJI NATH SAHAI* All. 668

—s. 242 (3). See Agra Tenancy Act, 1926, s. 44 767

Allimony. See Divorce Act, 1869, ss. 36, 37 834
Alluvion and diluvion—Re-formation—Rent assessed—Evidentiary value.

The fact that rent was assessed on re-formed land would be very strong, almost conclusive evidence, to support the case that the land had become fit for possession when it was so assessed. *ABDUL LATIF v. HABIBULLA* Cal. 714

Appeal—Abatement—Setting aside of—Held, sufficient cause was shown for setting aside abatement.

The critical question in deciding whether an abatement should be set aside is whether sufficient cause has been shown and that is a matter for decision on the facts of each case. No hard and fast rule can be laid down as to what constitutes sufficient cause.

An application for setting aside the abatement of the appeal was made by the appellant on the ground that his law agent who was in charge of the appeal was neither living in the village nor had any touch with the village where the deceased respondent lived and that he came to know of the death of respondent only after several months from his death:

Held, that sufficient cause was made out for setting aside the abatement. *RAM RANBIJAYA PRASAD SINGH v. MADHO TURBA* Pat. 498

—Parties—Application for execution of partition decree—All parties to partition decree impleaded—Only one of them filing objection impleading decree-holder alone and objection allowed—Decree-holder can in appeal implead only objector as respondent without impleading other parties.

Where in application for the execution of a

Appeal—concl.

partition decree; the decree-holder impleads all the parties to the partition decree and only one of them files an objection impleading the decree-holder alone and the objection is treated as a separate miscellaneous suit and decided against the decree-holder, the decree-holder is fully entitled in appeal to implead only the objector as respondent without impleading other parties to the partition decree. The objector by his objection having invited the Court to decide the matter between him and the decree-holder only, cannot subsequently raise an objection that the decree-holder should have impleaded other parties in appeal. *SARJU PRASAD v. DEOKI SINGH* Pat. 59

Arbitration—Arbitrator—Power of, to allow amendment of plaint refused by Court before referring suit to arbitration.

Where an entire suit has been referred to arbitration, the arbitrator has power to allow amendment of plaint in respect of certain wrong date mentioned in it even if such an amendment had been refused by the Court before reference to arbitration. *TRIPATI MARWARI v. KHDARNATH HIMAT-SINGHA* Pat. 273

Commissioner to effect partition and arbitrator—Distinction.

The essential difference between a Commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court, in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties have expressed no consent to be bound by the decision of the Commissioner who is appointed by the Court and whose decision the parties may challenge before the Court passing a final decree. In the latter case they have expressed such consent and cannot challenge the arbitrator's decision on questions of law and fact except on the limited grounds mentioned in Sch. II of the Civil Procedure Code. *RADHEY LAL v. KANHAI LAL* Pat. 52

Assignment—Decree—Assignment of, after its passing but before it is drawn up—Validity—Whether carries with it right to decree passed in appeal.

The assignment of a decree is nothing more than an assignment of the rights conferred by the decree. These rights are acquired as soon as the decree is passed or pronounced and cannot be made dependent on the preparation of the decree which is more or less a ministerial act. As the Civil P. O. provides in O. XX, r. 7, that the decree shall bear the date on which the judgment is pronounced, the decree must, in the eye of law, be presumed to have come into existence on the date on which the judgment was pronounced. The assignment of a decree after the judgment is pronounced but before the decree is drawn up is, therefore, valid.

When a decree is assigned, what is transferred is not the decree itself but the interest of the decree-holder in the decree as may be finally determined and therefore the assignment of a decree carries with it the right to the decree passed in appeal. *RAM KUMAR RAM SHRAFF v. MOHAN LAL MAHARAJ*

Pat. 788

Attachment—What is attached.

An attaching decree-holder attaches not the physical property but only the rights of the judgment debtor in the property. *DIRAYAM PILLAI v. VEERANAN AMBALAM* Mad. 562

Attesting witness. *See* Will 634
Benami. *See* Civil Procedure Code, 1908, s. 68

Benami transaction. *See* Company 176
Bengal Agricultural Debtors Act (VII of 1936), ss. 2 (8), 34—Debt payable under decree of original side of High Court, whether debt within meaning of Act—Proceedings in respect of such debt, if can be stayed under s. 34.

The expression "Civil Court" as used in the various sections of the Bengal Agricultural Debtors Act means a Court of civil jurisdiction separate from and subordinate to the High Court and does not include High Court. The expression "or otherwise", in s. 2 (8) means debt not founded on a decree, and even if it includes decretal debts, they would be decrees passed by other Courts, e. g., the Revenue Court, but not by the High Court. Hence, a debt payable under the decree of the original side of the High Court would not be a debt within the meaning of the Agricultural Debtors Act. It would not be within the competence of the Debt Settlement Board constituted under the Act to settle such debts, and no proceeding in respect of the same could be stayed by a notice under s. 34. Much the same result would be produced even if the view that the expression "Civil Court" includes the High Court is accepted. The assumption of jurisdiction by the Debt Settlement Board over debts payable under decrees of the High Court, is *ultra vires* and it was outside the competence of the Legislature to include a liability based upon a decree of the High Court within the definition of a debt as given in s. 2 (8), Agricultural Debtors Act. *TARAK NATH KUNDU v. PANCHANON DUTTA* Cal. 131

ss. 32 to 36—"Civil Court," if includes High Court.
The expression "Civil Court," in Bengal Agricultural Debtors Act, does not include the High Court. *KHIBROD O. GHOSH v. NARENDRA N. SANTAL* Cal. 256 (a) S B

s. 34. *See* Bengal Agricultural Debtors Act, 1936, s. 2 (8) 131

ss. 34, 2 (8)—"Liability" in definition of "debt"—Debt secured by mortgage by conditional sale, whether debt within s. 34.

The definition of "debt" found in s. 2 (8), Ben. Agricultural Debtors Act includes "secured and unsecured" liabilities. All mortgage debts are secured liabilities, although in a simple mortgage there is a personal liability flowing from the covenant to pay while in a mortgage by conditional sale, there is no such covenant and consequently there is no personal liability. Consequently, a debt secured by mortgage by conditional sale is a debt within the meaning of s. 34, Ben. Agricultural Debtors Act. *ABDUL LALIF v. ABDUL GANI SHRAFF* Cal. 393

Bengal Land Registration Act (VII of 1876), s. 78. *See* Civil Procedure Code, 1908, s. 100 638

s. 78—No registration under Act—Effect—Right to sue for rent if taken away—Suit within limitation—Registration beyond limitation—Effect.
Under s. 78, Land Registration Act, the right to the rent of an estate being in the proprietor, although not registered, his right to sue for the rent is not taken away; but this section merely puts an impediment in the way of his realising the rent until he had complied with the law by obtaining registration of his name as proprietor.

Where therefore a mortgagee who is not registered under the Act institutes a suit for rent within period

Bengal Land Registration Act—conold.

of limitation the mere fact that he gets registered beyond the period of limitation for the suit will not affect the position and the suit is within limitation. *DOMAN SÁHU v. GANGU NAYEK* Pat. 638

Bengal Local Self-Government Act (III of 1885), s. 73—*Scope of—Title of District Board in land held under ss. 73 and 75, whether different.*

Section 73, Ben. Local Self-Government Act, merely transfers the control of roads hither to under the control of certain authorities to the District Board. It does not say that the title of the District Board in the land held by it under ss. 73 and 75, respectively would be different. *SECRETARY OF STATE v. DISTRICT BOARD, RANGPUR* Cal. 454

Bengal Tenancy Act (VIII of 1885) SEE Civil Procedure Code, 1908, s. 42 300

s. 22 (2)—Status and rights of co-sharer landlord purchasing occupancy holding—His interest passes to transferee on his transferring of proprietary interest—Such transferee can sub-let it to another who then becomes raiyat of holding.

The status of a co-sharer landlord who has purchased an occupancy holding is not the status of a raiyat but a peculiar status, his right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the rent. The status is a peculiar status which attaches to the co-sharer so long as he remains a co-sharer. If he ceases to be a co-sharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. The person who has acquired such interest is entitled to sub-let the same to another person who thereupon becomes a raiyat of the holding. *SUKHDIO PANDHY v. RAMSHEWAR PRASAD AGARWALA* Pat. 557

s. 26-F—Pre-emption proceeding against minor, if void.

The effect of a decree passed against a minor in a suit in which he is not properly represented is a nullity so far as he is concerned. But to say that the decree is absolutely void and a mere waste piece of paper is to go a good deal further than this. A minor is certainly not bound to treat it as a nullity if he does not desire to do so, and third persons cannot be heard to say that it is void.

There is no real analogy between a decree of a Civil Court and an order passed in the proceedings under s. 26-F, Ben. Ten. Act. The order for pre-emption in no way corresponds to a decree and the section really does nothing more than provide a convenient machinery for giving effect to the claim to pre-empt.

Where the minor purchaser form a raiyat describes himself in the *kobala* as a major and the pre-emption proceedings are taken against him by the landlord under s. 26-F, an order obtained thereon is not void. *DEBENDRA CHANDRA DE v. JAMINI KUMAR DEY* Cal. 704

s. 26-G—Order in proceedings under, appealability.

The Ben. Ten. Act, nowhere provides for an appeal against an order in a proceeding under s. 26-G though there are provisions in other sections of the Act where an appeal has been provided for against other orders. Such an order is not also appealable under s. 96, Civil P. O., because the decree contemplated by s. 96 of the Code is a decree made in a suit. A proceeding under s. 26-G is

Bengal Tenancy Act—conold.

started by an application and not by a plaint, and consequently the order under s. 26-G cannot be said to be an order in a suit. *DIGAMBAR FONDA v. SATISH CHANDRA DAS* Cal. 368

s. 26-G—Whether affects law of estoppel contained in Evidence Act (I of 1872)—Estoppel.

The Evi. Act is an existing Indian Statute falling in the Concurrent List in Sch. VII to the Govt. of India Act. The Amending Act which introduced s. 26-G was passed by the Provincial Legislature of Bengal and it did not receive the assent of the Governor-General-in-Council. Consequently, the Provincial Legislature never intended to affect the law of estoppel as contained in the Evi. Act. There is a presumption that a Legislature acts *intra vires*.

Where therefore relying on the representation of the petitioners that they were *mokarari mourasi raiyats*, the opposite party advances money to them on the mortgage of the tenancy, the petitioners are precluded thereafter from showing that they were occupancy tenants. *PRAFULLA KUMAR MAITY v. UDAY CHANDRA PRADHAN* Cal. 587

s. 48-H—Registration of under-lease without payment of landlord's fees, effect of.

Under the terms of s. 48-H payment of the landlord's fee is a condition precedent to registration of an under-lease and the defect cannot be cured by a subsequent payment. *DEBENDRA CHANDRA DE v. JAMINI KUMAR DEY* Cal. 704

s. 106—Suit under—Plaintiff not admitting that he is out of possession—Whether can establish that possession of the other party is possession of his.

The determination of a question of bare title is outside the scope of a suit under s. 106, Ben. Ten. Act. A suit under that section relates to the Record of Rights and to the correction of the entries therein. A suit for the determination of a bare question of title divorced from possession is not one which falls within the purview of s. 106. But this does not mean that the Assistant Settlement Officer is not under any circumstances to consider questions involving the title of the rival parties. Where a plaintiff admits that he is out of possession and seeks to recover possession after a declaration of his title to the land, he cannot obtain these reliefs in a suit framed under s. 106, because such a suit would involve the determination of a question of bare title unaccompanied with possession. But where the plaintiff does not admit that he is out of possession of the land in suit, it is open to him to establish in a suit under s. 106, that the possession of the other party is really the possession of the plaintiff. *SECRETARY OF STATE v. DISTRICT BOARD, RANGPUR* Cal. 454

s. 145. SEE Bengal Tenancy Act, 1885, 416

s. 187—Right conferred by s. 187, whether restricted

The right conferred by s. 187 is not an unrestricted right, and it would always be open to the Court to direct the plaintiff's appearance in person. *SARAT CHANDRA ROY v. ARJUN MANDAL* Cal. 416

ss. 187, 145—Gomasta, if can conduct zemindari cases.

If a gomasta who is an authorized agent appears the suit cannot be dismissed for default. But a recognized agent has no right of audience. There is nothing in the Ben. Ten. Act which lays down that agents have a right of audience or a right to plead. The word "appearance" in s. 187, Ben. Ten. Act is far too restricted for such a meaning to be attributed to

Bengal Tenancy Act—concl'd.

it. All that s. 145 does is to give slightly wider powers to *naibs* and *gomastas* than are given to recognized agents under the Civil P. O. But they cannot plead and conduct cases. **SARAT CHANDRA ROY v. ARJUN MANDAL** Cal. 416

Bengal Village Chaukidari Act (VI of 1870), ss. 54, 55—Firing date from which sale is to take effect—Entry in sale certificate that such date is the day on which requisition under s. 54 was received by Collector—Onus of proving this date—Onus not discharged—Effect.

The date to be mentioned by the Collector in the sale notification, which he is bound to publish under s. 55, Ben. Village Chaukidari Act must be taken to correspond with the latest day of payment to which reference is made in s. 3 of Revenue Sales Land Act XI of 1859. The date with effect from which the purchase takes effect must be the day after that fixed for the last day of payment. This date cannot possibly be the date upon which the requisition for sale is sent to the Collector by the collecting member of the *panchayat* under s. 54, Village Chaukidari Act. Consequently, if there is any entry in the sale certificate that the sale will take effect from the date on which the requisition under s. 54 was sent to the Collector, such an entry being clearly wrong, the onus clearly lies upon the purchaser to show what this date on which the sale is to take effect is. Where he fails to discharge the onus, his title will accrue only from the date on which the sale is held. **KANTI CHANDRA GHOSAL v. SUORITRA SUNDARI DASSI** Cal. 560

Bengal Waqf Act (XIII of 1934), s. 70—Applicability outside Bengal.

The special provisions of the Ben. Waqf Act, 1934, cannot be read as meaning that s. 70 of that Act will have operation in proceedings outside the Province of Bengal. **COMMISSIONER OF WAQFS, BHARAT v. NARASINGH CHANDRA DAW & Co** Cal. 438

Bihar and Orissa Co-operative Societies Act (VI of 1935), s. 24-A. SEE Execution 606

Bihar and Orissa Municipal Act (VII of 1922), ss. 259 (1) (3), 264, 354—Resolutions by Municipality under power conferred by s. 259 (1) and (3) requiring licences and fixing its fee, for working *sarkhi* mill—Whether rules or bye-laws—If require confirmation under s. 354.

Resolutions passed by a Municipality under powers conferred by s. 259 (1) and (3), Bihar and Orissa Municipal Act fixing local limits and requiring licences to be taken out in respect of working a *sarkhi* mill are not matters of the same nature as the matters to be provided for by bye-laws under s. 264, and can neither be regarded as bye-laws nor as rules, but are of the nature of an order applying a section of the Act. Hence these orders did not require under s. 354 of the Municipal Act to be confirmed by the Local Govt. as a condition precedent to their taking effect. **THE MUZAFFARPUR MUNICIPALITY v. TARA PRASAD** Pat. 630

Bihar and Orissa Village Administration Act (III of 1922), ss. 68, 53 (2)—Complaint filed before Magistrate transferred by him to Union Board—Accused wishing to get it transferred to proper Court—Procedure.

Section 68, Bihar and Orissa Village Administration Act, does not empower the Union Board to re-transfer a case to the Court of a Magistrate but it only empowers it to direct the complainant to file a complaint before the proper Court. Where the complaint had already been filed before the Magistrate and transferred by him to the Union

Bihar and Orissa Village Administration Act—concl'd.

Board under s. 53 (2), the procedure to be followed by the accused if he wishes to get it transferred to the proper Court, is to move the District Magistrate or the Sub-Divisional Magistrate under s. 53 (2) (b) of the Act. **RAM CHANDRA SINGH v. BALDEO SINGH** Pat. 748

Bihar Money-lenders Act (III of 1938), s. 11.

SEE Bihar Money-lenders Act, 1938, s. 18 1

s. 11. SEE Bihar Money-lenders (Regulation of Transactions) Act, 1939, s. 7 294

s. 16. SEE Bihar Money-lenders (Regulation of Transactions) Act, 1939, s. 13 129

ss. 16, 11—Appeal relating to claim under s. 16 is maintainable and order of High Court relating to s. 11 can also be dealt with in such appeal.

An appeal to the Federal Court is maintainable so far as it relates to the appellants' claim under s. 16 of the Bihar Money-lenders Act of 1938 (now s. 13 of the Act of 1939) and the order of the High Court so far as it relates to s. 11 of the Act of 1938 (now s. 7 of the Act of 1939) can also be dealt with in such an appeal, as in estimating the value of the attached properties, the amount due on the mortgage has to be ascertained. **RAMNANDAN PRASAD NARAIN SINGH v. GOSHWAMI MADHAWANAND RAMJI** F. C. 1

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939) — Relief under—No formal application by judgment-debtor is necessary before obtaining relief under new Act.

No formal application by the judgment-debtor to the Court is necessary before he could obtain relief under the provisions of the new Act. **BEJI RAJ KUMARI v. SUBH KARAN DAS** F. C. 804

s. 7—S. 7 which re-enacts s. 11, Bihar Money-lenders Act (III of 1938), is valid.

Section 11 of the Bihar Money-lenders Act (III of 1938), has now been re-enacted as s. 7 of the Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939); and, as this Act has been passed in conformity with the procedure prescribed in s. 107 (2) of the Government of India Act, 1935, its validity is not open to question. **JAGDISH JHA v. AMAN KHAN** F. C. 294

s. 13—Application under s. 16, Bihar Money-lenders Act (III of 1938) rejected—During pendency of appeal to High Court, Amending Act coming into force—S. 13 of Amending Act applies.

Where during the pendency of an appeal to the High Court against an order rejecting an application under s. 16, Bihar Money-lenders Act of 1938, the Amending Act of 1939 has come into force, s. 13 of the Amending Act applies to the application. The fact that after rejection of application under s. 13 no stay was ordered and sale took place makes no difference and does not affect rights of parties in appeal. **BISHUN SINGH v. PALAKDHARI SINGH** Pat. 129

s. 13—S. 13 which re-enacts s. 16 of Bihar Money-lenders Act (III of 1938), is valid.

The Bihar Money-lenders (Regulation of Transactions) Act VII of 1939, re-enacting in s. 13, s. 16 of the Bihar Money-lenders Act, 1938, is perfectly valid. **RAM PRATAPJI v. HARI KISHAN DASS** F. C. 4

ss. 13, 14—Act is retrospective—Federal Court has power in appeal to order matter to be disposed of under ss. 13 and 14.

The Bihar Money-lenders Regulation of Transactions) Act, 1939, is retrospective and the Federal Court has power to make such an order on an appeal as the Court below could have made if the

Bihar Money-lenders (Regulation of Transactions) Act—conold.

case had been heard by them at the date of the appeal, i. e., to order the matter to be disposed of under the provisions of ss. 13 and 14 of the new Act of 1939, the sections which have replaced ss. 16 and 17 of the earlier Act. *BRU RAJ KUMARI v. SUBH KARAN DAS* F. C. 804.

— ss. 13, 14—*Applicability—Whether apply where execution sale is completed before passing of Act.*

There is nothing either in the Bihar Money-lenders (Regulation of Transactions) Act, 1939, or in the Bihar Money-lenders Act, 1938, to express the intention of the Legislature to invalidate a completed sale which was otherwise good. In order that ss. 13 and 14 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939, may be applicable, it is necessary that the execution should be still pending. On the sale of immovable property being confirmed, execution is complete. Hence where the execution sale has been completed before the passing of the above Act, ss. 13 and 14 of that Act have no application. *CHUNNA BEGUM v. KISBUNDO NARAIN MAHTHA* Pat. 404.

Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act (IX of 1938), s. 15—S. 15, if repugnant to any existing Indian Law—Whether applies to execution proceedings—Order of executing Court refusing to execute decree for amount mentioned in it and proceeding to execute it after reducing amount under s. 15, whether falls under s. 17, Civil Procedure Code (Act V of 1908)—Revision, if lies.

The Civil Procedure Code by itself does not apply to suits for rent. It is s. 143, Bihar Tenancy Act, which, with certain reservations, makes the Civil Procedure Code applicable to rent suits and the procedure and regulation of Rent Courts and Revenue Courts are exclusively within the purview of the Provincial Legislatures. It was quite open to the Provincial Legislature to amend s. 143, Bihar Tenancy Act, and provide new procedure for the trial of rent suits. If by implication they authorized the Court not to execute decrees beyond a certain sum specified in s. 15, Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, they had full power to do so. Section 15, Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, is not therefore repugnant to any existing law relating to the Concurrent List No. 3 of Sch. VII Government of India Act.

The directions given to Court in s. 15, apply to the proceeding for the execution of the decrees also.

Revisional powers are not exercised by the High Court in those cases in which a party entitled to appeal has not appealed. An order of the executing Court refusing to execute the decree for the sum which was mentioned in it and proceeding to execute it only after reducing it according to the direction given in s. 15 of Act IX of 1938 relates to a question of execution, satisfaction and discharge of decree and comes under s. 47, Civil Procedure Code, and is appealable and where no appeal has been preferred from such order revisional powers of the High Court cannot be invoked. *RAZAUER RAHMAN v. UDDIT SINGH* Pat. 135.

Bihar Tenancy Act (VIII of 1934), ss. 52, 180

—S. 52 is wider than s. 180—Under former section tenure-holders are entitled to abatement.

Section 52, Bihar Tenancy Act, is much wider than s. 180 inasmuch as it deals with every class of

Bihar Tenancy Act—conold.

tenants. S. 52 undoubtedly gives right of abatement to tenure-holders *NRIPENDRA NATN CHATTERJI v. JUGAL PRASAD MANDAL* Pat. 144.

— s. 155—*Principle underlying s. 114, Transfer of Property Act (IV of 1882), is embodied in s. 155.*

The principle underlying s. 114, T. P. Act, is also embodied in s. 155 of the Bihar Ten. Act which is virtually a counterpart of s. 114 of the T. P. Act; and, as the Act itself contains this provision which enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle. *MUKHAN SINGH v. CHANDRIKA PRASAD SINGH* Pat. 278.

— ss. 179, 155—*Landlord, whether can contract with lessee that right of ejectment under contract shall not be subject to qualifications imposed by s. 155.*

There is nothing in s. 179, Bihar Ten. Act, to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by s. 155. *MUKHAN SINGH v. CHANDRIKA PRASAD SINGH* Pat. 278.

— s. 180. *See Bihar Tenancy Act, 1931, s. 52* 144.

Bombay Borstal Schools Act (XVIII of 1929), ss. 6, 8—Previous convictions as evidence of criminal habits—Proof.

Where the evidence of criminal habits or tendencies from which it is to appear to the Court that it should take action under s. 6, Bombay Borstal Schools Act is that of previous convictions, the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of cl. (b) of s. 6. There is no difference in the standard of proof required for previous convictions, for the purpose of s. 75, Penal Code, or for the purpose of s. 6, Bombay Borstal Schools Act.

Where the only evidence of previous convictions is merely the extracts from the records of Central Bureau of Finger Prints and no certificate from Jail Officer or warrant of commitment is produced to prove it, on such evidence, the Court cannot take account of the previous convictions and cannot, consequently, take action under s. 6. *EMPEROR v. ABDULLAH KARIM* Sind 268.

— ss. 6, 11—*Action under s. 6, when can be taken—Procedure to be followed before referring case to High Court.*

Before a case is referred to the High Court under s. 6, a reference should be first made to the Inspector-General, and only when he is of the opinion that he cannot, by reason of the particular circumstances of the case or the provisions of s. 11, Borstal Schools Act, transfer a young offender to the Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to the High Court. *EMPEROR v. ABDULLAH KARIM* Sind 268.

Bombay Civil Courts Act (XIV of 1869), s. 23 (5)

—*Powers of transfer under—Jurisdiction—Objection to—Waiver—Civil Procedure Code (Act V of 1908), O. XX, r. 13, s. 115—Order reversing preliminary decree on ground of want of jurisdiction,—Setting aside of—Proper form of remedy.*

The powers of transfer conferred by s. 23 (5)

Bombay Civil Courts Act—*contd.*

Bom. Civil Courts Act, on the Court are controlled by the provisions of s. 24, Civil P. O., and are necessarily limited to administrative orders allocating business. Hence, the order of transfer purporting to have been made under cl. (5) of s. 23, Bom. Civil Courts Act, after another Subordinate Judge has taken cognizance of the suit, is incompetent.

Where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party, who has invoked or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings.

Where therefore, the defect in the jurisdiction of the Court arises due to the irregularity in the commencement of the proceedings before the transferee Court and the parties lead evidence concurring in the Court's assumption of jurisdiction under a wrong order of transfer, the concurrence of the parties amounts to consent and their conduct is tantamount to a waiver of objection to jurisdiction. They cannot, therefore, subsequently object to jurisdiction.

The more appropriate form of remedy to set aside an order reversing a preliminary decree on the ground that it was passed without jurisdiction, is by a civil revision application. *AJAM IBBRAHIM MODAN v. BAI HAVA BIBI* Bom. 813
Bombay District Police Act (IV of 1890), s. 39-A—Rules under—R. 17—Order of District Magistrate under—Interference by High Court under s. 435, Criminal Procedure Code (Act V of 1898).

When the District Magistrate passes orders under r. 17 of the Rules for licensing and controlling places of public entertainment framed under s. 39-A, Bombay District Police Act, the District Magistrate or Magistrate of the District whichever he may be called, is not acting as an inferior Court within the meaning of s. 435, Criminal P. O. He is acting as an executive officer in the exercise of powers conferred upon him under s. 39-A; Bombay District Police Act. High Court cannot, therefore, under s. 435, Criminal P. O., interfere with this order. *MANGHANMAL GIANO AND v. EMPRESSOR* Sind 392

Bombay Hereditary Offices (Amendment) Act (V of 1886), s. 2—Watan-dar, who is—Person merely acquiring watan property without acquiring office, whether watan-dar—S. 2, if applies.

'Watan-dar' means a person having a hereditary interest in a watan, i. e., the hereditary office and the property attached thereto, and includes so far as watan property is concerned, a person holding watan property acquired in the manner set out in the definition. But, a person who merely acquires watan property without acquiring the office is not a watan-dar, and to such a person and his family, the special law of inheritance enacted by the Watan Amending Act of 1886 has no application. *TARABAI SHRINIWAS NAIK GUPTAL v. MURTAO ARYA ANANTACHARYA* Bom. 874

Bombay Land Revenue Code (Act V of 1879), s. 48. See Bombay Land Revenue Code, 1874, s. 65

—ss. 65, 48, 213, 214—Code to be strictly construed—Determination of purpose to which building is put by farmer—Its character and amount spent, if material—Proprietor of land building godowns and using them for storing grass cut from his own land for selling it subsequently—If liable to non-agricultural assessment when his original intention was to use it for non-agricultural

Bombay Land Revenue Code—*contd.*

purpose—Rules framed under ss. 213 and 214, r. 91—“Any holding... assessed”, meaning of.

The Bom. Land Revenue Code not only imposes a pecuniary burden on the subject, but restricts the use and enjoyment of his property. Such a statute must always be regarded as subject to the rule of strict construction. The proprietor is, therefore, entitled to ask the Court to construe it in his favour.

The character of the building or the amount of money spent upon its construction is immaterial in judging the purpose for which it is put eventually by the farmer.

The use of the words “farm-buildings, wells or tanks” in s. 65, Bom. Land Revenue Code does not exhaust but illustrates the kind of improvements intended by the Legislature to entitle the owner to the benefit of lesser assessment. The phrase “make any other improvements thereon for the better cultivation of the land” in s. 65 ought not to receive a narrow construction limited to some object directly connected with agricultural operations or the act of production merely. Any improvement which conduces to profitable husbandry and facilitates the marketing of agricultural produce, would be included within the class of improvements protected by s. 65. That would include the provision for store-houses made by an agriculturist for the protection of his agricultural produce until it leaves his farm. Thus, if grass as agricultural produce is cut, pressed, baled and stored in a godown with the object of eventually selling it when the market improves and it is profitable to sell the produce, the construction of such a godown which facilitates the object in question would be protected. The farmer produces his crops in order to sell the same and thus to provide the means to carry on further cultivation, that is, in other words, the business of framing or cultivation. Thus the use of the land being for agricultural purpose, its proprietor is not liable to non-agricultural assessment merely because he previously intended to use it for non-agricultural purpose, as the mere intention to use the property for non-agricultural purpose without its actually being so used will not enable the Govt. to alter the agricultural assessment.

The expression “any holding which has been assessed” implies “legally assessed.” When therefore the basis for altered assessment fails, the levy of altered assessment would be illegal. *RAJCHAND GULABCHAND ACHJA v. SECRETARY OF STATE* Bom 495
—ss. 86, 87—Co-sharer not registered as managing inamdar, whether can bring suit directly against khatedar—His remedy.

The object of the entry of the names of co-sharers in the village *khatavani* is to enable the village officers to distribute the land revenue among them. It is only the registered managing *inamdar* who has the sole right to manage the village, i. e., to recover revenue, etc. If any of the village *khatedars* fail to pay the land revenue into the hands of the village officers, then it is for the managing *inamdars* to seek assistance from the *mamlatdars* under ss. 86 and 87, Bom. Land Revenue Code, or to file a suit against them in a Civil Court. But other co-sharers who are not recognized as managing *inamdars* cannot file a suit or seek assistance against the *khatedars* directly. Their remedy is to sue the managing *inamdars* for an account and to recover their share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing *inamdars*. *NARBAH*

Bombay Land Revenue Code—*conold.*

SONAJNH JAHAGIEDAR v. TRIMBAK SHRIDHAR JAHAGIEDAR *Bom.* 608

—ss 213, 214. *See* Bombay Land Revenue Code, 1879, s. 65 *495*

Bombay Municipal Boroughs Act (XVIII of 1925), ss. 104, 105, 203—S. 105, if prescribes limitation—Powers of Municipality acting under ss. 104 and 105, whether governed by Limitation Act (IX of 1908)—Remedy of Municipality by suit under s. 203 time-barred—If can exercise power under s. 105

Once a bill is presented with "the least practicable delay" as required by s. 104, sub-s. (1) of the Bombay Municipal Boroughs Act, the right to issue a notice of demand and then to recover the amount by a distress warrant under s. 105 accrues to the Municipality, and that right is not lost by lapse of time. Section 105 does not prescribe any period of limitation, nor does it say, like s. 104, that the distress warrant should be issued with the least practicable delay. The periods of limitation prescribed for filing a suit under the Lim. Act govern the procedure in a Court of law, and the powers of the municipality acting under the provisions of ss. 104 and 105 are not governed by the Lim. Act. The fact that the remedy of the municipality to recover the amount by filing a suit in a Civil Court under s. 203 is time-barred cannot prevent it from exercising the special powers conferred upon it by the Bombay Municipal Boroughs Act. **SURAT BOROUGH MUNICIPALITY v. SARIFA KARUNNISA** *Bom.* 366

—s. 111. *See* Civil Procedure Code, 1908, s. 115 *519*

Bombay Prevention of Adulteration Act (V of 1925), s. 4—Applicability to sale of articles of food of which ghee is necessary ingredient—Alleged adulterated ghee taken from shop where sweetmeats were offered for sale—Presumption.

Section 4, Bom. Prev. of Adul. Act, does not apply only to the sale of ghee simply as such but applies also to the sale of articles of food of which it is a necessary ingredient. The words of the section are wide enough to include articles of food which contain ghee mixed with other substance.

The fact that this ghee was taken from a shop where sweetmeats and *pakorae* were offered for sale, and indeed from a frying-pan in which other sweetmeats and *pakorae* were being made, makes it quite clear that the presumption apart, the admission of the accused himself apart, the sweetmeats and *pakorae* in his shop had been manufactured for sale within the meaning of s. 4 (1) (b) of the Act and that he was manufacturing and offering for sale sweetmeats and *pakorae* as containing pure ghee which contained the alleged impure ghee. **NEHBANDAS HOLLARAM v. EMPHROE** *Sind* 832

—s. 4—Burden to show that article is adulterated.

It is true that the burden of proof that the article of food is adulterated lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admissions of the accused himself. **NEHBANDAS HOLLARAM v. EMPHROE** *Sind* 832

Bombay Prevention of Gambling Act (IV of 1887), s. 4. See Criminal Procedure Code, 1898, s. 530 (q) *543*

—ss. 4, 5, 6—Evidence of bogus punters—Value of.

The bogus punters are usually very unsatisfactory witnesses. It does not much matter whether

Bombay Prevention of Gambling Act—*conold.*

they are called accomplices or spies or Police agents. No doubt, it is very difficult to get better evidence and the Police may have to make use of such people, and if their evidence is corroborated and fits in reasonably well with the prosecution case, the Court may be justified in relying on it. But if the punter is called as a witness and does not support the prosecution case, it is obviously worse, than if he was not called at all. **BAPTIST DE SOUZA v. EMPHROE** *Bom.* 203

—ss. 4, 5, 6—Finding of marked coins and slip of paper with figures, when sufficient for conviction.

The mere fact of the finding of the marked coins and the slip of paper with figures on it in the room is sufficient to justify the conviction only if the evidence makes it perfectly clear that these articles were instruments of gaming. **BAPTIST DE SOUZA v. EMPHROE** *Bom.* 203

—ss. 4, 5, 6—Statements of Police long after event—Value of.

The Court cannot possibly be expected to rely on the mere statements of the Police Officers long after the event without any independent corroboration. **BAPTIST DE SOUZA v. EMPHROE** *Bom.* 203

—ss. 4, 5, 6—Warrant in name of Sub-Inspector—Arrest by constable, Sub-Inspector being nearby—If vitiates warrant.

Where a warrant is in the name of a Sub-Inspector and he is present near the room used for gambling purposes but the accused is actually arrested by his constable who had already entered the room, the irregularity is not such as would vitiate the warrant or the proceedings in any way. **BAPTIST DE SOUZA v. EMPHROE** *Bom.* 203

—ss. 13, 4—Game of cards called *pettin-ata*, if comes within mischief of Act.

"Mere skill" means pure skill, skill and nothing else. A game in which there is a substantial element of chance cannot be described as a game of mere skill or pure skill. As the Bombay Prevention of Gambling Act now stands, and in particular in view of the provisions of s. 13 it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a game of mere skill, that is to say, a game in which there is no element of chance at all. Of course, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. A game of cards called *pettin-ata* played for money stake is not a game of mere skill, and comes within the mischief of the Bombay Prevention of Gambling Act. **EMPHROE v. KALLAPPA GURAPPA KOTAGUNSHI** *Bom.* 315

Bombay Revenue Jurisdiction Act (X of 1876), s. 4; Proviso—Dispute as to who is entitled to be holder—S. 4, Proviso, if applies.

The proviso to s. 4, relates to cases where there is a dispute as to the nature of a holding, that is to say, as to whether it is exempt from the payment of land revenue or not. It does not relate to disputes as to who is entitled to be the holder. **DATTATRAYA VISANI DASHOLKAR v. SADASHIV SHIVRAM NISAL** *Bom.* 839

—s. 4 (d)—Purchaser from *inamdar* claiming to be shown in village papers as person entitled to revenue—Suit, if barred by s. 4 (d) against Government—Proper order to be passed in such case.

Where in a suit brought by a purchaser of a share of a village from *inamdar*, the plaintiff wants to be shown in the village papers as the person entitled

Bombay Revenue Jurisdiction Act—Contd.

to the revenue of the village, he really claims to be the superior holder as defined in the Bom Land Revenue Code, and the suit is barred by s. 4 (d) against Govt. and the Govt. cannot be ordered not to pay the revenue to the *inamdar* but to pay it to the plaintiff direct. An injunction against Govt. to pay the plaintiff direct, and not to pay the superior holder, would be contrary to the spirit, if not to the express terms, of the Land Revenue Code. The relation between Govt. and the superior holder is not affected by the sale of the superior holder's rights. The proper thing to do in such a case is to order the *inamdar* to pay it to the plaintiff as soon as he receives it from the treasury. **DATTATRAYA VISHNU DABHOLKAR v. SADASHIV SHIVRAM NISAL** Bom. 839

s. 4 (f)—Government having no interest in revenue of alienated village—Applicability of s. 4 (f).

Clause (f) of s. 4, Bom. Revenue Jurisdiction Act can have no application to the case of an alienated village where Govt. has ceased to have any interest in the revenue at all.

Although the Revenue Jurisdiction Act is to be construed strictly, that does not mean that it should be construed so technically as to make its provisions a dead letter. **DATTATRAYA VISHNU DABHOLKAR v. SADASHIV SHIVRAM NISAL** Bom. 839

Bombay Weights and Measure Act (XV of 1932) as amended in 1937. See Penal Code, 1860, s. 266 228

Burma Municipal Act (III of 1898), s. 8—Rules under, r. 68-A—Government coming to conclusion that no proper election took place and ordering new election—Candidates declared elected in original election, if can get declaration that orders of Government were ultra vires.

Shortly after a Municipal Election a candidate brought a petition against those who were thought to have been the successful candidates and to have been elected upon the Municipal Committee, alleging many acts of irregularities. The consequence of this petition was that the irregularities came to the notice of the Govt. which held that the proceedings of the election were a farce and a fiasco. Consequently they proceeded under r. 68 made under s. 8, Burma Municipal Act for the preparation and publication of the electoral roll for holding a proper election. The Judge who decided the petition held, reviewing all the matters, that the objections raised in the petition were valid, and he pointed out that all the criticisms made in regard to the electoral roll were correct. Upon that it was thought that the next four persons who were on the list in having received votes during these proceedings ought to be elected. The person so declared elected sued for a declaration that the orders of the Govt. and the electoral authority were *ultra vires* and that they were duly elected members of the Municipal Committee.

Held, that once an election had taken place the Govt. could not declare it to be void and hold a new one. But the authorities must make a decision upon the facts as represented to them and must make their decision in good faith. When they were apprised of the existence of facts as the result of an inquiry, in which evidence as to those facts was relevant, they might be assisted by the examination of the tribunal's opinion and the record of the evidence before it. No proper election having taken place, the candidates could not be declared elected and that the orders of the Govt. and the Electoral Authority were within powers. **GOVERNMENT OF BURMA v. ARUNACHALLAM**

Rang. 526

Burmese Buddhist Law—Ecclesiastical—Owner of Poggalika conferring rights of appointing successor upon others—Such right not exercised—Ownership of Poggalika—Election by Sangha—Nature and mode of—Election of presiding monk—Nature of.

The ownership of the Kyaung-daik, upon the death of the original Poggalika owner, vests in the Sangha at large, if the original Poggalika owner has not himself appointed his successor, but conferred the right to appoint a successor on a third party and that party fails to exercise that right. After the death of the owner the presiding monk is then to be elected by the Sangha. The latter may elect such monk in any manner they choose provided it is a real, valid and true election. The members may nominate some of the senior members of them representing the whole body to elect the monk and the election would be valid and proper election by the Sangha as such.

Although there may be ceremonial contemplated at the time when the presiding monk is installed in his office, the question of his election by the Sangha is not analogous to ceremonial but is a plain question of fact and depends upon a consideration of the question whether the members of the Sangha were substantially in favour of his appointment. **U THISSITTA v. U EINDAWUNTHA**

Rang. 483

C. P. Debt Conciliation Act (II of 1933), Rules under—Rr. 18, 47, s. 8—R. 18, if cures illegality occurring under r. 47—Due notice to minor creditor and guardian—Board and debtor failing to appoint proper guardian—Proceedings held null and void.

Rule 18 made under C. P. Debt Conciliation Act does not cure illegality occurring under r. 47 but deals with a notice sent in an irregular form.

Where after due notice to minor creditor and his guardian the Board and the debtor failed to have a proper guardian appointed, the proceedings are initially illegal and if this has resulted in failure to submit a statement of debt due to minor, the minor is gravely prejudiced. In such a case the minor is entitled to a declaration in Civil Court that the proceedings are null and void. **PITAMBAR RAMCHANDRA PALIY v. SAHAB CHAND HARAKHOND SHOP** Nag. 418

ss. 16 (b), 15—Decree-holder alleging before Board that debt was bogus—Board holding it genuine—Question if can be re-agitated in Civil Court.

The intention of the Legislature in s. 16, C. P. Debt Conciliation Act, was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under s. 15. It may be that if fraud was practised on the Board without the knowledge of the Board, the Civil Courts could set the matters right; but where the decree-holder did allege to the Board that the other debt was bogus, but in spite of that the Board accepted it as a genuine one, the decree-holder is not entitled to re-agitate the question of fraud in the Civil Court. **JANBA v. MANNO** Nag. 888

C. P. Land Revenue Act (XVIII of 1881), ss. 33, 152—Jurisdiction of Civil Court—Lambardar co-sharer paying land revenue on behalf of co-sharers as zabti bhogra—Suit to recover such amount from co-sharers—Civil Court, if can entertain.

For a case to come under cl. (i) of s. 152 C. P. Land Revenue Act, the matter complained of and which gives rise to the suit must actually be con-

C. P. Land Revenue Act—concl'd.

nected with or arise out of an actual collection or some process for the recovery of arrears of revenue.

Where a *lambardar* co-sharer pays the whole of the revenue and brings a suit against other co-sharers to recover the amount paid by him on their behalf as *sabti bhogra*, the cause of action does not arise out of the collection or anything connected with the collection but rather from a payment made to the defendants' use and in view of s. 33 which presupposes that the Civil Courts have jurisdiction to hear suits by *lambardars* for arrears of revenue payable through them by the proprietors whom they represent, such a suit does not fall within s. 153 (b) (10). Such a claim is one under s. 69, Contract Act, and the Civil Court has jurisdiction to entertain it. *HARHAR DOBA v. UPENDRA PATI* Pat. 602

C. P. Land Revenue Act (II of 1917), s. 157 (3)—*Sadar-lambardar paying land revenue due of mortgagor's land, whether gets priority over mortgagee—Sale by him, effect of.*

When the land revenue in respect of mortgagor's land has been paid by the *sadar-lambardar*, he gets priority over the mortgagee, standing in the shoes of the Govt. to the extent of the land revenue paid by him. He can accordingly sell the land giving to the purchaser a like priority unless the mortgagee redeems this charge by payment. But the sale is not free from incumbrance. *ZALLIRAM v. MANGALBINGH* Nag. 780

C. P. Municipalities Act (II of 1922), s. 84 (3)—*Suit in Civil Court for refund of taxes paid, when barred.*

It is the duty of the Municipal Committee to assess each house, to decide who is the owner or occupier liable to assessment, and to recover that assessment. Whether that assessment has been correctly calculated or not or whether it is being levied on the right person is a matter for the Municipal Committee to decide, and it cannot be said that its action is *ultra vires* if it decides it wrongly. An assessee has a right of appeal under s. 83 of the C. P. Municipalities Act, and under s. 84 (3) no objection shall be taken to any assessment or levy nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act. According to s. 85 (2), no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of the Act and the rules made thereunder. Unless the allegations in the plaint show that the action of the Committee was *ultra vires*, no civil suit will lie for a refund of the taxes paid. *SECRETARY MUNICIPAL COMMITTEE, NAGPUR v. RAMOHANDRA* Nag. 893

C. P. Protection of Debtors Act (IV of 1937), ss. 3, 4—"Molestation"—*Creditor demanding payment of debt—Debtor becoming angry and bidding him go to Civil Court—Creditor losing temper beating debtor with shoe and leaving the place—Creditor, if can be punished under s. 4.*

The terms of the definition of "molestation" given s. 3, C. P. Protection of Debtors Act, indicate that the obstruction or using violence or intimidation to constitute molestation should be accompanied by the intent to cause the debtor to abstain from doing what he has a right to do or to compel him to do what he has a right to abstain from doing. It is evident that the particular intent is a question of fact in every case. If the Court holds that the creditor's intention in obstructing, or using violence to, or intimidating, the debtor is to compel him to pay a debt which he has a right in

C. P. Protection of Debtors Act—concl'd.

certain circumstances to abstain from doing, the creditor's act would amount to molestation.

The creditor demanded payment of his debt, from his debtor, whereupon the latter became angry and bade him go to Civil Court. The creditor lost his temper and beat the debtor with a shoe and left the place. The creditor was prosecuted for an offence punishable under s. 4 of the C. P. Protection of Debtors Act, 1937, for molesting the debtor for the recovery of a debt owed by him:

Held, that the circumstances in which the creditor used violence did not warrant any assumption that the creditor's intention was to compel him to pay the debt. But on the contrary its effect would presumably be to confirm the debtor's resolve not to pay. Here the creditor did not resort to violence as an instrument to compel the debtor to pay when he was not disposed to pay. It was only a manifestation of the pitch of his passion that was aroused by the debtor's remark that the creditor should look to Civil Court. But the creditor was indeed liable to be punished for assault under the I. P. C. *LAXMAN v. EMPEROR* Nag. 348

Calcutta High Court (Original Side) Rules, Chap. XXXVI, r. 77—*Sheriff's right to poundage, nature of—Attachment by him under precept issued under Civil Procedure Code (Act V of 1908), s. 46—Claim under decree satisfied on compromise—Sheriff, if entitled to poundage.*

The Sheriff has no Common Law right to reward for executing a writ. The Sheriff is not engaged by the litigant to realize the decree. There is no privity between the Sheriff and the litigant. The latter applies to the Court for the enforcement of its own decree and it is the Court that employs the Sheriff as one of its officers to enforce its orders. If the Sheriff is to be remunerated for such services, it is a matter between the Court and the Sheriff with which the litigant has no direct concern. If the Court or the Legislature consider that the Sheriff should receive remuneration, it is for those authorities to make provision by rule or statute for such remuneration, and in doing so they may undoubtedly levy fees on the litigant. Such rule or statute being a taxing rule or statute must be strictly construed so as to guard against any enlargement of its scope to the detriment of the subject who, but for such rule or statute, would be under no liability to pay.

There are two sets of circumstances under which the Sheriff can get poundage (a) where the Sheriff levies a sum in execution, and (b) where the claim in respect of which the Sheriff has taken steps to levy a sum in execution is satisfied, compromised or settled. The alternative portion of the rule is not independent of the first portion; the Sheriff is not entitled to poundage under the second portion of the rule unless he has taken steps under the first portion of the rule with a view to levying a sum in execution. An order issuing a precept is not an order directing execution and the attachment under a precept under s. 46, Civil P. C., is not an attachment in execution proceedings. The attachment under s. 46, Civil P. C., is merely a step taken to facilitate execution; it is not a step taken in the proceedings in execution. So where the Sheriff has attached certain property pursuant to a precept issued under s. 46, and the claim under the decree has been satisfied on compromise entered into after such attachment, the Sheriff is not entitled to poundage. *RAI KISANJI v. SRI KISAN MACKAR* Cal. 811

Calcutta Municipal Act (III of 1923), ss. 139, 141—Jurisdiction of Small Cause Court to hear objection as to liability to assessment.

The word "valuation" in s. 139, Calcutta Municipal Act, may mean: (1) the estimated value; (2) the act or process of valuing. There is nothing in this section to limit the meaning of the word "valuation" to the quantum of valuation only. It includes the whole process of valuing as well. Consequently, objections not merely as to quantum of assessment but as to liability to assessment also, can be heard by Small Cause Court Judge. *GOVERNMENT OF BENGAL v. CORPORATION OF CALCUTTA* Cal. 546

Carriage of Goods by Sea Act (XXVI of 1925), s. 2—Lighter carrying goods from port not to another port but to ship which carries those goods to another port—Lighter, if comes under s. 2.

Where a lighter carries goods from the port but it does not carry those goods to any other port, the fact that the goods transported are placed in another ship, which itself carries them to another port, would not bring such lighter within the purview of s. 2 of Act XXVI of 1925. Moreover, even if such lighter was a "ship" to which that Act applies, cl. (g) of r. 2 of Art. IV of the Schedule to that Act would make the owners of the lighter liable for the loss of goods which is due to the fault of the agent of the carriers. *CHOKKA DHANAMMA v. COBAMANDAL COMPANY, LTD.* Mad. 16

Certiorari—Writ of—Order of Board established under Madras Hindu Religious Endowments Act, declaring distribution of honours at a temple, nature of—Writ of certiorari cannot be issued in such a case.

A question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. In settling questions relating to the allocation of honours in religious institutions over which it has superintendence, the Board acts in its administrative capacity.

Hence where the Board established under Madras Hindu Religious Endowments Act, determines the order of the distribution of such honours, it cannot be said that it has declared any one's legal right or deprived any one of any legal right which he had and such a decision is merely an order dealing with the internal management of the temple. A writ of *certiorari* cannot be issued in such a case. *SRI EMBERUMANAR JEER v. HINDU RELIGIOUS ENDOWMENTS BOARD* Mad. 77

Champtorous transaction. See Contract 590

Charitable and Religious Trusts Act (XIV of 1920), ss. 3, 12—Application under s. 3—Proceedings, nature of—Res judicata—Decision, if operates as res judicata to bar regular suit even in case of person party to proceedings.

The decision of the District Judge under the Charitable and Religious Trusts Act—a decision from which by s. 12 there is no appeal—is a decision in a summary proceeding which is not a suit nor of the same character as a suit; it has not been made final by any provision in the Act; and the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act.

The existence of a public trust is the foundation of the proceedings authorised by s. 3 of the Act: *prima facie* while the District Judge may have to come to a decision upon this point in order to satisfy himself on the question of his own jurisdic-

Charitable and Religious Trusts Act—concl'd.

tion, he cannot by an erroneous decision thereon give himself jurisdiction. No matter how long or how peaceably an individual may have been in possession and enjoyment of property, it is always possible for persons claiming to be acting for the public to lay claim to the property as having been impressed with a trust of a charitable or religious nature. It would be both drastic and anomalous to provide that a person in possession, if not willing to bring a suit to establish his own title affirmatively, must be content to abide without right of appeal by the decision of the District Judge in a proceeding of this character. *BHAGWAN DIN v. GIR HAR SAROOP* P. C. 305

s. 6—S. 6, intention of—"If a trustee fails to comply," construction.

The terms of s. 6 of the Act are intended to define the consequences of an order made by the District Judge directing the persons to furnish particulars of the property, etc., but the words "if a trustee without reasonable excuse fails to comply" in s. 6 cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant to a suit under s. 92 of the Civil P. O. *BHAGWAN DIN v. GIR HAR SAROOP* P. C. 305

Chota Nagpur Tenancy Act (VI of 1908), s. 11. See Chota Nagpur Tenancy Act, 1908, s. 212 671

s. 63 as amended by (Act II of 1938),—Offence under s. 63—Only committed when landlord or his agent makes demands from tenants in excess of rent—Manager, Court of Wards, making such demands—Offence is committed.

An offence under s. 63, Chota Nag. Ten. Act is only committed if the landlord or his agent levies or makes certain demands over and above the rent legally due from the tenants. There is no offence if anybody other than the landlord or an agent of the landlord demands commodities from persons who are not his tenants. Where the Manager of the Court of Wards demands certain commodities or animals or birds from the tenants of the estate which he is not entitled to demand, he commits an offence under s. 63.

Section 63 (1) (a) of the Chota Nag. Ten. Act creates an offence but does not deal with the method in which investigation is to be made and the trial to be held; therefore by reason of s. 5 (2) of the Criminal P. C., it must be investigated into and tried according to the provisions of the Code. *M. O. ANGHLO v. KANDAN MANJAY* Pat. 738

s. 63—Offence to be investigated and tried according to provisions of Criminal Procedure Code—Appointment of manager with previous sanction of Government—Sanction for his prosecution under s. 197, Criminal Procedure Code (Act V of 1898), if necessary.

There is nothing in s. 63 which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that section. Section 258 does not deprive a Criminal Court of its jurisdiction to try a criminal offence.

Under s. 59-A, Court of Wards Act, a Manager of Court of Wards is a public servant and where according to the rules made by the Court of Wards under s. 70 of that Act such a person getting certain salary cannot be appointed without the previous sanction of the Govt., it follows that he cannot also be dismissed without the sanction of the Govt. When such a manager therefore commits an offence under s. 63, Chota Nag. Ten. Act while acting in his capacity as a manager of the estate, a sanction of

Chota Nagpur Tenancy Act—conold.

the Govt. under s. 197, Criminal P. O., is necessary for his prosecution. *M. O. ANGLO v. KANDAN MANJAI*

Pat. 738

ss. 63, 258—*Ss. 63 and 258, whether deprive Criminal Courts of their jurisdiction to try offence—Court of Wards Act (IX of 1879), s. 70—Rules made under, r. 115—If ultra vires.*

Rule 115 of the rules made by Court of Wards under s. 70 of the Court of Wards Act, does not take away the power expressly given to the Court by s. 20 to appoint and remove managers but it only requires the previous sanction of Govt. Sections 69 and 70 of the Act empower the making of such a rule and it is not therefore *ultra vires*. *M. O. ANGLO v. KANDAN MANJAI*

Pat. 738

s. 208. *See* Chota Nagpur Tenancy Act, 1908, s. 211

671

ss. 211, 208, 11—*Transferee of tenant not getting himself recorded in landlord's Sherista—Suit for rent by landlord without impleading transferee—Tenure sold in execution of rent decree—Sale, whether under s. 208—If affects share of transferee in tenure.*

There is nothing in s. 211, Chota Nagpur Tenancy Act to suggest that the non-registration will also defeat the claimant in the suit which he is authorised to bring under s. 211, cl. (2), (which corresponds to O XXI, r. 63, Civil P. O.). There is also nothing in the section to show that the transferee's failure to get himself recorded in the landlord's Sherista shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for recovery of rent he is to assume that the transferee is represented by the old tenants.

A sale therefore held in execution of a rent decrees obtained by superior landlord in a suit to which all the tenure-holders were not made parties is not a sale under s. 208 and does not affect the share in the tenure, of persons not parties to such suit even if they have not got themselves recorded in landlord's Sherista. *MOHAMMAD MURTAZA v. OYRIL INDERNATH DRY*

Pat. 671

s. 258. *See* Chota Tenancy Act, 1908, s. 63

738

Civil Procedure Code (Act V of 1908), s. 2. *See* Civil Procedure Code, 1908, O. XXI, r. 98

850

s. 9—*Suit to establish right to observe Kappu Kattu and Diparathana, whether one of civil nature—Whether can be tried by Civil Court.*

It is well-established that the Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. It is also established that a general right of worship either in a particular temple or outside is a civil right which can be claimed in the Courts. Generally speaking the rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed; nor will they prescribe the manner in which the worship is to be conducted. It is also the rule that when there is no obligation to perform an act of worship, there will be no civil right to claim honours or perquisites of nominal value which ordinarily accompany the voluntary act of worship. The position is different if the perquisites are attached to an office or an obligation; but when there is no obligation to render service to the deity, there is no legal right to claim any honorific return for the services rendered.

Civil Procedure Code—contd.

Kappu Kattu is an act of ritual, partly religious and partly appertaining to the caste, which is at the most a mere incident in a series of ritual observances making up the communal festival. There is no obligation upon the members of the community to take part in the festival or to have their young men decorated in a particular way by the priest who presides at the festival. In the same way Diparathana is a matter arising out of no legal obligation and forming the basis of no legal claim. A suit therefore to establish right to observe Kappu Kattu and Diparathana is not of a civil nature and Civil Court has no jurisdiction to entertain it. *NARAYANA MUDALI v. PERIA KALATHI MUDALI*

Mad. 239

ss. 9, 92—*Religious endowment—Mahant having two capacities secular and religious—Both offices interdependent, and inseparably blended—Suit relating to religious office, whether falls under explanation to s. 9—Jurisdiction of Civil Court to remove such mahant from both offices—True test to be applied in considering such removal.*

Where the secular and the religious duties of the mahant in the temple are interdependent and inseparably blended, efficient discharge of the one depends on the control of the other. In other words, in all such religious endowments, where tradition and custom play a vital part in intermingling the two functions, their division is unthinkable. Where such an office is connected with an endowment which has valuable properties and is associated with the control of extensive funds, even if the two capacities of the office can be separated, and the mahantship on its spiritual side regarded as purely an office or dignity, the office is of such a nature that a suit relating to it must fall within the purview of the explanation to s. 9 of the Civil P. O., as being a suit of a civil nature lying within the competence of a Civil Court, notwithstanding that the functions of such office are associated with religious rites or ceremonies.

The matter relating to the removal of the mahant of such an institution from both the capacities, secular as well as religious, is one for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. But the jurisdiction of the Civil Courts to decide such questions can no longer be doubted. The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices. *SATISH OHANDRA GRI v. DHARANIDHAR SINGHA ROY*

P. C. 616

s. 10—*Applicability to proceedings for probate of will—Two rival applications for probate—Date of institution, whether date when application was filed or date when caveat was entered—Succession Act (XXXIX of 1925), ss. 295, 273.*

Proceedings for obtaining probate of a will are not suits. The direction in s. 295, Succession Act, is only that the procedure of a suit shall be followed and not that proceedings, on becoming contentious, shall "become" regular suits instituted on the date of their becoming contentious. Section 10 of the Civil P. O., is, therefore, not strictly

Civil Procedure Code—contd.

applicable to such proceedings. Even assuming however, that it is applicable in principle, it is clear that as between rival applications for probate it is by no stretch of reasoning possible to treat as the date of institution the date on which the caveator may choose to allow the proceedings to become contentious. The only date which can be regarded as the date of institution with a view to deciding which of two rival "suits" is "previously instituted" must be the date on which the petition was filed and not the date on which the caveat was entered. *MRS VIOLET PETERSON v. MRS. ADELAIDE ELIZABETH FORBES* Oudh 377

— ss 10, 115—Order under s. 10 refusing stay—Revision, if maintainable.

No revision is maintainable against an order of a Judge under s. 10, Civil P. C., refusing to stay proceedings and directing a suit to proceed: *RAMCHAND VIRMAL v. LILARAM* Sind 765

— s. 11, Expl V, O. II, r. 2—Partition suit—Failure to ask for mesne profits from date of suit until delivery of possession—Another suit for recovery of mesne profits, if barred.

Order II, r. 2, must be read with Expl V to s. 11, Civil P. C., and the relief claimed under Expl. V to s. 11 is a relief arising from the same cause of action; and the fact that under O. II, r. 4, mesne profits may be claimed in the suit for recovery of immovable property emphasizes the fact that the suit for recovery of immovable property and the suit for mesne profits may arise from two separate causes of action. But the fact that a plaintiff may under O. II, r. 4, join in one suit two causes of action, does not mean that he must necessarily do so, or fall under the bar imposed by O. II, r. 2 and s. 11, Expl. V. Plaintiff may, of course, anticipate in the suit for partition that certain property will fall to his share; he may anticipate that after the final decree, he will not be given delivery of possession and he may in his suit for partition ask for mesne profits from the date of suit until delivery of possession. But if he does not do so, another suit for recovery of mesne profits is not barred. *TIKAMDAS HOTUMAL v. KISHNOMAL JBSOMAL* Sind 702

— s. 20 (c)—Amount on pro-note to be paid at Delhi—Defendant residing in U. P.—Suit, if can be brought at Delhi contrary to s. 7 of U. P. Agriculturists' Relief Act (XXVII of 1934)—Such suit, if illegal within s. 23, Contract Act (IX of 1872).

A pro-note had a clause that payment should be made in Delhi. The plaintiff sued for the amount due on the pro-note at Delhi. The defendant resided in U. P. The Judge returned the plaint because s. 7, U. P. Agriculturists' Relief Act (U. P. Act XXVII of 1934), said that every suit for recovering an unsecured loan in which the defendant was an agriculturist should be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant resided:

Held, that according to s. 107 (1) of the Govt. of India Act, if any provision of a Provincial Law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact, or to any provision of an existing Indian Law, then the Federal Law or the existing Indian Law, shall prevail and the Provincial Law shall, to the extent of the repugnancy, be void. In Delhi the Courts are governed by s. 20 (c), Civil P. C., and the local law of the U. P. was void to the extent of the repugnancy.

Civil Procedure Code—contd.

Held, also that the bringing of such a suit in Delhi contrary to the provisions of the U. P. Act was not illegal within the meaning of s. 23, Contract Act. *HANS RAJ GUPTA v. RAM LAX BALDHO PARSAD* Lah. 711

— s. 24. See Suits Valuation Act, 1887, s. 11 467

— s. 24—Distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction, if can be made.

So far as s. 24, Civil P. C. is concerned, there is no reason to make a distinction between lack of inherent jurisdiction and lack of any other kind of jurisdiction in a Court trying a suit. *KANHAIYA LAL v. HAMID ALI* Oudh 467

— s. 35. See Civil Procedure Code, 1908, s. 80 460

— s. 42—Ordinary Civil Court passing rent decree in rent suit under Bengal Tenancy Act (VIII of 1885)—Decree transferred to Small Cause Court for execution—Latter Court, if can execute it.

Where an ordinary Civil Court, in a suit for rent under Bengal Ten Act, passes a decree for rent and that decree is transferred for execution to the Court of Small Causes, the latter Court has jurisdiction to execute it. *NANI GOPAL MUKHERJEE v. SRISAI CHANDRA NANDY* Cal. 300

— s. 46. See Calcutta High Court (Original Side) Rules, Chap XXXVI, r. 77 811

— s. 47. See Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act, 1938, s. 15 135
See Civil Procedure Code, 1908, s. 102 486

— s. 47—Execution of decree deciding rights of parties to intestate estate—Court appointing Commissioner to investigate what sums were due to estate—Whether final order—Appeal, if lies.

During the course of execution proceedings in respect of a decree passed on an award deciding rights of parties in the intestate estate of a deceased, a Commissioner was appointed to investigate the question as to what sums were due to the estate in order that the amount of that estate may be ascertained, so that the parties may be able to enjoy their respective properties in accordance with the award made:

Held, that the order was in the nature of an interlocutory order and was in no sense a final order and the appeal was not maintainable. *PRABHAVATI DEVI v. MRS. LILA SINGH* Pat. 852

— s. 47—Partition decree keeping certain property undivided pending litigation about it and providing that, that property should be partitioned by metes and bounds after termination of that litigation—Property subsequently lost to family and money acquired in its stead—Separate suit for partition of that money basing right on decree, if barred by s. 47.

Where a partition decree has kept certain immovable property undivided until the termination of a pending litigation concerning such property and has further provided that after the determination of the said litigation, the property should be divided by metes and bounds between the parties according to their shares but after the decree that property is lost to the family and some movable property in the form of money is acquired in its stead, that movable property cannot be partitioned in execution of the decree which made no reference to it, and a separate suit mentioning the circumstances and basing right to the partition of the money on the decree is not barred by s. 47,

CIVIL Procedure Code—contd.

Civil Procedure Code, **IAWMAN MANJUNATHAYA BALWALLI v VENKATRAO MANGESHAO** Bom. 13

—s. 47, O. XXI, r. 2 (1)—*Parties executing solenama, after decree—Effect of—Such solenama, if can be dealt with by executing Court under s. 47—Pardanashin lady—Deed of adjustment after passing of decree—Held on facts, the transaction embodied therein was binding on lady.*

Where subsequent to the decree the parties enter into a *solenama*, it has the effect of extinguishing in part the plaintiff's claim under the original decree and to that extent it is an "adjustment" of the decree within the meaning of O. XXI, r. 2 (1), Civil P. O. But even otherwise and as such, it is a matter to be dealt with by the executing Court under s. 47.

There was a dispute between a *pardanashin* lady and her adopted son. It was referred to arbitrators. Their award was made a decree of the Court. Subsequently in the executing Court a *solenama* was filed, embodying the terms of settlement between them. The *solenama* showed that the provisions thereof were the natural results of the circumstances and the relations between the parties. There was nothing to indicate fraud. It was in evidence that before the execution of the *solenama* there were direct negotiations between the lady herself and her son and that she caused the terms which were agreed between them to be reduced to writing in the form of a note or draft and that the *solenama* was prepared in accordance with it.

Held, that the transaction embodied in the *solenama* was the free and intelligent act of the lady and was binding on her. **PARTU KUMARI BIBI v. NIRMAL KUMAR SINGH** Cal. 691

—s. 48—Art. 182, Limitation Act (IX of 1908), should not be invoked in determining starting point for limitation under s. 48—Limitation under s. 48 cannot be extended by amendment of decree.

In construing s. 48, Civil P. O., the Court ought to limit itself to examination of the provisions of the Code itself and not import the provisions of other enactments, more particularly Art. 182, Lim. Act, which by its own terms applies only to the period for execution of a decree or order not provided for by s. 48, Civil P. O. An amendment of a decree does not therefore give a new date for starting a period of limitation if the application for execution is beyond the period of twelve years prescribed by s. 48. The period of twelve years under s. 48 is final and cannot be extended by any amendment of the decree. **DULHIN v. HARISHAR GIRI** Pat. 373 (b)

—s. 60—Exemptions from attachment are cumulative.

Exemptions from attachment running from sub-heads (a) to (p) of s. 60, Civil P. O., are cumulative and any man is entitled to all the benefits if he is qualified to do so. **MUNICIPAL CORPORATION OF RANGOON v. RAM BHABRI** Rang. 460

—s. 60—Non-owner disposing of goods not belonging to him—His action vis-a-vis true owner, nature of.

Per Baguley, J. (in order of reference):—If the non owner does, dispose of goods which do not belong to him, his action vis-a-vis the true owner is in the nature of a tort and it is quite incredible that under s. 60, Civil P. O., the law entitles a creditor to attach and sell his judgment-debtor's right to commit a tort and clearly, no right to

CIVIL Procedure Code—contd.

commit a tort can be envisaged. **MAUNG AYE MAUNG v. A. SCOTT** Rang. 757 F B

—s. 60—Question whether judgment-debtor is agriculturist has to be decided with reference to date of attachment.

The question whether the judgment-debtor is an agriculturist has to be decided with reference to the date of the attachment and whether the property is attachable or not has to be decided with reference to the situation on that date. A man might cease to be an agriculturist within the meaning of s. 60, Civil P. O. Surely it cannot be argued if a man had so ceased to be an agriculturist that his property could not be attached because at the time of the decree he might have fallen within the definition of agriculturist. Similarly, a man might become an agriculturist and his property might not be liable to attachment at the time when it is attached and it cannot be argued that because at the date of the decree he was not an agriculturist therefore the property was liable to attachment. Where therefore the property is attached when in the possession of and owned by legal representative who is a non-agriculturist, the property therefore is liable to attachment and sale on that date. It is beside the question to discover whether the original debtor was or was not an agriculturist within the meaning of s. 60. **BALDEV SINGH v. SHERR SINGH** Lah. 609

—ss. 60, 35, O. XXI, r. 46—Emoluments, if salary—Attachment of subscription to provident fund by garnishee order.

The emoluments of the judgment-debtor known as his pay must be regarded as 'salary' for the purposes of this section as defined by the explanation.

Before the time of the payment of subscription by a judgment-debtor to a provident fund, the money does not belong to the judgment-debtor and at the time of the payment it becomes a compulsory deposit and is exempted from attachment under s. 60 (k). There is no intervening period between which a subscription by the judgment-debtor to a provident fund can be attached by a garnishee order to the Corporation in which judgment-debtor is an employee. **MUNICIPAL CORPORATION OF RANGOON v. RAM BHABRI** Rang. 460

—s. 60 (1) (l)—Employee contracting himself out of benefits of s. 60, by agreeing to pay decretal amount in instalments—Salary, if can be attached.

Where a railway employee agrees to a compromise decree in favour of his creditor agreeing to pay the decretal amount by monthly instalments, he contracts himself out of any benefits of s. 60, Civil P. O., in the matter of the attachment of his salary. **JAGAN NATH v. ALLAH DAD** Lah. 317

—s. 64. See Hindu Law

—s. 64—Effect of s. 64—Son's interest attached in execution of decree against father—Father becoming insolvent—Official Receiver selling property in pursuance of contract, if sale entered into by father prior to attachment—Sale, if contrary to s. 64—Sale, if conveys son's interest.

All that s. 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read s. 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienor's title will be unassailable. The only effect of s. 64 is

Civil Procedure Code—contd.

that such transfer shall not prejudice the rights of the attaching creditor. As recognized in s. 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. Nor can it be said that the sale by the contracting parties executed in pursuance of a pre-existing contract to sell prejudices the attaching creditor, because the sale is merely the fulfilment of the obligation to which the judgment-debtor was already subject. The utmost that the attaching decree-holder will be entitled to, in such circumstances, is the payment of the balance of the purchase money, if anything, remained due on the date of the attachment.

Consequently where son's interest had been attached in execution of a decree against father and the father had been adjudicated insolvent and the Official Receiver under orders of the Insolvency Court sold joint family property in pursuance of a contract of a sale entered into by the father prior to attachment :

Held, that the sale was not contrary to s. 64. The sale was effective to convey not merely the interest of the father but also of the son who continued to remain joint with his father.

Held, further that when the Official Receiver executed the sale deed it was not in the capacity of the representatives of the general body of creditors or even in the exercise of the power possessed by him or by the insolvent to satisfy the general body of creditors that he acted. He was merely carrying out an obligation which prior to the insolvency had been incurred by the insolvents. There was no justification for holding that the order in the claim proceedings instituted by the Official Receiver precluded the person claiming under the contract of sale that he was the owner of the property. *DIRAVYAM PILLAI v. VIRENAN AMBALAM* Mad. 562

s. 64, O. XXXVIII, r. 7, O. XXI, r. 103—Attachment before judgment—Procedure—Proper procedure not followed—Transfer, if invalidated under s. 64.

Unless all the processes of attachment which are required by law to effect a valid attachment have been served, there is no such attachment of the property as would invalidate its transfer under s. 64, Civil P. O. Under O. XXXVIII, r. 7, the attachment before judgment must be effected in the same manner as the attachment in execution of a decree. Under O. XXI, r. 54, the attachment of immovable property is to be made by an order prohibiting the defendant from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order has to be proclaimed in the manner described in sub-r. (2) of r. 54. A mere order of attachment is not enough. *BAI HAKIMBU v. DAYABAI RUGNATH* Bom 655

s. 64, O. XXXVIII, r. 10—Contract of sale before attachment of property before judgment—Subsequent conveyance if prevails over attachment. Section 64 and O. XXXVIII, r. 10, Civil P. O., must be read together. Section 64 applies, to an effective attachment, and under O. XXXVIII, r. 10, attachment before judgment is not effective as against rights subsisting at the date of the attachment. Hence a conveyance of a property, executed after its attachment before judgment by a creditor,

Civil Procedure Code—contd.

in pursuance of a contract dated before the attachment, should prevail over the attachment. *RASAPPA CHANBASAPPA OBEKKI v. HANMAPPA RAMAPPA MANAUR* Bom 225

s. 66—Object of—Section, if draws distinction between purchase by person in name of stranger and one by father in name of son—Person purchasing at Court auction in his own name though on behalf of somebody else—S. 66 (1), if deals with such case.

The object of s. 66, Civil Procedure Code, is to put a stop to *benami* purchases at execution sales.

There is no difference between purchases by A in the name of B where A and B are strangers and where A and B are closely related as in the case of father and son. Section 66, Civil Procedure Code, therefore, applies also to purchases by father in the name of the son.

Section 66 (1), does not deal with a case where A has purchased at Court auction property in his own name though he purchased on behalf of somebody else. The section deals with a case where "any person" has made the purchase "on behalf of the plaintiff." *B. L. CHOUDA v. B. K. RAI*

s. 73—Order under s. 186, Companies Act (VII of 1913), if decree within meaning of s. 73. An order under s. 186 of the Companies Act, cannot be regarded as a decree within the meaning of s. 73, Civil P. O. *LYALLPUR BANK, LTD v. RAMJI DAS* Oudh 889

s. 73, O. XXI, r. 52—Custody Court holding money under O. XXI, r. 52, becoming execution Court by reason of various applications for execution being filed in it—Order passed by such Court under s. 73—Competency.

Although the custody Court which holds money under O. XXI, r. 52, Civil P. C., cannot proceed under s. 73 of the Code, yet, where, long before the date on which the order under s. 73 was passed by the custody Court, that Court had ceased to be a custody Court under r. 52 and had become an execution Court by reason of various applications for execution being filed in it, it is perfectly competent to that Court to award rateable distribution. *LYALLPUR BANK, LTD. v. RAMJI DAS* Oudh 889

s. 73, 115—Order under s. 73, whether revisable under s. 115.

An order passed by a Court under s. 73, Civil P. O., though in nature administrative one, is yet a judicial order so as to be subject to revision under s. 115.

It is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to the party, for there is no warrant for this either in s. 115 or in any other provision of the Civil P. O. Hence an order under s. 73, Civil P. O., is revisable under s. 115 even though the applicant has got a remedy by way of suit under s. 73 (3). *LYALLPUR BANK, LTD. v. RAMJI DAS* Oudh 889

s. 80—Notice under s. 80—Subsequent discovery that certain plot had been omitted—Another notice adding that plot—Suit more than two months after first notice, whether premature. A notice under s. 80, Civil P. O., was served on the Secretary of State for India but when subsequently it was discovered that a certain plot was omitted from the notice, another notice adding that plot to the subject-matter of the suit was sent. The suit was brought more than two months after the first notice.

Civil Procedure Code—contd.

Held, that s. 80 was complied with and the suit could not be said to be premature so far as it related to the other plots mentioned in the first notice.

SECRETARY OF STATE v. DISTRICT BOARD, RANGPUR

Cal. 454

—s. 92. SEE Civil Procedure Code, 1908, s. 9

616

—s. 92—*Hindu dying disposing of his property by will and trust deed in favour of charitable institutions—Will providing for certain amount as maintenance for widow—Suit by widow challenging validity of deeds and alternatively claiming suitable maintenance for her according to Hindu Law—If governed by s. 92.*

A Hindu died disposing of his property by will and a trust deed in favour of charitable institutions. The will provided for a certain amount to be paid to the testator's widow for her maintenance. The widow brought a suit challenging the validity of the deeds and alternatively, if this could not be done, claiming maintenance suitable for her requirements and status to which she was entitled under the Hindu Law:

Held, that the widow was not seeking to enforce the trust. She was claiming what she considered reasonable maintenance not on the basis of the trust but in spite of the trust, relying on principles of Hindu Law to which the trust, though valid in other respects, must conform. She was not asking the Court to administer the trust but administer her husband's estate in accordance with these principles simply for the purpose of giving her proper maintenance. Hence the suit was not governed by s. 92, Civil Procedure Code, and not liable to be dismissed because it had not been filed as a representative suit with the sanction of the Collector. NARSIDASJI BALMUKUNDDASJI v. BAI JAMNA

Bom. 44

—s. 92—s. 92, scope of—*Temple a trust within purview of s. 92—Entire office of mahant is indivisible and falls under s. 92—Suit for only religious part of mahant's duties is maintainable.*

Where the mahant of a temple which is a trust for public purposes of a charitable or religious nature within the purview of s. 92 of the Civil P. O., has two capacities secular as well as religious, the entire office of mahant held by the same individual is indivisible and falls within the operation of s. 92. No words are to be found either in s. 92 or elsewhere excluding the religious part of the mahant's duties from the operation of that section. The only limit to the Court's jurisdiction to entertain suits under that section is to be found in the provisions of s. 9 of the Civil P. O., but, the spiritual portion of the office being intimately connected with the exercise of rights to property, a suit relating to it cannot be said to be outside the purview of s. 9. SATISH CHANDRA GIRI v. DEBARANI DEBI SINGHA ROY

PC 616

—s. 100. SEE Agra Tenancy Act, 1928,

ss. 3 (14), 249

808

—s. 100, O. XLI, r. 33—*Powers of second Appellate Court—Suit dismissed under s. 78, Bengal Land Registration Act by Appellate Court—Plaintiff getting registered during pendency of second appeal—Decree, if can be passed in second appeal.*

The provisions of O. XLI, r. 33, Civil P. O., are wide enough to enable the Court to take into consideration the entry in the land registration record made since the institution of the second appeal. In special circumstances the Court of second appeal can

Civil Procedure Code—contd.

take notice of facts material to the decision of a case which have arisen subsequent to the decision of the suit. Section 100 must be read with O. XLI, r. 33. Order XLI, r. 33, applies not only to appeals from original decrees but also to appeals from appellate decrees.

Where, therefore, a suit for rent instituted by a mortgagee has been rightly dismissed by the trial as well as the First Appellate Court under s. 78, Ben. Land Reg. Act, and during the pendency of the second appeal the mortgagee has been registered under the Ben. Land Reg. Act, the Court of second appeal can pass a decree in his favour on the basis of the registration. DOMAN SAHU v. GANGU NAYEK

Pat. 638

—s. 102—*Decree in suit to recover sums payable by khatedar to inamdar as superior holder—Second appeal, if lies.*

Sums payable by a khatedar to an inamdar as superior holder are "dues," and a suit to recover such dues is not cognisable by a Court of Small Causes, and a decree passed in such suit is subject to a second appeal. NAHAR SONAJEE JAHAGIRDAR v. TRIMBAK SHRIDHAR JAHAGIRDAR

Bom. 608

—ss. 102, 47—*Orders in execution under s. 47—Section 102, if applies—Appeal barred against judgment-debtor, if barred against surety.*

Section 102, Civil P. O., not only applies to appeals but to orders in execution under s. 47. If an appeal against an order under s. 47, is barred under s. 102 against the judgment-debtor, it is also barred against his surety. KHANDOCHAND MAYARAM v. PRASAD LAKSHMAL

Sind. 486

—s. 104—*Private reference to arbitration—Subsequent application to Court under Para. 17 (1), Sch. II, Civil Procedure Code (Act V of 1908), for filing agreement—Out of three arbitrators, two making one award and third making different award—Court finding majority award bad and refusing to make it decree—Appeal, if maintainable.*

Certain persons after making a private reference to arbitration, made an application to the Court under para. 17 (1) of Sch. II of Civil P. O., that the agreement to refer to arbitration should be filed in Court. The Court dismissed the application, but on appeal under s. 104 (1) (d), Civil P. O., the High Court directed the application to be filed. There were three arbitrators. Two of them made one award and the third made another award. The Judge found that the award of the majority was bad. He accordingly refused to make that award a decree of the Court:

Held, that no appeal lay from the order of the Court. MUL RAJ v. TULSI RAM

Lan. 632

—s. 104 (c)—*Appeal under—Validity of award itself, if can be challenged.*

The scope of an appeal under s. 104 (c), Civil P. O., is a limited one, and the party appealing can attack the order of the Court only in so far as it modifies the award and must confine himself to points which have a bearing on the modification made in the award. It is clearly open to the party attacking the order to show that none of the conditions mentioned in Para. 12 of Sch. II applied and the award could not have been modified; but s. 104 does not entitle a party to appeal against the award itself; nor can he in appeal under this provision attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. An award cannot, therefore, be challenged in an appeal under s. 104, on the ground that the arbitrator was not justified

Civil Procedure Code—contd.

in allowing certain amendment in the plaint.
TEJPAL MAHWARI v. KEDARNATH HIMATSINGKA

Pat. 273

—s. 109 (c)—*Applicability to interlocutory orders—Leave to appeal from interlocutory order, when granted.*

Clause (c) of s. 109, Civil P. O., applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. The mere fact that the order superseding the arbitration passed by the Court below was an interlocutory order cannot therefore be a bar to the application for leave to appeal to His Majesty in Council. But before the application can be granted, the High Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. A case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. One of the matters to be taken into consideration in this connection must invariably be whether the permission to appeal is or is not calculated to unduly delay the disposal of the substantive dispute between the parties on its merits. If the interlocutory order, the validity of which is sought to be tested by an appeal to His Majesty in Council, is one that is not calculated to prejudicially affect the right of either party to the litigation to have the substantive matters in dispute in the litigation decided by a competent Court ordinarily leave to appeal ought not to be granted. GOVIND DAS v. INDRAWATI

All. 854

—s. 110—*Amount granted by lower Court in land acquisition case, increased by High Court—There is affirmation of decision—Questions relating to method of calculating value of bungalows for land acquisition are substantial questions of law.*

Where in a case under the Land Acquisition Act, the District Judge has granted certain amount and on appeal the High Court has increased that amount, it must be taken for the purposes of s. 110, Civil P. O., that the decision of the lower Court has been affirmed by the High Court and therefore it must be shown that the appeal involves some substantial question of law.

Where the grounds of appeal refer to questions of law relating to method of arriving at the value of bungalows for the purposes of land acquisition they are substantial questions of law. SRI NARAIN KHANNA v. SECRETARY OF STATE

All. 513

—s. 110—*Applicant, if can be allowed to enhance valuation of plaint for purposes of s. 110.*

A person applying for leave to appeal to His Majesty in Council has no right to allege before the High Court that the valuation for jurisdiction which he put on his plaint in the trial Court was too low and that he should be allowed to enhance the valuation for the purpose of s. 110, Civil P. O. RAI SRI KRISHNA MOHAN JI v. PURSHOTAM DAS

All. 690

s. 115.

SHE Civil Procedure Code, 1908, s. 10 765

SHE Civil Procedure Code, 1908, s. 151 791

SHE Civil Procedure Code, 1908, O. XX, r. 13 813

—s. 115—*Mere error of law, whether ground for revision.*

A mere error of law on a question which the Court has jurisdiction to decide will not in itself be a ground for interference in revision. RAM OUDH v. GOVERNMENT OF BURMA

Rang. 574

—s. 115—*Order of Sessions Judge passed in revision under s. 111, Bombay Municipal Boroughs*

Civil Procedure Code—contd.

Act (XVIII of 1925)—Second revision, if lies—Interference, when justified.

The fact that revision is allowed to one Court by a statute does not necessarily exclude a further application in revision to the High Court. The High Court has jurisdiction under the Civil P. O., in a proper case to entertain an application in revision against an order in revision passed under s. 111, Bom. Municipal Boroughs Act, but such applications should be very sparingly entertained. The mere fact that the Sessions Judge has gone wrong in his law is not a ground which would justify the High Court in interfering in revision, in other than very special circumstances. LOKMANYA MILLS, LTD., BARRI v. MUNICIPAL BOROUGH, BARRI

Bom. 519

—s. 115—*Revision on ground that evidence is being or will be rejected by lower Court, if maintainable.*

High Court will not entertain an application for revision on the ground that evidence is being or will be rejected by the trial Court. An interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. It is open to the party to question the decision in appeal which is the proper time at which the error, if any, should be remedied. RAM OUDH v. GOVERNMENT OF BURMA

Rang. 574

—s. 115—*Revision, when permissible.*

Under s. 115, Civil P. O., revision is permissible only where the order complained of is not appealable. HARBALLAV PRASAD OHOWDHURY v. JAGABALLAV PRASAD OHOWDHURY

Pat. 769

—s. 115—*Scope of—Whether provides parties right of second appeal.*

Section 115, Civil P. O., is intended to relate to a question of jurisdiction. Section 113, is intended only to supplement the Code in relation to matters on which the Code is silent. It is not intended to provide the parties the right of a second appeal. KHANOHAND MAYARAM v. PESSUMAL LAKEHUMAL

Sind 486

—s. 115 (c)—*Mistake as to onus—Revision lies.*

The mistake as to onus gives rise to a revision petition. SHIB LAL v. GOBINDI

Lah. 613

—s. 144—*Sale confirmed but subsequently set aside—Application by judgment-debtor for mesne profits whether comes under s. 144.*

Section 144, Civil Procedure Code, contemplates restitution, where, and in so far as, a decree has been varied or reversed. An order of the executing Court confirming the sale, which is subsequently set aside does not amount to a decree, and, therefore, an application for mesne profits payable in consequence of that order cannot be made under s. 144. GANESH DATTA v. MODEL TOWN SOCIETY LTD.

Lah. 125

—s. 145—*Liability accrued before dismissal of execution application—Surety, if can be proceeded against.*

There is nothing in s. 145, Civil P. O., or any other section to prevent the judgment-creditor proceeding against a surety in respect of a liability accrued before the execution application is dismissed. There is nothing in that section to suggest that the dismissal of the execution application has retrospective effect so as to excuse the surety from any liability incurred before the dismissal. PEOPLES BANK OF NORTHERN INDIA, LTD. v. NANIKRAM CHHATISING

Sind 573

CIVIL Procedure Code—contd.

CIVIL Procedure Code—contd.

s. 151. See Civil Procedure Code, 1908, O. XLVII, r. 1 480 F B

s. 151—*Applicability of s. 151—Matters to be considered.*

Section 151 should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of this section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under this section. *RAMKHELAN SINGH v. MONILAL SAHU* Pat. 480 F B

s. 151—*Compromise decree proper on face of record—If can be set aside on application under s. 151.*

If a decree is sought to be set aside on the ground of fraud, misrepresentation or mistake, then several complicated questions would arise and they have to be decided in a separate suit. If on the face of the record the compromise decree is proper, then the Court which passed the decree cannot set it aside in an application under s. 151, Civil P. O. *KESAV RAMKRISHNA BHATT PHADKE v. SUBBA MANGA NAIR* Bom. 669

s. 151—*Remand—Necessary issues not tried—Case can be remitted for trial of these issues.*

Where the necessary issues in the case have not been tried, the Appellate Court can under the provisions of s. 151, Civil P. O., remit the suit to the trial Court for a re-trial upon those issues. *DABARMON v. RAN SINGH* Lah. 828

s. 151, O. XXXII, r. 5—*Decree absolute passed in proceedings for dissolution of marriage—Defendant minor but not represented by guardian—Decree, if can be set aside under s. 151 on application of third party—Decree is nullity but declaration to that effect cannot be made on application by third party under s. 151—O. XXXII, r. 5, applicability of.*

Where the High Court in proceedings for dissolution of marriage has made not merely a decree nisi but also a decree absolute for dissolution of a marriage, a third party cannot move the High Court to set aside that decree absolute by applying the provisions of s. 151, Civil P. O., and the High Court by the application of that section or any other section has no jurisdiction to set aside its own decree.

It may be the case that material facts have not been brought to the notice of the High Court, and that throughout the proceedings in Court right up to and including the decree absolute, the defendant was a minor, and that will necessarily affect the decree if the appointment of a guardian *ad litem* of the defendant was essential in a suit under the Divorce Act, but that is not by itself any reason for the Court to assume a jurisdiction under s. 151, Civil P. O., on an application by a stranger which it does not possess.

Order XXXII, r. 5, Civil P. O., is not applicable except while the proceedings in a suit are still pending.

Obiter.—Section 7, Divorce Act, merely relates to the principles and rules which are to guide the Court in acting and giving relief in suits and proceedings under the Divorce Act. But under s. 45, the provisions of Civil P. O. apply to proceedings under the Divorce Act and as the Code requires that a guardian *ad litem* should be appointed for a minor defendant, it would *prima facie* appear to follow that where no guardian *ad litem* had been appointed, the decree is a nullity, but the declaration that the decree is a nullity

cannot be given upon an application by a third party under s. 151, Civil P. O. *MRS. N. A. ALEXANDER v. M. S. JALIL* Oudh 884

ss. 151, 115—*Jurisdiction of Court under s. 151—Interference by High Court under s. 115 with order under s. 151.*

Section 151, Civil P. O., does not confer upon the Courts any powers with which they were not vested before the passing of the Civil P. O. There are certain well-recognized principles which guide the Courts in the exercise of their jurisdiction under s. 151. The Courts must proceed according to the principles of equity, justice and good conscience. Under s. 115 the High Court has jurisdiction to interfere, where the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity.

The parties entered into a contract which took the form of a mortgage-deed and a finance agreement both of which were executed on the same day at Bombay. The deed recited that "no suit or proceeding arising out of and in relation to this indenture shall be instituted in any Court other than the High Court of Judicature at Bombay." On default of the mortgagors to pay an instalment due under the mortgage, the mortgagees filed a suit at Bombay. Subsequently the mortgagors made an application under the U. P. Encumbered Estates Act and obtained an injunction restraining the mortgagees from proceeding with their suit in the Bombay High Court:

Held, that judged even by the lowest standards of commercial morality, the conduct of the mortgagors was utterly inexcusable. There was nothing whatever illegal in the contract and such a provision was quite usual and was in the circumstances eminently reasonable. In granting the injunction, the Court had not acted consonantly with the spirit of s. 151, Civil P. O. In restraining the mortgagees from doing something which the mortgagors agreed that they should be permitted to do in a solemn contract, the Court had not acted in accordance with the principles of equity, justice and good conscience. It was not in accordance with these principles to permit a party to repudiate his contractual obligations. In failing to take into consideration the legal rights of the mortgagees the Court acted with material irregularity. *GOVIND RAM v. A. U. JOHN* All 791

O. I, r. 8—*Suit against unregistered body through one of its members only—Procedure under O. I, r. 8, not followed and decree passed against that body—Trial held void and illegal.*

Where a suit is brought on behalf of or against an association or an unregistered body, then no one member thereof can alone sue or be sued. The suit must be brought by or against all the members thereof. In order that a decree passed in a suit against an unregistered body should be binding, the procedure laid down by O. I, r. 8 of the Civil P. O., must be followed. Order I, r. 8(1) and (2) lays down the conditions upon which a representative suit can be entertained and proceeded with and if the procedure laid down by that rule is not followed, then the result of the suit has no binding effect on those who are not on the record.

The objection that the procedure under O. I, r. 8, Civil P. O., was not followed, in a suit brought against an association through one of its members only, is not an objection as to non-joinder or misjoinder of parties. The prejudice is obvious in such

CIVIL Procedure Code—contd.

a case where all the members of an association have been made bound by the decree although they were never either parties to the suit or properly represented by some one else.

A suit was brought against All India National Congress which is not a registered body, describing the defendant as All India Congress through one B, Secretary of the exhibition, and a decree was passed against the All India National Congress without carrying into effect the procedure laid down by O. I, r. 8 of the Civil P. O., to secure the representation of all the members thereof:

Held, that the procedure under O. I, r. 8, not having been followed, the defect in such a case was not mere irregularity but went to the root of the case and the trial was wholly void and illegal and the decree passed against the All India National Congress could not be sustained;

Held, also that as B was not impleaded in his personal capacity and no relief against him personally was claimed, it was not open to the Chief Court to convert the decree passed by the Court below against the All India National Congress into a decree against B personally. THAKUR PRASAD SAKSENA v. FIEM SADIQ HUSAIN-MEHDI HUSAIN

Oudh 330

— O. II, r. 2. SEE Civil Procedure Code, 1908, s. 11, Expl. V 702

— O. V, r. 20 (2)—“Effectual” in O. V, r. 20 (2), meaning of.

The word “effectual” in O. V, r. 20, sub-r. (2) does not mean due service. The order for substituted service is made *ex parte*, and obviously it should be open to the defendant when he appears to show that the method employed was not calculated to effect the purpose which the Court had in view, namely, informing the defendant of the institution of the suit. The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. The basis of the order on which the Court orders substituted service to issue is either that the defendant is either deliberately keeping out of the way to avoid process or that it cannot be served in the ordinary way, perhaps through no fault of his own. In the latter case, the defendant may always show that the proceedings could not have come to his knowledge. In the former case the order of the Court is only relevant to the question whether the defendant was in a position to have knowledge of the proceedings, for obviously if a defendant keeps out of the way to avoid service of process on him either on account of the suit in question or of other suits that have been or may be filed against him, he cannot afterwards be heard to argue that he had no knowledge of the proceedings as he has deliberately put himself in a position where he can have no such knowledge. K. K. N. K. A. R. CHETTYAR FIRM v. AGA M. SHEHRAZEE

Rang. 663

— O. VI, r. 5—Rejected replication though cannot be treated as pleading, can be placed on record and used to contradict statements by petitioner under s. 145, Evidence Act (I of 1872).

Though the replication which is rejected cannot be treated as a pleading, the Court can place the replication on the record with its order thereon. The replication can be used as a previous statement to contradict the statements made by the petitioner in Court under s. 145, Evi. Act. BEHARI LAL SUD v. EMPEROR

Lah. 588

CIVIL Procedure Code—contd.

— O. VI, r. 17. SEE Civil Procedure Code, 1908, O. VII, r. 11 44

— O. VII, r. 11—Rule, if precludes amendment of plaint which under O. VI, r. 17, may be made at any time

No doubt O. VII, r. 11, Civil Procedure Code, uses the words “shall reject” which are mandatory words. But *prima facie* the Rule is mandatory only *rebus sic stantibus*, that is to say, when the Court has to deal simply with the position referred to in the Rule, and would not preclude an amendment of the plaint which under O. VI, r. 17, may be made at any stage of the proceedings. Order VII, r. 11, and O. VI, r. 17, ought to be read together. NARSIDASJI BALMUKUNDDASJI v. BAI JAMNA

Bom. 44

— O. VIII, r. 6. SEE Civil Procedure Code, 1908, s. 47 13

— O. VIII, r. 6—A suing B for share in certain amount realized by B—B claiming set-off in respect of certain amount awarded to him against A by previous decree—Set-off, if can be allowed—Omission of B to pay court-fees, whether affects his claim to set-off.

Where A sues B for a share in certain amount realized by B and B in his written statement claims set-off in respect of certain amount awarded to him against A by a previous decree, the set-off can be granted as both the claims are definite pecuniary demands. It does not matter that B had already secured by a judgment against A the amount which he claimed by way of a set-off. The omission of B to pay court-fees on the amount claimed does not affect his claim to set-off. LAXMAN MANJU NATHAYA BALWALLI v. VENKATRAO MANGESHAO

Bom. 13

— O. IX—Applicability to insolvency proceedings.

Having regard to the provisions of s. 5, Prov. Insol. Act, the provisions of O. IX, Civil P. O., may perhaps be held to be applicable to insolvency proceedings. RAMDEVAL BABULAL FIRM v. LAKHU SAO

Pat 857

— O. IX, rr. 7, 13, 6—Code, if in terms provides for application to set aside order declaring defendant *ex parte*—Courts in *mofussil* so declaring defendant—If can put restriction on him that he can only cross-examine opposite witnesses and not lead evidence himself—Whether can be debarred for filing written statement at that stage.

Though it is the practice in the *mofussil* to pass an order declaring a defendant *ex parte*, the Civil P. O., does not, in terms provide for an application to set aside that order. All that r. 7 of O. IX provides is that where the *ex parte* hearing of a suit has been adjourned, the defendant may at any time before the disposal of the suit appear, and if he assigns good cause for his previous non-appearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is only when a decree has been passed that an application in terms to set aside that decree is contemplated in r. 13.

In the absence of any express statutory provision as that found in O. VI, r. 2, of the Original Side Rules, Courts in the *mofussil* have no warrant to impose while declaring a person *ex parte*, a restriction on him to the effect that he is entitled only to cross-examine the witnesses on the other side and is not entitled to lead any evidence on his own side. Similarly there is no reason to deny him an opportunity to file a written statement at the stage. The mere fact that on the new statement

Civil Procedure Code—contd.

additional issues may have to be framed does not amount to re opening anything that has happened already. Where by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why rr. 6 and 7 of O. IX should be applied as penal provisions depriving parties of the opportunity of putting forward their defence *PERUMAL NAICKEN v KONDAMA NAICKEN* Mad 247

O. IX, r. 13. *See* Limitation Act, 1908, Art. 164 663

O. IX, r. 13—"Prevented by any sufficient cause from appearing" in O. IX, r. 13, meaning of. The words "prevented by any sufficient cause from appearing" in O. IX, r. 13, Civil P. O., clearly mean causes other than lack of knowledge of the proceedings. *K. K. N. K. A. R. CHETTYAR FIRM v. AGA M. SHEERAZEE* Rang 663

O. XIV, r. 5—Court cannot make out case for plaintiff that was never put.

It is not open to a Court to frame an issue on a point that does not arise out of the allegations made by the parties or their Counsel and the contents of documents. The trial Court cannot make out a case for the plaintiff that was never put forward. *NANDAL RAMPRATAP v DEORAO* Nag. 881

O. XIX, r. 1—Affidavits—When can be acted upon.

Affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence. *GOORU NARAYAN v. VAIKUNTAM CHINNA LAKSHMAYYA* Mad. 421

O. XX, r. 13, s 115—Order reversing preliminary decree on ground of want of jurisdiction—Setting aside of—Proper form of remedy. *See* Bombay Civil Courts Act, 1869, s. 23 (5) 813

O. XXI, r. 2 (1). *See* Civil Procedure Code, 1908, s 47 691

O. XXI, r. 11—Petitions by husband and wife under Guardians and Wards Act—Consent order passed by which husband was to pay for maintenance and schooling of children to wife or school authorities as the case may be—Wife taking out summons for leave to execute consent order as if it were money decree—Order held valid but could not be executed as decree for payment of money.

Husband and wife made cross-petitions under the Guardians and Wards Act, but arrived at an agreement with regard to the maintenance and custody of their minor children. A consent order was passed, whereby the husband was to pay the expenses of the maintenance and schooling of the children and the wife or the school authorities, as the case may be, were to receive the money for the said purpose. Subsequently the wife took out a summons for leave to execute the consent order as if it were a decree for the payment of money under O. XXI, r. 11, Civil Procedure Code:

Held, that the order did not fall within the terms of the Guardians and Wards Act, which does not confer on the Court any power to order a parent, or anybody else, to pay the school bills of the minors, but as the parties consented to the Court passing an order, which was within its ordinary jurisdiction, and as they were properly before the Court, the order was a valid order. The consent order, however, could not be regarded as a decree for payment of money to the decree-holder, the wife, for a part, and possibly the whole amount might be paid to third parties, and could not, therefore, be executed as

Civil Procedure Code—contd.

such *NARIMAN EDULJI v. FIROJBAI NARIMAN* Bom. 56

O. XXI, rr. 11 to 14. *See* Limitation Act, 1908, Art. 182 (5) 835

O. XXI, r. 15—One of several decree-holders as result of arrangement arrived at between them, applying for execution of decree—Omission to state in application expressly that he was only one out of several decree-holders—Whether invalidates application—Application, if can be allowed to be amended so as to bring it into compliance with O. XXI, r. 15.

The omission in an application by one of several decree-holders for execution to mention that there are other decree-holders does not necessarily invalidate the application and when the attention of the Court is drawn to the defect, the Court can allow the application to be amended.

Where, therefore, one of the several decree-holders, as a result of an arrangement arrived at between them applies for the execution of the decree without expressly stating in the application that he is only one of the decree-holders, his application is not liable to be dismissed by reason of the defect and the Court can allow the decree-holder to amend the application in order to bring it into compliance with the requirements of O. XXI, r. 15. It is not open to the judgment-debtor to raise an objection to the arrangement arrived at between the decree-holders. He can only request the Court under O. XXI, r. 15, to see that his interests were not in any way jeopardized by payment to one out of many decree-holders. *VHBRAMMANI v. VHBRABASAYA CHIKKA ROYAL* Mad 500

O. XXI, rr. 22, 66—Notice under O. XXI, r. 66—Judgment-debtor appearing and contesting execution proceedings—Failure to give notice under O. XXI, r. 22, and omission to record reasons for failure—Proceedings, if vitiated.

Where notice of the execution proceedings and sale thereunder is issued under O. XXI, r. 66, and the judgment-debtor appears and contests these proceedings, it is unnecessary to give the judgment-debtor notice of proceedings that he is already well aware of and failure to give notice under O. XXI, r. 22, and the omission to record reasons dispensing with this notice is no more than an irregularity which does not take away the jurisdiction of the Court. *LADLI PARSHAD v. OJAMAN LAL* Lah. 843

O. XXI, r. 35—Delivery of possession of land includes crops standing thereon.

Where the decree-holder is put in possession of land, such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land. *MAUNG KAN v. MAUNG PO TOK* Rang. 119

O. XXI, r. 46. *See* Civil Procedure Code, 1908, s. 60 460

O. XXI, r. 52. *See* Civil Procedure Code, 1908, s. 73 889

O. XXI, r. 54—Prohibitory order on judgment-debtor—Personal service, if essential.

The Code does not require personal service of the prohibitory order on the judgment-debtor. The omission to require service of a notice on the judgment-debtor in person in r. 54, O. XXI, was intentional. No notice other than the publication of the order is necessary. Except in the cases covered by O. XXI, r. 22, and except where the Court issues of grace of its own motion, notice to the judgment-debtor to show cause against attachment, the judg-

Civil Procedure Code—contd.

ment-debtor has no notice, actual or constructive, of attachment before a prohibitory order is issued under O. XXI, r. 54, as that is the first stage in execution by attachment of immovable property.
S. T. R. M. CHETTYAR FIRM v. ANDAT² AL

Rang. 386 S B

—O. XXI, r. 62—Mortgagee choosing to take advantage of summary procedure under r. 62, must suffer disadvantage also.

The mortgagee is not obliged to prefer any claim at all under O. XXI, r. 62, but if he chooses to take advantage of a summary procedure, he must suffer the disadvantages as well. AMBICA PRASAD SANYAL v. MESSRS. SOORAJMULL NAGARMULL FIRM Cal. 523

—O. XXI, r. 62—Order under r. 62, effect of. If a mortgagee without possession chooses to prefer an objection under O. XXI, r. 58, on the strength of his alleged mortgage, and an adverse order is passed against him in the objection proceeding, such decision is conclusive against him unless he brings a declaratory suit within one year. BHUBHO PRASAD v. SRI NATH All. 660

—O. XXI, rr. 62, 63—Order under r. 62, nature of—Mortgagee's application under r. 62 to have attachment continued subject to mortgage, dismissed—Order not set aside by suit under r. 63—Order becomes final and mortgagee is estopped from asserting rights denied by that order.

Order XXI, r. 62, Civil P. C., is an enabling provision and when the Court is satisfied that the attached property is subject to a mortgage or charge in favour of some person not in possession, it can direct the continuance of the attachment subject to such mortgage or charge. The order contemplated by this Rule clearly indicates that this is a judicial determination, though in a summary way of the question as to whether there is a valid mortgage or charge existing upon the attached property and when the Court passes an order, directing the continuance of the attachment subject to such charge, what is put up to sale is nothing more than the equity of redemption which the judgment-debtor has got in the attached property. The decree-holder or the purchaser cannot, in such cases, dispute the mortgage unless he brings a suit to set aside the summary order under O. XXI, r. 63. The same principle applies when the Court does not pass an order directing the continuance of attachment subject to a mortgage but the mortgagee's application to have such a direction is dismissed or refused. Whether the attachment on the property is directed to continue either subject to or free from the mortgage or charge, the order is one which comes within the purview of O. XXI, r. 62, and if it is not set aside by a regular suit commenced under O. XXI, r. 63, the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies. AMBICA PRASAD SANYAL v. MESSRS. SOORAJMULL NAGARMULL FIRM Cal. 523

—O. XXI, rr. 62, 66—Part of mortgaged property put up for sale in execution of money decree, by third person—Mortgagee's objection dismissed under r. 62—Order relates only to part put up for sale.

Where in execution of a money decree obtained against a mortgagor by a third person, a part of the mortgaged property is put up for sale and the mortgagee applies under O. XXI, r. 58, Civil P. C., but his objection is dismissed under r. 62 and the third person purchases the part of the mortgaged property, the order of the Court under r. 62 operates only in respect of that portion and the third person

Civil Procedure Code—contd.

cannot take advantage of this order in respect of other part of the mortgaged property purchased by him privately subsequent to the passing of such orders. BHUBHO PRASAD v. SRI NATH All. 660

—O. XXI, rr. 62, 66—Third person attaching mortgaged property in execution of money decree—Application by mortgagee that his mortgage should be notified in sale proclamation—Court dismissing application holding that mortgage was discharged—Order, whether under r. 62.

A decree-holder who had obtained a money decree against a mortgagor attached the mortgaged property in execution. The mortgagee applied to the executing Court stating that the attached property was mortgaged to him and praying that at the time of the auction sale notification of his mortgage should be made. Upon this application the mortgagor alone led evidence and the Court dismissed the application concluding that the mortgage had been discharged.

Held, that the order passed by the execution Court amounted merely to refusal to notify the mortgage in the proclamation for sale, and was not an order under O. XXI, r. 62, Civil P. C. and the mortgagee was not in any way debarred from contending in the subsequent case that the mortgage had not been paid up. BHUBHO PRASAD v. SRI NATH All. 660

—O. XXI, r. 63. Sess Limitation Act, 1908, Art. 182 (5) 70

—O. XXI, r. 63—Onus of proof—Claimant must show that he has right which was denied by adverse order.

Where in a claim proceedings under O. XXI, r. 58, an adverse order is passed against the claimant, the order is conclusive, unless it is displaced by a declaratory suit brought under O. XXI, r. 63. The onus is certainly upon the claimant to show that he has a right which was denied by the order. The burden cannot be discharged merely by pointing to the innocent appearance of the instruments under which the plaintiff claims. He must prove that they are as good as they look and it is not for the defendant to make out that they are collusive. DHIRENDRA NATH DAS v. INDRA CHANDRA KISHIYALA Cal. 871

—O. XXI, r. 63—Suit under r. 63—Whether claim under r. 62 was investigated or not is immaterial.

In order to bring a case within the purview of O. XXI, r. 63, Civil P. C., the question as to whether the claim was investigated or not is immaterial and if an adverse order is made against the plaintiff in the claim proceeding, he is bound to institute a suit under O. XXI, r. 63, failing which the order becomes conclusive and final. AMBICA PRASAD SANYAL v. MESSRS. SOORAJMULL NAGARMULL FIRM Cal. 523

—O. XXI, rr. 63, 62—Attachment of property in execution of simple money decree—Objection by third person that property was subject to his mortgage—Objection allowed and property sold subject to encumbrance—Fact that property is subsequently released from attachment whether relieves decree-holder of his duty to bring suit within one year.

The order in objection proceedings that property attached is subject to the mortgage of the objector is conclusive as against the decree-holder unless he brings a suit which would terminate in his favour, within the period of one year. The fact that the property was released from attachment afterwards in no way annuls the duty that

Civil Procedure Code—contd.

lies on him if he wishes to bring the property to sale unencumbered. *MISHRAIL v. BARIK* Nag. 727

— O. XXI, rr. 63, 62—Auction-purchaser knowing fictitious nature of mortgage but keeping silent to get property cheaper—Whether can challenge validity of mortgage in suit by mortgagee.

When upon attachment of property in execution of a simple money decree, a mortgagee objects to the attachment on the ground that the property was subject to his mortgage and the objection is supported by the judgment-debtor and the property is sold subject to the mortgage, and the auction-purchaser knowing that the mortgage was fictitious keep silent in the hope of purchasing the property cheaper, he cannot, in a suit brought by the mortgagee, challenge the validity of the mortgage. No equitable considerations can be brought into play in his favour. *MISHRAIL v. BARIK* Nag. 727

— O. XXI, rr. 63, 62—Sale as result of order under r. 62, effect—Distinction between where property is sold subject to mortgage and where notice of alleged mortgage is given in sale proclamation.

The phrase "subject to such mortgage" must mean that what is sold is the equity of redemption and that a distinction is made between an express order directing the property to be sold subject to a mortgage and cases where notice of an alleged mortgage is given in the sale proclamation. In the former case a prospective purchaser is told exactly what he is buying; in the latter he takes a chance that the mortgage which is alleged to exist may prove unenforceable either from inherent defects or possibly because it may have been satisfied by the time of the sale, and the price which the property would fetch would vary considerably according to whether the property is definitely stated to be sold subject to an ascertained encumbrance or merely subject to the risk of encumbrances existing. *MISHRAIL v. BARIK* Nag. 727

— O. XXI, r. 66. *See* Civil Procedure Code, 1908, O. XXI, r. 62

— O. XXI, r. 66 (as amended by Patna High Court)—Held, that there was no irregularity in entering valuation in sale proclamation.

In the execution the sale proclamation contained an entry of the value as given by the decree-holder and also mentioned the valuation arrived at in the High Court in earlier proceeding by an agreement between the decree-holder and the judgment-debtor. The sale took place on April 7, 1937:

Held, that it was not open to the judgment-debtor to contend that the entries regarding valuation in the sale proclamation constituted a substantial irregularity in the proceedings for sale. *RAZIA BEGUM v. KISHUNDRO NARAIN MAHTHA* Pat 404

— O. XXI, r. 93—O. XXI, r. 93, whether creates new right.

Per Roberts, C. J.—The Civil P. O., is adjective law as opposed to substantive law and O. XXI, r. 93 does not create a new right but merely gives a new and summary remedy in respect of immovable property to enforce that right. Order XXI, r. 93, only comes into operation if an order setting aside a sale has been passed under r. 93 and it does not provide the exclusive remedy of the auction-purchaser, and these rules have no application where an auction-purchaser has been deprived of the property purchased by him after the sale has been confirmed and by reason of the intervention of the true owner upon the ground that the judgment-debtor had no saleable interest in the property. *MAUNG ATA MAUNG v. A. SCOTT* Rang. 757 F B

Civil Procedure Code—contd.

— O. XXI, r. 98; s. 2—Plaintiff obtaining decree without fraud and collusion and bona fide, believing person sued against to be legal representative of his deceased debtor—Other legal representatives not parties to suit, whether bound by decree—Such representatives, if judgment-debtors within meaning of O. XXI, r. 98—Order passed in their favour refusing to deliver possession to decree-holder, whether appealable as decree.

Where a plaintiff bona fide believing that the person who is sued, is the proper legal representative of his debtor, obtains a decree against him without fraud or collusion, the other proper legal representatives of the deceased debtor would be bound by it even if they were not impleaded in the suit, when the person who has been sued as a legal representative is in possession of the whole estate left by the deceased debtor. The case would be still stronger if the interest of the person who had been sued turns to be identically the same as of those who were not impleaded for want of knowledge on the part of the plaintiff. When plaintiff in such a suit obtains a decree, the legal representatives who are not impleaded in suit must be regarded as judgment-debtors within meaning of O. XXI, r. 98, Civil P. O., and an order passed in their favour refusing to deliver possession to the decree-holder is appealable as decree. *V. V. VYTHILINGAM PILLAI v. SESHAN* Mad. 850

— O. XXI, r. 102—Transfers whether voluntary or otherwise, if covered—Transfer of Property Act (IV of 1882), s. 52.

The general doctrine of *lis pendens* under s. 52, T. P. Act, has been extended to involuntary alienations and the same principle should apply in the case of transfers which are covered by r. 102 of O. XXI, Civil P. O. The transfer of property belonging to the judgment-debtor, whether such transfer be voluntary or involuntary, nevertheless operates as a transfer by the judgment-debtor and, the language of r. 102 is sufficiently wide to cover both kinds of alienations by a judgment-debtor. *BHUPIN CHANDRA GORAIN v. BHIM CHANDRA MUKHERJEE* Cal. 424

— O. XXI, r. 103—Suit under O. XXI, r. 103—Right to present possession established—Plaintiff's dispossession pending suit is not material—Order of removal of his obstruction must be set aside.

In a suit under O. XXI, r. 103, Civil P. O. the plaintiff must prove not only that he was in possession when he obstructed the defendant in taking possession of the property in suit as its auction-purchaser, but must also "establish the right which he claims to the present possession of the property." If he succeeds in doing so, his dispossession during the pendency of the suit does not matter. If his right is proved, then the order of the removal of the plaintiff's obstruction must be set aside and the *status quo*, as at the date of that order, must be restored, that is to say, the plaintiff must be put back into possession. *BAI HAKIMBU v. DATABHAI KUGNATH* Bom. 655

— O. XXII, r. 1—Person obtaining decree for compensation for malicious prosecution dying during execution proceeding—Execution, if abates—Whether can be continued by his heir.

It is true that the right to get compensation for malicious prosecution is personal to the person wronged, and to such a right, the maxim *actio personalis moritur cum persona* (a personal right of action dies with the person) fully applies. If there-

Civil Procedure Code—contd.

fore such person dies before suing the wrong-doer, his heirs, executors or administrators cannot, after his death, maintain an action for the same relief against the wrong-doer. In such a case clearly there is a "discharge of the tort" by the death of the person wronged, and the wrong-doer is released from all liability for his tortious act. It is equally clear that if the injured person had brought a suit, in his life-time, but had died before a decree had been passed in his favour, the suit would have abated and his legal representatives could not have continued the suit after his death, for the "right to sue" in such a case being personal to the deceased did not 'survive'. The position, however, is different when the suit had been decided in the plaintiff's life-time and a decree passed in his favour granting him compensation. On the passing of the decree, there is no longer an *actio personalis* in existence; it has passed into a judgment and become a matter of record (*transit in rem judicatum*). The original personal claim has merged in the decree of the Court, and as such, its character has entirely changed. It has to all intents and purposes, become a part of the "property" of the decree-holder and, on his death, it devolves, as a part of his estate, on his heirs, executors or administrators, and they can execute it in the same manner as he would have done, if alive. **SALIG RAM v. CHARAN DAS** *Lah. 877*

O. XXII, r. 3—*Suit by joint Hindu brothers as reversioners—One dying—Steps to bring his legal representative on record not necessary.*

Where a suit has been instituted by joint Hindu brothers as next reversioners and one of them dies the other brothers being nearer reversioners than the sons of the deceased, are his legal representatives and being already on record, no steps are necessary to bring them on record. **RAM SARUP SINGH v. MOHAN SINGH** *All. 783*

O. XXII, rr. 3 and 4. See Limitation Act, 1908, s. 5 *402*

O. XXII, r. 4—*Cause of action for suit—Joint act of defendants and joint relief claimed against all defendants—Suit dismissed—One defendant dying during pendency of appeal and his legal representative not brought on record—Appeal abates as whole.*

If the absence of the legal representatives of a deceased party from the record will result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectually to execute a decree that may be passed in an appeal, the appeal must fail.

Where a joint relief is sought for by the plaintiff against all the defendants, on whose joint act the cause of action for the suit is based, and during the pendency of an appeal from the dismissal of the suit one of the defendants dies and his legal representative is not brought on record, the appeal abates as a whole and must be dismissed as there would be two inconsistent decrees if the appeal were allowed. **RANI DHANDEI KUR v. FATMA ZULRA** *All. 649*

O. XXII, r. 11, O. XLIII, r. 1 (k)—*Order refusing to set aside abatement of appeal—Whether appealable.*

An appeal lies against an order refusing to set aside an abatement of an appeal. **RAM RANBIJAYA PRASAD SINGH v. MADHO TURRA** *Pat. 498*

O. XXIII, r. 3. See Civil Procedure Code, 1908, O. XXXIV, r. 4 *75*

O. XXIII, r. 3—*Manager, Court of Wards agreeing to pay decree-holder without seeing whe-*

Civil Procedure Code—contd.

ther decree was barred by time—Decree barred by time then—Agreement, if enforceable.

Where a Manager of Court of Wards does not apply his mind to the question whether the decree-holder's claim was within time or not, an agreement entered into by him with the decree-holder to pay a certain amount in full satisfaction of the decree which had by that time become barred by time, is not a lawful agreement capable of enforcement by Court under the provisions of O. XXIII, r. 3 of the Code of Civil Procedure, and the Manager is not estopped in any manner from resiling from the settlement. **ANAND BHABRI LAL KHANDELWAL v. DEPUTY COMMISSIONER, BARA BANKI** *Oudh 290*

O. XXVI, rr. 9, 10—*Commissioner's report—Principles to be adopted in dealing with.*

The principle to be adopted in dealing with the Commissioner's report is that there should be no interference with the result of a long and careful local investigation except upon clear defined and sufficient grounds. It is not safe for a Court to act as an expert and to overrule the elaborate report of a Commissioner whose integrity and carefulness are unquestioned, whose careful and laborious execution of his task is proved by his report, and who has not blindly adopted the assertions of either party. **CHANDAN MULL INDRA KUMAR v. OHIMAN LAL GIRDHAR DAS PABKH** *P. C. 219*

O. XXXII, r. 3—*Appeal by third person on behalf of minor, when there is properly constituted guardian ad litem—Propriety.*

Execution proceedings are only a continuation of the regular suit and the guardian *ad litem* appointed in the civil suit continues to be the guardian *ad litem* in execution proceedings and for the purpose of appeal.

Where there is a properly constituted guardian *ad litem*, no one else can represent the minor in appeal, which would be dismissed in his absence. Such dismissal of appeal on the ground that the minor was not properly represented cannot affect the minor's interest as he is bound by it. **SINGARAM v. S P. R. SOMASUNDARAM** *Rang. 883*

O. XXXII, r. 5, applicability of. See Civil Procedure Code, 1908, s. 151 *884*

O. XXXII, r. 5 (2)—*Minor without guardian, applying for execution of rent decree—Court, if can allow Receiver appointed in proceedings to execute decree on his behalf.*

Sub-r. (2) to r. 5 of O. XXXII, Civil Procedure Code, does not say that an order on any application made by a minor where no next friend or guardian is appointed 'shall' be discharged; it says 'may' be discharged. The sub-rule cannot be construed to deprive the Court of its discretion to allow proceedings, which are in the interests of the minor to go on, or to permit them to be frustrated by mere accident or technicality.

So where an application for execution of rent decree is made by the minor without a guardian being appointed, the Court may allow the Receiver appointed in the proceedings to recover rent on behalf of the minor. **LALUMAL DHOLUMAL v. HARUMAL LALSINGH** *Sind 155*

O. XXXIII—*Notice—Provisions of O. XXXIII regarding notice to be understood as incorporated in O. XLIV, r. 1, so far as applicable.*

Although there is no express provision in O. XLIV, Civil P. C., applicable to appeals for the issue of a notice yet the provisions, in so far as they are applicable, contained in O. XXXIII ought to be understood to be incorporated inasmuch as it is

Civil Procedure Code—contd.

expressly laid down in O. XLIV, r. 1. *RAM KAILASH KUNWARI v. ISHWAR SARAN* All. 406

—O XXXIV—Agricultural land hypothecated in decree—Decree-holder authorised to recover decretal amount by sale—Attachment before sale, if necessary.

Where in a decree which was based on an award agricultural land was hypothecated and the decree-holder was expressly authorized to get the amount due under the decree realized by sale of the property, the decree comes within the purview of O. XXXIV, Civil P. C. The decree being thus in substance a mortgage decree, it is not necessary to effect attachment of the land before ordering its sale in execution. *LADLI PARSHAD v. CHAMAN LAL* Lah. 843

—O. XXXIV, r. 4, O. XXIII, r. 3—Preliminary decree under O. XXXIV, r. 4—Terms thereof are imperative—Payment or adjustment out of Court without sanction cannot be recognised.

The terms of a preliminary decree passed according to the provisions of O. XXXIV, r. 4, Civil Procedure Code, as regards payment in Court, etc., are imperative; and payment or adjustment out of the Court without its sanction is inadmissible under O. XXIII, r. 3, Civil Procedure Code, and will not be recognised. A preliminary decree in a suit for sale is a formal adjudication of the rights of the parties with reference to the mortgage and the decree directs that the plaintiff's claim shall be satisfied by a payment in Court in a certain manner. Any adjustment out of Court would, therefore, be obviously contrary to the terms of the decree. *RAJA RAM v. ALLAHABAD BANK, LTD.* Lah. 75

—O. XXXVIII, r. 10—Applicability, where property attached before judgment is cash—Attachment—Before judgment—Priority.

The principle of O. XXXVIII, r. 10, Civil P. C., also applies to a case where property attached before judgment is cash. Where therefore a sum of money is attached before judgment by a person in his suit and another decree-holder attaches the same sum in execution of his decree, the person who has obtained attachment before judgment cannot claim priority after his suit is decreed. *DURGA PRASAD v. SEETTA PRASAD TIWARI* Oudh 301

—O. XXXVIII, r. 10—Attachment—Before judgment—Provisional order coming for being made absolute—Court directing defendant to furnish security, and on failure, property would be attached—Effect of.

Where at the time when the provisional order for attachment before judgment has come before the Court for being made absolute, the Court directs the defendant to give security and says "failing which the property will be attached," all that the Court means is that the attachment on the property will be continued, that is to say, the Rule will be made absolute unless the security is furnished within time allowed in which case the attachment will be discontinued. *BASAPPA CHANBASAPPA CHEKKY v. HANMAPPA KAMAPPA MANAUR* Bom. 225

—O. XXXIX, r. 2—Temporary injunction in suit for declaration and injunction, when could be granted—*Prima facie* case and balance of convenience must be made out. See Tort 57

—O. XLI, r. 4. See Abatement 685

—O. XLI, r. 19. See Civil Procedure Code, 1908, O. XLVII, r. 1 480 F B

—O. XLI, r. 33. See Civil Procedure Code, 1908, s. 100 638

—O. XLI, r. 33—Scope—Respondent wishing to

Civil Procedure Code—contd.

maintain decree of lower Court—Whether can challenge finding, result of which would be to destroy part decree passed by lower Court in favour of appellant, without preferring appeal or filing cross-objection.

Rule 33 of O. XLI, Civil Procedure Code, gives to the Appellate Court power to pass any decree and make any order which ought to have been passed or made, etc. This rule contemplates modification of the decree by the Appellate Court at the instance of the appellant. It has no scope where the respondents in effect want to maintain the decree of the lower Court or where the decree under appeal is not modified in appeal. Where the respondent says that he wants to maintain the decree of the lower Court and does not want it to be disturbed, he cannot challenge a finding, the result of which would be to destroy the foundation on which the part decree made by the lower Court in favour of the appellant rests, without preferring any appeal or filing a memorandum of cross-objection. *FAROK AHMED MEAH v. LALIT MOHAN CHOUDHURY* Cal. 94

—O. XLI, r. 33—Suit dismissed—Appeal by one of defendants—No appeal by plaintiff but only cross-objection—Appellate Court, if can grant him relief.

Where an action is dismissed and an appeal has been filed by one of the defendants, the Appellate Court has power under O. XLI, r. 33, Civil Procedure Code, to grant the plaintiff relief even if he has not preferred an appeal but has filed only cross-objection. *HALLIMAN BIBI v. MUHAMMAD TAJAMUL HUSSAIN* Pat 250

—O. XLIII, r. 1—Order amending final decree, if in itself appealable—Whether can be treated as amending preliminary decrees and appealed against.

On an application under s. 151, Civil Procedure Code, the Subordinate Judge believing that he was in error when he passed the final decree purported to amend his own final decree by altering the same in order to correct what was believed to be a mistake. The District Judge on appeal treated the order of the Subordinate Judge amending the final decree as a decree and allowed the appeal.

Held, that the order of the Subordinate Judge amending the final decree was not an appealable order in itself; but that he should be treated to have amended the preliminary decree which amended decree could be appealed against. *KHODROMAL JBRAMDAS v. MBNGHOMAL JBRSDMAL* Sind 67

—O. XLIII, r. 1 (K). See Civil Procedure Code, 1908, O. XXII, r. 11 498

—O. XLIII, r. 1 (w), O. XLVII, r. 4 (1)—Appeal under O. XLIII, r. 1 (w), if subject to O. XLVII, r. 7.

The right of appeal granted by O. XLIII, r. 1 (w), Civil P. C., is subject to the grounds set out in O. XLVII, r. 7. *HARBALLAV PRASAD CHOWDHURY v. JAGBALLAV PRASAD CHOWDHURY* Pat. 769

—O. XLIV, r. 1—Application for leave to appeal as pauper—Notice issued to respondent—Right of respondent to be heard on merits of appeal.

The wording of the proviso to O. XLIV, r. 1, Civil P. C., directs the Court to reject the application unless upon a perusal thereof and of the judgment and decree, certain matters appear to the Court. The word "perusal" implies that this is not to be the subject of argument by Counsel and that there is no right of Counsel to

Civil Procedure Code—contd.

argue on the merits of the proposed appeal. The amendment of the Allahabad High Court directing notice to issue to the respondent does not give him any right to be heard on the point. All that he can argue is on the question of whether the proposed appellant is or is not a pauper. *RAM KAILASH KUNWARI v. ISHWAR SARAN* All. 406

O. XLV, r. 7. SSB Federal Court Rules, 353 F B

O. IX, r. 1
O. XLV, r. 7—*Privy Council Rules, r. 9—Time for lodging security, if can be extended under r. 9 beyond limit specified in O. XLV, r. 7.*
The discretion given to the Court by r. 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion, the Court must have regard to the fact that under O. XLV, r. 7, the extension of time for giving security is strictly limited, and it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that Rule. *SHANKAR DYAMANGONDA PATIL v. PUTTABAI GURUNATHGONDA K. PATIL* Bom. 410

O. XLV, r. 7—*Time for furnishing security beyond that prescribed by O. XLV, r. 7, if can be extended—Privy Council Rules—R. 9.*
Under r. 9 of the Privy Council Rules, the High Court has power for cogent reasons to extend the time for furnishing security beyond that which would be allowed by O. XLV, r. 7, if it were read alone. *ISMAIL PIPERDI v. MOMIN BI BI*

Rang. 819 F B
O. XLVII—*Interpretation of O. XLVII, r. 4 (1).*

Sub-rule (1) of r. 4, O. XLVII, Civil P. C., cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted, the case falls under sub-r. 2. *HARBALLAV PRASAD OHOWDHURY v. JAGBALLAV PRASAD OHOWDHURY* Pat. 769

O. XLVII, r. 1—*Words "any other sufficient reason," meaning of—New matter or evidence—Discovery must be by party—Error—Nature of.*

Rule 1 of O. XLVII must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in r. 1.

Under O. XLVII, r. 1, the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. *RAMKHELAWAN SINGH v. MONILAL SAHU* Pat. 480 F B

O. XLVII, r. 1, O. XLI, r. 19, s. 151—*Order dismissing appeal for failure of appellant to file list within time—Application to set aside, not maintainable under O. XLVII, r. 1 but under s. 151.*

An application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed cannot be entertained as an application for review under O. XLVII, r. 1, Civil P. C. Order XLI, r. 19, which is the only provision

Civil Procedure Code—contd.

in the Code for the restoration of the appeal does not apply to such a case but such an application may be entertained under s. 151. *RAMKHELAWAN SINGH v. MONILAL SAHU* Pat. 480 F B

Sch. II—*Parties agreeing as to their respective shares—Agreement incorporated in preliminary decree and division of properties referred to arbitrators—Final decree wholly based on award—Case, if falls under Sch. II.*

There is nothing in the Code of Civil Procedure to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit. Where in a partition suit the parties have agreed among themselves as to their respective shares and this agreement is incorporated in the preliminary decree but the division of the properties is referred to the arbitrators and the division of the properties which is wholly a subject of the final decree, is wholly based upon the award of the arbitrators, the case falls under Sch. II. *RADHEY LAL v. KANHAI LAL* Pat. 52

Para. 1—*Partition suit—Parties not agreeing as to mode of division of properties and referring matter to arbitration—Such case, if covered by Para. 1.*

The expression "the matter in difference between the parties" which has been used in Para. 1, Sch. II, Civil Procedure Code, is quite general and fully covers a case where in a partition suit the parties not having agreed among themselves as to how the property was to be divided, referred the matter to the arbitrators. *RADHEY LAL v. KANHAI LAL* Pat. 5.

Para. 16—*Decree in accordance with award—Award in excess of powers conferred on arbitrators—Appeal, if lies.*

There is ample provision in Paras. 14 and 15, Sch. II, Civil Procedure Code, to enable the Court to which the award is submitted, to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the Court it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the Court should be challenged on appeal. Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely, the Court through which reference is made to arbitrator and not that Court and an Appellate Court. No appeal, therefore, lies from the decree when it is in accordance with the award, even the award itself is in excess of the powers conferred upon the arbitrators. *RADHEY LAL v. KANHAI LAL* Pat. 5

Para. 17 (1). SSB Civil Procedure Code, 1908, s. 104
Companies Act (VII of 1913), s. 21 (2)—*Meaning of.*

It is no doubt true that money becomes a debt when it is due under the Articles of Association and Memorandum, but money does not become a debt merely because signatories of the Articles of Association or the Memorandum have undertaken to purchase shares and pay for them. There is a distinction between money which is due and money which is presently due and it is only money which is presently due which can be described as a debt. *VISHWANATH PRASAD JALLAN v. HOLLAND CEMENT LTD., BENARES* All.

s. 21 (2)—*Signatories of Memorandum un-*

Companies Act—contd.

taking to purchase certain shares—No time for payment for such shares fixed—Shares, if can be forfeited on failure to pay before date fixed for payment by general public subscribing to shares.

The signatories of the Memorandum and Articles of Association of a certain company undertook to purchase certain number of shares each. There was no term in the Articles of Association or Memorandum by which the signatories contracted to pay any sum on any particular date or any particular time, or on demand. The signatories failed to pay the prescribed amount of their shares on or before the date fixed by the directors for payment by the members of the public subscribing for the shares, and their shares were forfeited:

Held, that the amount was not presently due from the signatories and, therefore, their shares were not liable to forfeiture. *VISWANATH PRASAD ALLAN v. HOLYLAND CINETONE, LTD., BENARAS* All. 501

s. 30—In order to give rise to liability to pay up value of shares, express allotment of shares to subscriber is necessary.

Although in the case of a person who subscribes to the memorandum of association, no separate application for shares is necessary, yet an express allotment of shares to subscriber is necessary, in order to give rise to a liability to pay up the value of the shares. The liability to pay up the value of the shares does not arise where there has been no valid allotment of shares to the subscriber. *SYNEMOBLUX LTD., TINNEVELLY v. K. VENNAMUTHU PILLAI* Mad. 712

s. 186. See Civil Procedure Code, 1908, s. 73 889

s. 234—Lahore High Court's Rules and Orders, Vol. II, Chap. I—R 68—Liquidator must make out case that compromise will be beneficial.
The liquidator cannot consider a mere matter of pity or mercy. He must make out a case that the compromise will be beneficial to the Company! for example, that there is a contested claim, and if the compromise is entered into, the payment would be made very much sooner than if the claim was contested; or on similar grounds. *In the matter of PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE* Lah. 314

s. 234—Lahore High Court's Rules and Orders, Vol. II, Chap. I—R. 68—Unwilling liquidator, if can be compelled to compromise debt due to Company.

The Court has no jurisdiction to compel an unwilling liquidator to compromise a debt due to the Company in liquidation. *In the matter of PEOPLES BANK OF NORTHERN INDIA LTD., LAHORE* Lah. 314

s. 277-N—Order under, when should be passed, stated.

It was never the intention, of the Legislature in enacting s. 277-N, Companies Act, that a company in an insolvent position should be allowed to continue its operations under the protection of the Court and that those who had dealings with the Company should be prevented under the orders of the Court from seeking legal remedies to which they would otherwise have been entitled. It may be that the directors and the Chairman of a Company are actuated by the best of motives and that they think and hope that their arrangements are those best suited to meet the liabilities of the Company, but that is no ground in law for passing an order under s. 277-N, Companies Act, unless the Court really is satisfied that the position of the

Companies Act—concl'd.

Company is embarrassed only temporarily. *In the matter of BENARAS BANK, LTD., BENARAS* All. 388
Company—Contributories—Father purchasing shares for minor sons by signing application form on their behalf—Father held owner of shares and contributory—Benami transaction.

In India, the presumption in law is that if a person buys property in the name of another but with his own money, the transaction is *benami* and that the property in what is bought is in the person whose money was used for the transaction. So where a father with his own money purchases shares of a company for his minor sons and signs the application form on behalf of his sons, the father must be considered as owner of the shares and must be placed on the list of contributors. The same principle applies where the father purchases by transfer shares by signing his minor son's name on the transfer form as transferee through himself. *In the matter of MUSLIM BANK OF INDIA, LTD.* Lah. 176

Shares—Local situation of.

The general rule is that the local situation of a share is the place where the share can be transferred on the register of the company. *AHMED IBRAHIM SINGAPORE v. COLLECTOR OF SUEZ* Bom. 870

Contempt of Court—During pendency of proceedings under s. 107, Criminal Procedure Code (Act V of 1893), against certain persons, an M. L. A., writing to Magistrate to withdraw proceedings against one of them—Contempt of Court held committed.

No member of the Legislative Assembly has any right to interfere in the course of administration of criminal justice.

While proceedings under s. 107, Criminal P. O., against certain persons were pending in the Court of a Magistrate, a member of the Legislative Assembly wrote a letter to the Magistrate with the intention that the proceedings against one of the persons should be withdrawn:

Held, that the latter grossly offended against the law of contempt of Court. *DISTRICT MAGISTRATE, SULTANPUR v. RAMJAS YADAVA* Oudh 754

Publication of pamphlet during pendency of proceedings, when amounts to contempt of Court.

A pamphlet published during the pendency of proceedings is contempt of Court, if (1) it assumes the truth of certain facts which are connected directly or indirectly with the matters under consideration and awaiting decision in the appeal itself, (2) the document contains reflections of the gravest possible nature upon the conduct and the character of certain of the persons in the appeal, and (3) the pamphlet purports to predict that the appellants will be or are likely to be successful in the appeal and adds the comment in effect that if they are successful, law and justice will be defeated. *BIBHABATI DEVI v. KUMAR RAMENDRA NARAYAN ROY* Cal. 286 S B

Writing and publishing article likely to prejudice pending case amounts to contempt of Court—Accused held guilty of contempt but was discharged under s. 3, proviso 1, Contempt of Courts Act (XII of 1926).

The special privilege of the press is a time-worn fallacy, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. Writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court.

Contempt of Court—concltd.

Held, that the article grossly offended against the law of contempt of Court. [The accused was, however, discharged on his tendering unqualified apology, under first Proviso to s. 3, Contempt of Courts Act.]
DISTRICT MAGISTRAR, KENRI v. HAMID ALI GARDISH

Oudh 342

Contempt of Courts Act (XII of 1926), s. 3, Proviso 1. See Contempt of Court 342

Contract—*Champerous transaction—Agreement to finance suit in consideration of having share in property, if recovered—When opposed to public policy—Points to be considered—Agreement held valid.*

Champerous transactions are in their essence speculative and the fairness or otherwise of a particular bargain is almost always open to some debate. In applying the principle that "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy" it is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This has to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have had to be shared with the financier. Though it is clearly not conclusive, the proportion to be retained by the claimant is an important matter to be considered when judging of the fairness of a bargain made at a time when the result of the litigation is problematical. The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money, he may well be allowed some chance of exceptional advantage:

Held, that the agreement was valid and binding.
RAM SARUP v. COURT OF WARDS

P C 590

—*Concluded contract—Burden of proof—Only certain terms settled, while others left open—Whether concluded contract—Option for renewal of contract on terms to be mutually agreed upon—Whether implies that terms of prior contract should be incorporated in new one.*

In an action on an alleged contract, the burden of proof is of course, upon the plaintiffs to show that a firm contract has been entered into between the parties and that something more than mere negotiations had taken place. The negotiations and correspondence must be looked at as a whole to see whether the parties to them have concluded a binding contract or not. There is no concluded contract, where only certain terms of the contract were settled and the other terms were left open.

Moreover, the fact that a party to the contract has given the other party to it, an option for renewal of the contract on terms which would be mutually agreed upon, does not imply that the terms of the prior contract, or any of them should be incorporated in the new one. The party does not bind itself in any way to renew the contract upon the old terms. AKOONH JADWET & Co. v. A. V. & SON

Rang. 705

—*Contract of guarantee—Contract held not one of guarantee.*

Relevant clauses in a contract between an insurance company and its employee were as follows:—that he should get Rs. 125 per mensem as salary. Subsequent increment was to be proportionate to the

Contract—concltd.

increase of business, the basis of calculation being one and half lacs. That he was expected to complete a business of Rupees one and half lacs during the first year which was to increase year by year with the expansion of organization:

Held, that this could not be construed as a contract of guarantee. The securing of business was not a condition precedent to the accrual of salary.
PREM PARKASH SHARMA v. FEDERAL INDIA ASSURANCE CO., LTD. DELHI

Lah. 122

—*Conveyance and contract of sale—Distinction pointed out.*

There is a distinction between a conveyance and a contract of sale of minor's property. When the minor's property is already alienated, the Court is required only to find whether the alienation is binding on the minor or not. In such a case, no consideration of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. KRISHNA CHANDRA SHARMA v. RISHABHA KUMAR

Nag. 156

Contract Act (IX of 1872), ss. 19, 20—*Suit for possession by Municipality decreed with costs—Judgment-debtor's offer not to file appeal and also to deliver possession, if Municipality gave up costs, accepted—Judgment-debtor found not to have right of appeal—Agreement held either void under s. 20 or voidable under s. 19.*

Municipal Committee instituted a suit for possession of certain property which was alleged to have been encroached upon by one R. The suit was decreed with costs. The judgment-debtor R thereafter applied to the Municipal Committee to the effect that if the Committee gave up the costs, he would not file any appeal from the decree and also deliver possession of the property. The Committee accepted this offer. The Committee on re-examination of the matter found that as a matter of fact R had no right to appeal at the time when he made the offer:

Held, that even if the judgment-debtor made the offer honestly believing that he had a right of appeal, it would amount to saying that both the parties were under a mistake of fact essential to the agreement when they were alleged to have entered into the agreement in question; because the Committee would never have agreed to give up their costs if they knew that R's right of appeal had already become time-barred. If, on the other hand, R had made a dishonest misrepresentation, the agreement would be voidable at the instance of the Committee on that account. In either aspect of the case, the agreement would be voidable or void under s. 19 or s. 20, Contract Act. RAM RATTAN v. MUNICIPAL COMMITTEE, AMRITSAR

Lah 713

s. 25 (3)—*Manager of Court of Wards, whether agent generally or specially authorised to pay time-barred debt.*

The Deputy Commissioner, acting on behalf of the Court of Wards, is not an agent generally or especially authorised to pay a time-barred debt of the ward: ANAND PRAHARI LAL KHANDELWAL v. DEPUTY COMMISSIONER, BARA BANKI

Oudh 290

s. 40 illus. (a) *on death of banker liability of his sons to pay sums to customers, whether changed—Banker and customer.*

Where an amount has been deposited with a banker the death of the banker does not alter the nature of

Contract Act—conold.

the liability of his sons to pay that amount. The case falls within illus. a) to s. 40 of the Contract Act and the liability in respect of this money remains entirely unchanged by the banker's death. *NRIEENDRA NATH CHATTERJEE v. ARUN CHANDRA CHATTERJEE* Pat. 339

— s. 65—Minor granted relief—Awarding of compensation to other party is in discretion of Court—Compensation held could not be awarded.

While it cannot be held that in every case in which relief is granted to a minor, he should be made to return the benefit derived by him from his contract, it cannot also be ruled that in no case can any person who seeks to avoid a contract entered into by him in his minority be made to pay compensation to the other party.

The fact that the purchaser was cognizant of the seller's minority at the time of the sale totally disentitles him to claim any compensation. *BAGHAI v. HAYAT MOHAMMAD* Oudh 337

— s. 74. See Mortgage 440 (b)

— ss. 114, 160—Company depositing as security in respect of warehouse Government promissory note—Position of Government is of bailee—Return of note—Interest of third party in note, effect of.

Where Govt. accepts a Govt. promissory note deposited by a company with the excise authorities as a security in respect of a private warehouse, the Govt. becomes under s. 114, Contract Act, the bailee and must return the note to the bailor without demand after the termination of the license. The fact that some third person has interest in the note cannot be a ground for refusal to return it. *R. ECKTEL v. PROVINCE OF BENGAL* Cal. 214

— s. 128—Surety—Liability, extent of—Surety binding himself for due appearance of judgment-debtor in Court on date of hearing or as ordered by Court—Judgment-debtor absconding—Surety held liable.

By a surety bond it was provided that the surety would secure the attendance of the judgment-debtor in Court on a particular day and thereafter when ordered by the Court to appear. The judgment-debtor appeared on some hearing and was informed about the next hearing date, when he did not appear before the Court so as to enable the Court to deal adequately with the execution application before it because the judgment-debtor absconded;

Held, that *prima facie* the surety was liable. *PEOPLES BANK OF NORTHERN INDIA, LTD. v. NANIKRAM CHARATSING* Sind 573

Contribution—Claim for contribution as between partners, when cannot be entertained.

It is one thing to say that money was borrowed as it was required for the partnership trade by both the partners, the borrowing itself not being a partnership transaction though the partners borrowed it in order to advance it to the partnership as capital, and it is quite another thing to say that the borrowing itself was by the partnership. It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership that it would be excluded by the general doctrine that as between partners there can be no claim for contribution. *KANNAYYA REDDI v. MUTHU REDDI* Mad. 62

— Debt borrowed for partnership trade—Joint decree against partners—One partner paying off whole decretal amount, if can claim contribution against others.

Where the claim for contribution is not based on

Contribution—conold.

the ground that as a partner the defendant is liable to contribute but the basis of the claim is a joint decree made against the plaintiff and the defendant in respect of debt contracted for partnership trade in execution of which the plaintiff alone had to pay the entire amount due under the decree in such a case, the law of partnership does not prohibit the entertainment of a claim for contribution against other partner. *KANNAYYA REDDI v. MUTHU REDDI* Mad 62

— Suit for—Liabilities of all parties must be determined once for all—Necessary party not impleaded—Effect

In a suit for contribution, the respective liabilities of all the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. Hence a suit for contribution would fail *in limine* where a person who is a necessary party and in whose absence the liabilities of the parties to the suit cannot be satisfactorily ascertained, is not impleaded in the suit.

In a suit for contribution the consideration that the plaintiffs were no parties to the contract between defendants *inter se* is by no means conclusive of the matter. *A. JAMES v. ACHAIKAR SINGH* Pat. 297

Contributory Negligence. See Tort—Negligence 599

Co-operative Societies Act (II of 1912), s. 51—Limitation—Award by Registrar—Enforcement by Civil Court other than High Court—Limitation applicable—Limitation Act (IX of 1908), Art. 182.

By statute the award of the Registrar under s. 51 of the Co-operative Societies Act is given the same status as a decree of a Civil Court for the limited purpose of execution and the provisions of law relating to the enforcement of decrees of such Courts including the law of limitation applicable for such enforcement will apply by necessary implication. So when a question of limitation arises as to the enforcement of an award of the Registrar of the Co-operative Society, the Court before which the application for its enforcement is made will have to apply the Article applicable for the enforcement of the final decree of that Court. Where the execution is by a Civil Court, other than the High Court, the Article applicable is Art 182, Lim. Act S. V. *SUBBA RAO v. CALICUT CO-OPERATIVE URBAN BANK, LTD.* Mad. 230

Co-owners—Partition—Allotment—Alienees of co-owners, shares of—Estate not large enough for alienees to get from their vendors' share all they purported to sell—Same piece of land not sold twice over—Principle of priority of first purchaser over subsequent, if applies.

In a suit for partition if what the co-owners sold or purported to have sold can be allotted to their alienees on partition, it should be so allotted so that the alienees can get from their vendors what they sold or purported to sell to them.

The principle that the alienees under the first sale have priority with respect to the lands sold or purported to be sold to them over subsequent purchasers will have no application if the estate is not large enough for the alienees to get from their vendors' share all they purported to sell to them and if the vendors have not sold the same piece of land twice over. *MANGALMAL AGANMAL v. MOHAMMAD USIF BHOBO* Sind 11

Copyright—Assignment—Work incomplete when document assigning copyright is drawn up—Copyright, if transferred.

There cannot possibly be a transfer of copyright or assignment of copyright in a non-existing work where there is no proof that the work was substantially completed at the time when document transferring copyright was drawn up and on the face of it the document refers to a future work, copyright cannot be transferred by it. **AMAR NATH KHOSLA v. M. O. MOHAN** Lah. 65

Corporation—Extraneous structure brought on to highway—Negligence of Municipality in maintaining it in good repairs—Person suffering injury, if can sue for damages.

An extraneous structure brought on to a highway must be maintained in good repair by the authority bringing that structure on to the highway, and where a Municipality is negligent in doing so, and owing to it, a person suffers injury, he is entitled to sue the Municipality for damages. **NOOR BIBI v. MUNICIPAL COMMITTEE, AMBALA CITY** Lah. 772

Co-sharers See Adverse possession 11

Co-ownership of Muhammadans and joint ownership of Hindu family—Distinction.

There is a difference between the co-ownership of Muhammadans and the joint ownership of a joint Hindu family, for, while in a joint Hindu family all the co-parceners have a share in the whole property, among Muhammadans who inherit as heirs, each one has a specific share. **MANGALMAL AGANMAL v. MUHAMMAD USUF BHORO** Sind 11

Costs. See Income Tax Act, 1922, s. 66 (3) 556

Costs in test cases.
In test cases, no order for costs should be passed. **MUNICIPAL CORPORATION OF RANGOON v. RAM BHARI** Rang. 460

Court-fee. See Revision 372

Cross-objection—Court-fees on.

A cross-objection must be chargeable with a court-fee calculated *ad valorem* on the amount of "the subject-matter in dispute." "The subject-matter in dispute" means the subject-matter in dispute in the cross-objection. **MARIAM BIBI v. CASSIM EBRAHIM MALIN** Rang. 623

Court Fees Act (VII of 1870), s. 7, Sch. I, Art. 1—Art. 1 imposes liability and is not merely auxiliary to s. 7.

Article 1 of Sch. I, Court Fees Act, is not merely auxiliary to s. 7 because, the Schedules to the Act, when read with ss. 4 and 6 of the Act, do impose a liability. Section 7 refers only to suits and, in certain cases specifically mentioned, memoranda of appeal. The fees chargeable in respect of all other documents are those laid down in the Schedules to the Act, liability being imposed by the Schedules read with s. 4 or s. 6 as the case may be. **MARIAM BIBI v. CASSIM EBRAHIM MALIN** Rang. 623

s. 7 (IV), (C)—Suit under—Power of Court to raise valuation—Such power, when can be exercised.

In a suit coming within s. 7, sub-s. (iv) (c), Court Fees Act, being a suit to obtain a declaratory decree where consequential relief is prayed for, the plaintiff is bound to pay *ad valorem* court-fee according to the amount at which the relief sought is valued in the plaint. The plaintiff has not an absolute right to value the relief at any sum he pleases but the Court may enquire into the matter and raise the valuation if it finds the relief claimed as under-valued. Until however reasonable standards for such valuation are laid down by appropriate rules framed under s. 9, *Estate Valuation Act*, it would not be possible for the Court to exercise this

Court Fees Act—contd.

power except in certain defined cases. **STAR TRADING & INVESTMENT, LTD. v. ASHUTOSH MUKHERJEE** Cal. 648

s. 7 (v) as amended by Madras Act V of 1922. See Court Fees Act, 1870, Art. 17-B 459

s. 12 (ii)—Decree signed and sealed but Court ordering plaintiff to pay deficit court-fee—Plaintiff getting benefit under decree—Revision from such order—High Court can take action under s. 12 (ii), before passing final orders.

Where the plaintiff is ordered to pay the deficit court-fee after the judgment is signed and sealed, the Judge would be acting without jurisdiction, in that after giving judgment, his power to order the deficit court-fee to be paid is gone. But although the plaintiff may have a genuine grievance that he had not the opportunity of being heard and that the Court was *functus officio*, if he gets benefits from the decree, it is but reasonable that he should pay court-fee upon the benefits so received. Consequently the High Court, in revision from such an order, can before passing final orders, take action under s. 12 (ii), Court Fees Act. **RAMOHAN KIMATRAI v. UDHMAL DWARKADAS** Sind 364

s. 17—Suit by widow against persons claiming as legatees under her husband's will, for recovery of possession of his property on ground that he died intestate—Alternative prayer for maintenance—Separate court-fee for alternative claim, if must be paid.

Where a widow brings a suit for recovery of her husband's property alleging that he died intestate, against persons who claim to be legatees, under the will executed by her deceased husband with a prayer in the alternative for maintenance, the payment of court-fees for the higher claim, for possession is sufficient to cover the alternative claim for maintenance as well, and no separate court-fee is payable for such alternative claim. **SURATHU SITHARATHANAMMA v. PILLARISETTI SESHANNA** Mad. 30

Sch. I, Art. 1—"Value of subject-matter in dispute," meaning of—Appeal on merits also challenging order of costs independently—Value of subject-matter of appeal is total amount of value of subject-matter in suit and amount of costs challenged.

The words "value of the subject-matter in dispute" in Art. 1, Sch. I, Court Fees Act refer, where the Court is concerned with a suit, to the value of the subject-matter of the suit, and where it is concerned with an appeal then these words refer to the value of the subject-matter in dispute in appeal. The subject-matter of the suit and the subject-matter of the appeal may not be the same. Where the appellant appeals against the decree in a suit on merits and also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount consisting of the value of the subject-matter in the suit and the amount of costs challenged. **BHAWANI SHANKAR v. MOHAMMAD HASAN** Oudh 895

Art 17-B, s. 7 (v) as amended by Madras Act V of 1922—Mortgagee of portion of house obtaining decree, purchasing that portion and obtaining symbolical possession thereof—Another mortgagee of whole house obtaining decree purchasing whole house and refusing first mortgagee to enter into possession of his portion—Suit by first mortgagee for partition and possession held fel. under s. 7 (v) and not under Art. 17-B.

Court Fees Act—conold.

A mortgagee obtained a mortgage decree in respect of a portion of a house and at the subsequent sale in execution became the purchaser thereof and obtained symbolical possession of that portion. Another decree-holder subsequently obtained a mortgage decree in respect of the whole house, and in execution thereof purchased the house and was in physical possession of the whole house and refused to allow the first mortgagee to enter into physical possession of his portion. The first mortgagee thereupon brought a suit for partition of the property and possession of his half share. In his plaint he averred that the second mortgagee was in wrongful possession and enjoyment of the whole house:

Held, that the suit was in truth and in fact a suit for possession against a person in wrongful possession of the property. The plaintiff was in possession of no portion of the property. In these circumstances s. 7 (v) of the Court Fees Act, applied, and not Art. 17-B. **KAMAKSHI AYYAR v. NAMBERUMAL AYYANGAR**
Mad. 469

— Sch. II, Art. 17 (vi)—*Appeal not relating to amount of decree but to manner of its execution—Art. 17 (vi), Sch. II applies.*

Where an appeal does not relate to the amount for which the decree has been passed but to the manner in which the decree can be enforced or executed, the appeal falls under Art. 17 (vi) of the Second Schedule of the Court Fees Act. **SHANTRANJIJI v. DEPUTY COMMISSIONER**
Oudh 766

Criminal Appeal Ordinance of Trinidad and Tobago (1931)—*Court of Criminal Appeal established under—Whether branch of Supreme Court—Person appointed as acting Judge under s. 7 (1) of Judicature Ordinance of Trinidad and Tobago (1880) as amended in 1936, if can act as member of Court of Criminal Appeal—Court of Criminal Appeal composed of Chief Justice and two Acting Judges held not properly constituted—Interpretation Ordinance (XIX of 1933), ss. 17, 20—Applicability—Constitution of Court.*

The Court of Criminal Appeal established under Criminal Appeal Ordinance, 1931, of Trinidad and Tobago, is not established as a branch of the existing Supreme Court; but as a separate Court of Record, the Judges of which are stated to be the Chief Justice of Trinidad and Tobago and the Puisne Judges of Trinidad and Tobago. The Criminal Appeal Ordinance contains no power to appoint a person to act as a Judge of the Court of Criminal Appeal.

A person appointed under s. 7 (3) of the Judicature Ordinance of Trinidad and Tobago (1880), is not a Puisne Judge of Trinidad and Tobago, nor is he under that provision invested with any powers beyond such as are necessary to enable him to act effectively as a Judge of the Supreme Court. Such person cannot, therefore sit as a member of Court of Criminal Appeal.

Sections 17 and 20 of the Interpretation Ordinance, 1933, deal with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him.

An acting Judge is not a Puisne Judge of the Colony, for the number of Puisne Judges is fixed and cannot be exceeded. Moreover, they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting Judges.

Where, therefore, an appeal from conviction of the accused is heard by the Court of Criminal Appeal composed of the Chief Justice of the Colony and

Criminal Appeal Ordinance of Trinidad and Tobago (1931)—conold.

two acting Judges of the Supreme Court appointed under s. 7 (3) of the Judicature Ordinance, the Court is not properly constituted and its judgment is void and of no effect. **TUBAL URIAH BUTLER v. THE KING**
P C 461

Criminal Procedure Code (Act V of 1898), s. 88 (6-d)—*Suit to establish title to attached property—Claim under sub-s. (6-a), if should first be filed.*

Sub-s. 6 (d) of s. 88, Criminal P. O., does not prevent a person from filing a suit to establish his title to attached property without first filing a claim or objection under sub-s. 6 (a). **R. EZZIKIEL v. PROVINCE OF BENGAL**
Cal. 214

— s. 94 (3)—*Documents protected under s. 126, Evidence Act (I of 1872), whether exempted under s. 94 (3).*

Clause 3 of s. 94, Criminal P. O., does not exempt documents protected under s. 126, Evi. Act, and the production of such documents is incumbent under s. 162, Evi. Act, notwithstanding any objection which there may be to the production or admissibility. **PUBLIC PROSECUTOR, MADRAS v. M. S. MENOZI**
Mad. 419

— s. 106—*Order under, in respect of offence under s. 426, Indian Penal Code, legality.*

Offence under s. 426, I. P. O. does not involve a breach of the peace and the order under s. 106, Criminal P. O. cannot be sustained. **IN re-MADDUKURI SUBBA RAO**
Mad. 753

— ss. 107, 112—*Notice under s. 107, if must relate to breach of peace or wrongful act in contemplation at time when information is given to Magistrate.*

Action taken under s. 112, Criminal P. O., constitutes a judicial act and therefore the Magistrate should not act arbitrarily. There must be information of a nature which convinces him that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. What is reasonably sufficient to satisfy a Magistrate must depend on the particular situation. While that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, the Code does not require the information to show the particular act which is in contemplation at the time. The Magistrate must be satisfied that there is a likelihood of a breach of the peace. What will satisfy him must depend on the particular facts of the case.

The High Court has undoubtedly power to quash proceedings where the notice issued does not comply with the requirements of s. 112, but before doing so, it must be satisfied that there has been a failure to comply. It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under s. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion has been arrived at. **IN re MUTHUSWAMI CHETTIAR**
Mad. 824 F B

— ss. 109, 117. **SEE** Criminal Procedure Code, 1898, s. 496 *318*

— s. 112. **SEE** Criminal Procedure Code, 1898, s. 107 *824 F B*

— s. 144. **SEE** Criminal Procedure Code, 1898, s. 523 *773*

Criminal Procedure Code—contd.

s. 144—Order under s. 144 against public generally.—Scope of—Requirements of—Order held not in accordance with law.

The scope of an order passed under s. 144, Criminal P. O., against the public generally is narrower than that passed against an individual and served personally on him. Although the word "public" has not been used with the expression "particular place" in s. 144 (3) still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public.

An order passed under s. 144, Criminal P. O., was addressed to the general public and was to the effect that nobody shall sacrifice a cow within a radius of a mile from certain villages:

Held, that the order proclaimed was not in accordance with law. *BABU v. EMPEROR* Oudh 745

s. 144 (1), (2)—Order under first two clauses of s. 144 cannot be issued to general public.

The first two clauses of s. 144, Criminal P. O., do not invest the Magistrate with any power to issue an order to the general public. They are confined to the case of an individual person or persons to whom a notice may be issued directing them to refrain from a certain act or to take certain order with certain property in their possession or management. *SAT NARAIN v. EMPEROR* All. 172

s. 144 (3)—Order under cl. (3), when can be issued to general public.

It is clear from the terms of sub-cl. (3) of s. 144, that no order under s. 144 can be issued to the public generally except when, "frequenter or visiting a particular place" and any order which ignores this limitation must be held to be bad in law. *SAT NARAIN v. EMPEROR* All. 172

s. 145—Fresh proceedings under s. 145, when can be started.

Obiter.—Where in previous proceedings under s. 145, Criminal P. O., a party is declared to be entitled to possession, the Magistrate has jurisdiction to start fresh proceedings under s. 145 if the party to such proceedings was not a party to the previous one. *AMBIKA THAKUR v. EMPEROR* Pat. 529

s. 145—One party claiming exclusive possession and other joint possession with them—Proceedings under s. 145, if appropriate.

Proceeding under s. 145, Criminal P. O., can be started in a case in which one party claims exclusive possession while another party claims to be in joint possession along with them as the question in such a case is no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. *ZAFAR ALBAN v. JUGESHWAR BUX ROY* Pat. 346

s. 145—Party forbidden to disturb possession of successful party—If can plead that he is still in possession in spite of order under s. 145 or that he has been able to regain possession by force.

The whole object of s. 145, Criminal P. O., is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the Civil Court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the

Criminal Procedure Code—contd.

order might have been, he is still in possession or has been able to regain possession by force, and thus either compel the successful party to go to the Civil Court or to coerce a Magistrate to proceed again under s. 145, Criminal P. O. This will be a definite encouragement to disobedience of orders under the section. *AMBIKA THAKUR v. EMPEROR* Pat. 529

s. 145—Possession—State delivery of possession by Civil Court, whether conclusive proof of present possession.

The law is that the Criminal Court ought to hold that if on a given date the plaintiff has been put into possession by the Civil Court then on that date the plaintiff got possession as against the defendant. But where a considerable period elapses between the date of delivery of possession and the date on which possession of the land is disputed, a state delivery of possession cannot be conclusive as to present possession. *ZAFAR ALBAN v. JUGESHWAR BUX ROY* Pat. 346

s. 145—Possession of successful party, whether can be put to an end by unsuccessful party by violence or surreptitious invasion.

Though an order under s. 145, Criminal P. O., confers no title, the fact of possession remains and the person in possession can only be evicted by a person who can prove a better title to possession himself. The possession of the party which succeeds in proceedings under s. 145, Criminal P. O., cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion. Therefore, even if the unsuccessful party in proceedings under s. 145 is able on some occasions either surreptitiously or forcibly to cultivate the lands in possession of the successful party, these would be no more than isolated acts of trespass—and offences punishable under s. 188, I. P. O., but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders unless the other side refrain from asserting their possession for a sufficiently long period, and give up the protection of the order under s. 145 in their favour. *AMBIKA THAKUR v. EMPEROR* Pat. 529

ss. 145, 146—Decree-holder obtaining symbolical possession in execution of decree upon delivery warrant—Judgment-debtor attempting forcible entry within two months—Application under s. 145 by decree-holder—Magistrate by order under s. 145 (1) referring back parties to Civil Court—Propriety of.

Where in execution of a decree the Court orders delivery of possession of judgment-debtor's property to the decree-holder and the Officer of Court executing the delivery warrant gives effect to the order and since then the decree-holder is in possession both in fact and in law of the property in question but the judgment-debtor within two months of the execution of such warrant attempts forcible entry upon the land whereupon the decree-holder files a petition in Criminal Court under s. 145, Criminal P. O., the Magistrate cannot go behind the decision of the Civil Court in the matter and cannot ignore the decree even though the Court passing the decree had no jurisdiction over the land. It is immaterial that the delivery of possession is symbolical only. In the enquiry under s. 145, there is only one conclusion possible for the Magistrate to arrive at with reference to the land, that is, that it was in the possession of the applicant on the date of the order passed under sub-s. (1) of s. 145. Even assuming

Criminal Procedure Code—contd.

that the applicant (decree-holder) had been forcibly dispossessed at any time after the execution of the delivery order, the first proviso to sub-s. (4) will operate in favour of the applicant. Consequently, when in such circumstances the Magistrate passes an order under s. 146 (1) referring the parties back to Civil Court for the determination of their rights, the order is highly improper and opposed to all principles of justice. **MAUNG KAN v. MAUNG PO TOK** Rang. 119

—s. 162. **See** Evidence Act, 1872, s. 27. 310
—s. 170—*Innocent persons falsely implicated*

—*Investigating officer, if justified in not sending them for trial on ground of insufficient evidence.*
Where definite allegations are made by aggrieved persons which they are prepared to support by positive evidence, apparently free from taint, it is generally not the function of the Police to play the rôle of Judges and to pronounce their verdict on the truth or falsehood of those allegations. In such cases, they are bound to send up the accused for trial and not to discuss the probabilities or the improbabilities of the case and come to a final decision of their own. But where there is a tendency to implicate innocent persons along with the guilty whenever any occasion arises in that respect, not only the Courts but the investigating officers must proceed cautiously when they are faced with that situation. A Police Officer is in the same position as a Magistrate holding inquiry in cases triable by a Court of Session, and such Magistrate as power to discharge an accused person if the evidence against him is palpably false or legally insufficient. Where the investigating officer not being satisfied with the evidence against some of the accused feels that they are falsely implicated he is justified in not sending them for trial. **JAIMAL INGR v. EMPEROR** Lah. 266

—s. 195 (1) (a)—*Complaint under s. 195 (1) (a), absence of—Effect—There was held no complaint.*
The fact that no complaints required by the mandatory provisions of s. 195 (1) (a), Criminal P. O., were made makes the trials nugatory.

On a report of a Sub-Inspector of Police that certain persons had sacrificed a cow against the order passed by a Sub-Divisional Magistrate under s. 144, Criminal P. O., prohibiting such sacrifice within certain areas, with a suggestion that cases under s. 188, I. P. O., should be started against those persons, the Sub-Divisional Magistrate sent the reports to the District Magistrate that those persons be prosecuted. The District Magistrate passed an order sanctioning the prosecution and making the case over to a particular Magistrate and returned the records to the Sub-Divisional Magistrate who then sent the cases to the Magistrate named:

Held, that the reports sent to District Magistrate are not complaints under s. 195 (1) (a). The mere fact that the Sub-Divisional Magistrate while giving evidence before the trying Magistrate several months later, called them complaints did not make them complaints. **BABU v. EMPEROR** Oudh 745

—s. 195 (3). **See** Criminal Procedure Code, 1898, s. 476-B. 700

—s. 197. **See** Chota Nagpur Tenancy Act, 1908, s. 63. 738

—s. 197—*Member of non-City Municipality, whether can claim protection of s. 197.*

A member of a non-City Municipal Board is removable by the Commissioner under s. 40, U. P. Municipalities Act, and hence cannot be described as a person not removable from his office. *save*

Criminal Procedure Code—contd.

by or with the sanction of a Local Govt. or some higher authority. He cannot, therefore, claim protection of s. 197, Criminal P. O. At the stage when the Magistrate has to decide whether he can take cognizance of the offence or not, the question whether the offence with which the Municipal Commissioner is charged is one for which the Commissioner would or would not eventually have the power to remove him does not arise at all. **B. SOHAN LAL v. M. MUBARAK ALI KHAN** All. 224

—ss. 236, 237—*Accused not charged under s. 424, Penal Code (Act XLV of 1860)—His conviction under that section held wrong in law.*

Where the complainant who had put forward a very clear and definite case of cheating under s. 418, Penal Code, never alleged that the accused had either concealed or removed the property within the meaning of s. 424, Penal Code, and no evidence was produced on behalf of the prosecution to show that the property had been concealed or removed by the accused; to such a case ss. 236 and 237, Criminal Procedure Code, are not applicable and the conviction of the accused by the Appellate Court under s. 424, Penal Code, even though they were not charged with that offence, is wholly wrong in law. **NAND KISHORE v. EMPEROR** All. 151

—ss. 236, 237, 238. **See** Criminal Procedure Code, 1898, s. 423. 151

—s. 237. **See** Criminal Procedure Code, 1898, s. 236. 151

—s. 239. **See** Criminal Procedure Code, 1898, s. 537. 303

—s. 289 (2)—*Direction of Judge that there is no evidence that accused committed offence, whether binding on jury—Whether must return verdict of not guilty.*

The expression "direct" in s. 289 (3), Criminal P. O., leaves no room for doubt that the intention of the Legislature was that the jury was bound to accept the opinion of the Judge, whether they agreed with that view or not. It therefore follows that the direction of the Judge that there is no evidence that the accused committed an offence is binding on the jury and must be followed by them, and the jury cannot return a verdict of guilty on such a direction. The question of absence of evidence is a question of law and not a mere question of fact. **EMPEROR v. QUDRAT** All. 271

—ss. 297, 537—*Omission of Judge to explain to jury all essential elements of offence charged against accused, when vitiates trial.*

Under s. 297, Criminal P. O., it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that Advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative. It is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. An important non-direction to the jury or an omission to direct them on an important point, amounts to misdirection; but s. 297 must be read along with the provisions of s. 537 of the Code. It is necessary, however, that the misdirection should be such as to occasion failure of justice, such

Criminal Procedure Code—contd.

failure of justice as would vitiate the trial or proceedings. There is no ground for broadly assuming that if even a mandatory provision of the Code is infringed, the result in all cases must be to vitiate the trial irrespective of whether it has or has not occasioned failure of justice. *EMPEROR v. JHINA SOMA* Bom. 382

—ss. 297, 537—*Prosecution, if can urge in appeal that Sessions Judge omitted to explain law to jury.*

Omission by Govt. to take a ground that the Sessions Judge omitted to explain the law to the jury, would not debar the prosecution from urging it in the appeal. *EMPEROR v. JHINA SOMA* Bom. 382

—s. 342—*Confession in dock under s. 342—If can be taken against co-accused under s. 30, Evidence Act.*

Quere.—Whether a confession made by an accused in the dock, when examined under s. 342 of the Criminal P. O., can be taken into consideration under s. 30 Evi. Act against the other accused persons. *MOTILAL v. EMPEROR* Nag. 310

—s. 342 (3). *See* Factories Act, 1934, s. 71

—s. 345 (5-A)—*No impropriety in order of lower Courts—Case heard and determined by competent Court—High Court, if can record compromise—Use of discretion—Aggrieved person must be before High Court.*

It is clear from the language of s. 439, Criminal P. O., read with s. 345 (5-A) of the Code that the High Court can, in certain circumstances allow a compromise to be recorded in the exercise of its revisional jurisdiction in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. The language of s. 439 is very wide and it does not limit the jurisdiction of the High Court to interfere in revision merely in cases in which the High Court has called for the record of a case on the ground of some alleged illegality or impropriety in the order made by an inferior Criminal Court. The High Court is competent to record the compromise having regard to the provisions of s. 345 (5-A) even although there is no impropriety in the order of either of the lower Courts in suitable circumstances; the parties can be allowed in such cases to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them. But the exceptional powers conferred by s. 345 (5-A) should not be used where the proceedings before the lower Court disclose no irregularity or impropriety, except where the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before the Court passed final orders.

Ordinarily the party who seeks to invoke the jurisdiction of the High Court under sub-s. (5-A) of s. 345, must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence. In any event it would not be competent for the High Court to allow a compromise to be recorded under sub-s. (5-A) of s. 345, unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded. *BAHURALI SARDAR v. KALA CHAND BEPARI* Cal. 177

—s. 367. *See* Criminal Procedure Code, 1898, s. 424

Criminal Procedure Code—contd.

—ss. 369, 430—*Construction of s. 369.*
Section 369, Criminal Procedure Code, must be read with s. 430 of the Code. *THE KING v. NGA BA SAING* Rang. 142

—ss. 370, 421, 439 (5), (6)—*Appeal against conviction dismissed—Recommendation for enhancement made subsequently—Accused asked to show cause—Whether can show cause against conviction*

When an appeal is preferred and it appears to the Judge that there is reason to believe that an enhancement of the sentence should be considered it is the practice of the Rangoon High Court to issue notice in revision to the accused to show cause against enhancement, and the appeal and the revision are heard at one and the same time. Where a recommendation for enhancement of sentence has been made to the High Court after the decision of the appeal, the accused when called upon to show cause against the enhancement of the sentence cannot be allowed to show cause against his conviction, but may only show cause against enhancement of the sentence. The order of the High Court in appeal must be regarded as final and the accused person cannot be heard to show cause against his conviction. It does not make any difference that the accused's appeal from jail was dismissed summarily. Such appeals are dismissed summarily after consideration of the grounds of appeal, in addition to the judgment and, if necessary, the evidence. *THE KING v. NGA BA SAING* Rang. 142

—ss. 423, 236, 237, 238—*Powers of Appellate Court under s. 423, if limited by ss. 236, 237 and 238.*

Section 423, Criminal Procedure Code, is to be read with ss. 236, 237 and 238. The powers conferred upon the Appellate Court by s. 423, Criminal Procedure Code, are limited by the provisions of ss. 236, 237 and 238. *NAND KISHORE v. EMPEROR* All. 151

—ss. 423, 439—*Acquittal under ss. 302-149, Penal Code (Act XLV of 1860), whether can be converted into conviction under ss. 326-149 under combined appellate and revisional powers of High Court.*

Quere.—Where accused charged under ss. 302-149 and also under s. 147, I. P. O., are acquitted by the Sessions Judge of charge under ss. 302-149 but are convicted under s. 147 and the accused prefer an appeal against the conviction and the complainant files a revision to convict the accused under ss. 302-149 or in the alternative to enhance the sentences, whether the High Court under its combined appellate and revisional powers can convert the acquittal under ss. 302-149 into a conviction under ss. 326-149 and then pass a sentence where none is passed by the Sessions Judge for the latter offence. *AMBIKA THAKUR v. EMPEROR* Pat. 529

—ss. 424, 367—*Duty of Appellate Court.*

It would be well for District Magistrates who hear appeals in criminal cases to bear in mind that they are also subordinate to higher Courts and it is their duty to satisfy the higher Courts by their judgments that they have applied their minds to the case before them and in recording a finding of conviction upon the evidence produced before them, have arrived at a correct conclusion. In order to discharge this duty, it is necessary for them to see that their judgments fulfil the requirements laid down by the law. Merely saying that all the points arising in the case have been considered by the Court below and have been rightly decided, does not show that the Appellate

Criminal Procedure Code—contd.

Criminal Procedure Code—contd.

Court has applied its mind to the points arising in a case and has arrived at its own independent judgment in respect of them as it is required by the law to do. **BANSIDHAR v. EMPEROR** All. 682

—s. 430. SEE Criminal Procedure Code, 1898, s. 369 142

—s. 435. SEE Bombay District Police Act, 1890, s. 39-A 392

—s. 438—*Reference to be decided on basis of position on date of proceedings.*

A reference made under s. 438, Criminal P. O., is to be decided on the basis of the position as it was on the date when the proceedings began. **MUZAFFARPUR MUNICIPALITY v. TARA PRASAD** Pat. 630

—s. 439. SEE Criminal Procedure Code, 1898, s. 499 598

—s. 439—*Application in revision by private party to convict accused of offences of which they are acquitted and to enhance sentences in alternative, when can be entertained.*

High Court is, as a rule, loath in ordinary circumstances to entertain an application in revision from a private party asking the Court to convict an accused of offences of which they have been acquitted by the Sessions Judge and to enhance sentences passed upon them. But where there are clear indications that the accused party is defying law and disobeying the orders, both of the Civil and of the Criminal Courts, and has been repeatedly creating trouble in the locality for many years past, such application should be entertained in revision. **AMBIKA THAKUR v. EMPEROR** Pat. 529

—s. 439—*Power is discretionary.*

Exercise by the High Court of the revisional jurisdiction in criminal matters is a matter of discretion. **EMPEROR v. ABDULLAH KARIM** Sind 268

—s. 439—*Prosecution under s. 193—Lower Courts concurring—Order, if can be revised.*

Revision can only be granted, if there is some error of law, some irregularity, or some abuse of power on the part of the lower Courts. It is inadvisable for the High Court to interfere in revision when two Courts have concurred in holding that a prosecution is in the interests of public policy. In case of a prosecution under s. 193, I. P. O., such a revision is not even in the interests of the accused person as it deprives him of the only means of clearing his character, which would otherwise remain affected by the fact of the complaint having been made and endorsed by the Court of appeal. **SHARI LAL SUD v. EMPEROR** Lah. 588

—s. 439 (5), (6). SEE Criminal Procedure Code, 1898, s. 370 142

—s. 439 (6)—*Sub-s. (6) of s. 439 only refers to sub-s. (5)—Scope.*

Sub-s. (6) of s. 439, Criminal Procedure Code, can only refer to sub-s. (5) of the section, and means that, although a party who has not appealed cannot be allowed to make an application in revision, yet, proceedings are taken against him in revision and notice to show cause why his sentence should not be enhanced is issued to him, he shall, in showing cause, be entitled also to show cause against his conviction. Sub-s. (6) is intended to operate as an exception to what is otherwise laid down in the section itself. **THE KING v. NGA BA SAING** Rang. 142

—ss. 439 (6), 562—*Release under s. 562 on probation of good conduct—Order set aside and sentence in lieu thereof passed under s. 562. (3)—Whether amounts to enhancement of sentence.*

Under s. 562, Criminal P. O., when an accused is released on probation of good conduct, no sentence is passed by the Court. Therefore, when, under s. 562 (3) the High Court sets aside an order and passes a sentence in lieu thereof, it cannot be said that it enhances a sentence within the meaning of s. 439 (6), Criminal P. O. An enhancement of sentence pre-supposes that there is a sentence to be enhanced. **EMPEROR v. MIRO GHULAM HUSSAIN** Sind 428

—ss. 476-B, 195 (3)—*Special Judge making complaint under s. 476 for offence committed in case under U. P. Encumbered Estates Act—Appeal from such order—Forum.*

Where a person commits perjury in the Court of a Special Judge in a case under the U. P. Encumbered Estates Act and the Judge makes a complaint against him under s. 476, Criminal P. O., the Special Judge acts only as a Civil Court irrespective of the fact that the Court is further invested with special powers under the Encumbered Estates Act. The Special Judge is primarily Civil Judge and if he takes any action under s. 476, Criminal P. O., in an ordinary civil case, whatever its valuation, his order would be appealable to the District Judge and not to the High Court. **AKBAR HUSSAIN KHAN v. EMPEROR** All. 700

—s. 488—*Wife living with husband for short while during pendency of her application for maintenance, by husband's subterfuge—Maintenance, if should be disallowed on the ground.*

Where the husband has neglected his wife for a number of years and the fact that he has succeeded by means of a subterfuge in making her live in his house for a short while during the pendency of an application for maintenance by her, should not be allowed to affect the decision of the application presented by her for maintenance. **GHULAM MOHAMMAD v. ALLAH RAKEI** Lah. 69

—s. 491—*Powers of High Court under, to enquire into conduct of Political Agent before issuing warrant of arrest under s. 7, Extradition Act.*

The powers of the High Court under s. 491, Criminal P. O., are limited and they do not authorize the High Court to enter as it were upon an enquiry into the conduct of the Political Agent before issuing a warrant of arrest under s. 7, Extradition Act. All that the High Court is concerned with while exercising its power under s. 491, is to see that the authority under which a person is being detained is on the face of it legal and valid. If there are any formal defects in the warrant under which the applicant is arrested, the High Court can certainly take notice of them and can upon that basis hold that the warrant is on the face of it invalid. It would necessarily follow in that event that the detention of the applicant was unlawful, but this is the limit beyond which the High Court cannot go in the exercise of its power under s. 491. **ISRAR HUSSAIN v. EMPEROR** All. 302

—ss. 496, 109, 117—*Surety bond for proceedings under s. 109—S. 496, if applies to proceedings under s. 109—Form of bond.*

Section 496, Criminal P. O., applies to proceedings under s. 109 of the Code. Section 49 does not merely refer to an accused person but generally to "any person other than a person accused of a non-bailable offence who appears or is brought before a Court."

In the absence of any special form prescribed by law with reference to the preventive sections of

Criminal Procedure Code—contd.

the Criminal P. O., there is nothing to prevent the use of the printed form prescribed for appearance under ss. 496-499, specially when the bond makes it clear what the nature of the proceedings was and in which Court accused was to appear. **EMPEROR v. KARBALAI HUSSAIN** Nag. 318

s. 497 (1). **SHN** Criminal Procedure Code, 1898, s. 499 249

ss. 499, 514, 497 (1)—*Bail bond for appearance containing undertaking for good behaviour—Forfeiture, legality of.*

The only condition contemplated by a bail bond is a condition for attendance in Court and a bail bond in which any other condition of the nature of condition as to undertaking for good behaviour such a bond, is included, cannot be regarded as a bond under the Code. The forfeiture of such a bond is therefore illegal. **GIANI MAHER SINGH v. EMPEROR** Cal. 249

ss. 499, 514, 537, 439—*Bail—Surety—Conditions on which accused was released not forming part of bail bond—Surety, however, signing order-sheet containing terms—Whether form part of bond—Procedure under s. 514 not followed—Facts not showing failure of justice—Interference in revision.*

Where although the conditions imposed on the accused before releasing him on bail do not form part of the bail bond executed by the surety, yet if the surety has signed the order-sheet of the Magistrate against the part which contains the undertaking on which he accepted the bail bonds, the order-sheet with the surety's signatures itself becomes a part of the contract between the parties.

Where the Magistrate has failed to follow the procedure under s. 514, Criminal P. O., in holding the surety to his bond without calling upon him to show cause why the penalty should not be paid, although such an omission is not justifiable, yet if the facts show that such an omission has not occasioned any failure of justice it is sufficient to prevent interference in revision. **RAM BILAS SHARMA v. EMPEROR** Pat. 598

s. 514. **SHN** Criminal Procedure Code, 1898, s. 499 249, 598

ss. 514, 106—*Bond for appearance of accused—Forfeiture—Recording of evidence—Burden to give explanation why accused was unable to attend Court—Bond under s. 106—Evidence to prove fresh breach of peace and forfeiture of bond—Opportunity of cross-examining witness—Witness on whose evidence forfeiture is established examined in absence of accused—Whether should again be examined in presence of accused—Forfeiture should not be ordered without giving accused or surety chance to prove their allegation.*

In cases where a bond has been executed for appearance merely, it is often unnecessary for the Magistrate to record any evidence at all. The Magistrate knows by his own observation that the accused failed to appear in his Court. The burden of proving the negative, that is to say that the accused absented themselves without reasonable cause for their non-appearance, is not upon the prosecution and it is for the surety to give an explanation why the accused person was unable to attend Court.

Obiter.—In case of bond under s. 106, Criminal P. O., it is necessary for the Magistrate to record evidence to prove the commission of a fresh breach of the peace and the forfeiture of the bond. Such evidence need not, according to the terms of s. 514, be taken in the presence of the respondent,

Criminal Procedure Code—contd.

but when the respondent appears and shows cause he must be given an opportunity of cross-examining the witnesses upon whose evidence the Magistrate has directed him to show cause why the bond should not be forfeited. The section does not require that before a final order is made the witnesses on whose evidence the forfeiture is held to be established, if they have been previously examined in the absence of the accused, must again be examined in his presence.

Where the Magistrate directs forfeiture of bond executed for the appearance of accused and directs the surety to pay penalty without giving the accused and the surety an opportunity of showing cause by adducing evidence, as to why the accused failed to appear, the order is bad and must be set aside. **KUMARAPAN v. THE KING** Rang. 614

ss. 523, 144—*Magistrate refusing to take proceedings under s. 144—He must exercise discretion conferred by s. 523 in respect of property seized by Police—Proper order to be made—Discretion not judicially exercised—Interference by High Court.*

Where a Magistrate after having refused to take proceedings under s. 144, Criminal P. O., thinking that he was not competent to investigate the question as to who was in possession of the property seized, directs the Police to retain it in their custody; and, if it was liable to decay, to sell it, and deposit the money in safe custody pending orders from a proper Court, he has not judicially exercised the discretion which s. 523 confers on him and the High Court can, therefore, interfere with his order. In such a case he must exercise the discretion conferred by s. 523 and if he decides that one or other of the parties was in possession at the time the Police seized the property, the proper order to be passed will be to restore that party to possession. If the Magistrate is unable to decide who is in possession, it will be his duty to issue a proclamation under sub-s. (2) of s. 523 and proceed in accordance with the provision of that sub-section. **RAMSAGAR YADAV v. M. YUNUS** Pat. 773

ss. 530, 561-A—*Complaint under s. 420. Penal Code (Act XLV of 1860), disclosing offence under s. 477—Accused tried and acquitted under former section—Magistrate having no jurisdiction to try under s. 477, Penal Code (Act XLV of 1860)—Proceedings, validity of—Fresh trial, necessity of.*

Where the fact disclosed in the complaint under s. 420 constitutes an offence under s. 477 and it is found that the Magistrate trying the case and acquitting the accused under the former section had no jurisdiction to try the same under the latter section, the proceedings before him are void and the accused should be re-tried under the latter section but he should not be allowed to adduce fresh evidence so as to fill in gaps under s. 561-A, Criminal P. O. **RAMPRASAD v. DHANNA** Lah. 415

s. 530 (q)—*Magistrate trying offence under s. 4, Bombay Prevention of Gambling Act (IV of 1867), summarily—S 530 (q) if applies.*

Trying an offender summarily under s. 30 (q), Criminal P. O., means trying the particular offender in a particular case summarily and trying that offender for that offence of which he is accused.

Where, therefore, a Magistrate tries an offence under s. 4, Bom. Gambling Act summarily, s. 530 (q), Criminal P. O. applies. **EMPEROR v. MAHANANT KUBRAJMAL** Sind 543

s. 537. **SHN** Criminal Procedure Code, 1898, s. 297 382
SHN Criminal Procedure Code, 1898, s. 499 591

Criminal Procedure Code—*conold.*

— ss. 537, 239—Two persons charged with same offence of murder—Prosecution evidence mutually exclusive—Joint trial, legality.

When one accused is charged with having murdered a certain person at a certain place, and another accused is charged with having murdered the same person at the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed, one of the accused will have to be convicted, whereas if the other set of evidence is believed, the other accused will have to be convicted; it cannot be said that those persons are charged with the same offence committed in the course of the same transaction within the meaning of s. 239, Criminal P. O. "The same offence" means an offence arising out of the same act or series of acts and can mean nothing else. When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together; and the joint trial of the two persons is not a mere irregularity which can be cured under s. 537, Criminal P. O., it is an illegality which goes to the very root of the trial. *NGA SAR KEE v. THE KING* Rang. 303

— s. 561-A. SEE Criminal Procedure Code, 1898, s. 530 415

— s. 562. SEE Criminal Procedure Code, 1898, s. 439 (6) 428

Criminal trial—Bail. SEE Penal Code, 1860, s. 124-A 249

— Benefit of doubt—Court doubting truth of prosecution version—Benefit of doubt.

Once the Court has any doubt about the truth of the version even as first recorded in the first information report, then the accused is entitled to the benefit of that doubt. *RAMBRIJH SINGH v. EMPEROR* Pat. 162

— Case under s. 379, Penal Code (Act XLV of 1860)—Property seized—After investigation case referred as of civil nature—Property should be returned to persons from whom it was seized and not to complainant.

In a case under s. 379, I. P. C., against five persons in respect of articles used in cultivation, the Police seized the property and after investigation referred the case as one of civil nature. The Magistrate struck off the case from the Police file but on the recommendation of the station house officer ordered that the property be returned to the complainant:

Held, that the subsequent order was wrong and the property had to be returned to the persons from whom it was seized. *In re PAIDI SUBBAYYA* Mad. 440 (a)

— Confession—No evidence to show that any portion of exculpatory element is false—Confession should either be accepted or rejected as a whole—Right of private defence—Held on facts that accused exceeded the right—Penal Code (Act XLV of 1860), s. 304.

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible.

Held, on facts that the accused had a right of private defence but in hitting the deceased on head with axe and killing him, he exceeded that right: (The conviction was altered to one under

Criminal trial—*contd.*

second part of s. 304, Penal Code.) *KALA MOHAMMAD AKBAR v. EMPEROR* Lah. 274

— Conviction—Fight between two mobs—Mere suspicion that accused were present is not sufficient for conviction.

If a fight has taken place between two armed mobs, but there is no evidence as to what actually occurred, a mere suspicion that the accused were present can form no basis for a conviction. *RAMBRIJH SINGH v. EMPEROR* Pat. 162

— Conviction—No conviction on basis of scientific theories

Persons cannot be convicted merely on scientific theories which may or may not be infallible. *AIMAL SINGH v. EMPEROR* Lah. 266

— Duty of prosecution—Defence story untrue—Prosecution must still establish truth of their story.

Even if the version put forward by the defence be wholly untrue, yet the prosecution must establish beyond all reasonable doubt that the case put forward by them is true. *JADU JHA v. EMPEROR* Pat. 162

— Duty of prosecution—Public prosecutor should not withhold evidence.

It is the duty of a Public Prosecutor to conduct the case for the Crown fairly; his object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. It is his bounden duty to place before the Court for the adjudication of the Court, all the evidence against the accused persons and should not withhold certain evidence by not calling the principal witness on the ground that he did not believe the witness's evidence. It is for the Judge not for the Public Prosecutor to decide whether the evidence should be believed or not. *NGA SAR KEE v. THE KING* Rang. 303

— Evidence—Privileged communication—Letters written by accused to another accused, in possession of latter's lawyer—Whether privileged communication under s. 126, Evidence Act (I of 1872).

Letters written by accused to another accused alleged to be in possession of latter's lawyer are not *prima facie* privileged communications by accused to his lawyer under s. 126, Evi. Act. *PUBLIC PROSECUTOR, MADRAS v. M. S. MENON* Mad. 419

— Evidence—Riot—Riot as result of party faction in village—Cause of trouble should be ascertained.

In a case of riot which is the result of a party faction in a village where the evidence on either side is liable to be prejudiced, it is necessarily of importance to ascertain the cause of the trouble. *NARSINGH SINGH v. EMPEROR* Pat. 594

— Evidence—Riot alleged as result of threats by accused to prevent complainant's servant from working for him—Threats, proof of—Hearsay evidence of complainant as to what his servant told him regarding threats—Admissibility of—Story of unjustified attack not supported by unambiguous and unimpeachable evidence—Value of.

Where the prosecution allege that the riot was the result of the threats and attempts of the accused to prevent the servant of a complainant from working for his employer, the only way the prosecution can prove these threats is by the evidence of some one who heard them uttered. The hearsay evidence of the

Criminal trial—contd.

complainant with regard to what the servant told him that the accused persons had said, is inadmissible unless, possibly, it is impossible to secure the attendance of the servant.

It is possible to believe a story of an apparently unjustified attack when it is supported by unambiguous and unimpeachable evidence. But when the evidence tendered is not of that description, it is unsafe to accept it unless it is supported by circumstances indicating its truth. Evidence of previous threat is evidence of such a nature. **NABISINGH SINGH v. EMPEROR** Pat. 594

Evidence—Witness—Statement to Police—Repudiation of portion—Duty of Court.

When a witness is confronted with a portion of his Police statement which he repudiates, the Police Officer recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the Police Officer perfunctorily whether a particular document represents the witness's statement as a whole should be condemned. It is the obvious duty of the Judge to apply his mind to the question whether he is satisfied that the denial is to be rejected. **EMPEROR v. JIWAN DAS MILAWA RAM** Lah. 380

Identification—Articles not mixed with similar articles—Value of identification.

Where during the identification of articles recovered from the accused, they were not mixed with similar articles, this omission would not make the identification inadmissible although it would detract from the weight that would otherwise be attached to that evidence. **MOTILAL v. EMPEROR** Nag 310

Murder—Presumption—Accused's recent possession of property of murdered person—Cause of death not proved—Presumption of guilt, if arises
Where the charge is specific, that the murder was caused by throttling and it is not proved and there is no evidence to show that the deceased was murdered at all, the presumption of guilt cannot be drawn from the recent possession by the accused of jewellery taken from the murdered person. **EMPEROR v. TADUTURO POLIGADU** Mad. 829

Practice—Appeal from conviction on private prosecution—Complainant, if entitled to be heard by an Advocate.

The strict rule is that in an appeal against a conviction, only the Crown is entitled to be served with notice, and heard. Nobody but the Crown is entitled to be heard, because no private citizen is technically interested in upholding a conviction. But the true rule, which should be followed in all Courts, is that in private prosecutions, the Court in its discretion may allow the complainant to appear by an Advocate, but it is not in any case bound to do so. **PRAGJI BHULABHAI v. BHAGWANJI BAWABHAI** Bom. 795

Revision—Practice.

As a general practice the High Court will not entertain in the absence of most exceptional circumstances an application in its criminal revisional jurisdiction after the expiry of 60 days from the date of the decision or order impugned. **ZAFAR AHMAN v. JAGESHWAR BUX ROY** Pat. 346

Revision—Question of fact not disputed in lower Court, if can be introduced in revision.

High Court sitting in revision cannot allow the applicant to introduce before it questions of fact which, as they were not disputed, by implication, were admitted in the lower Court. **NEBHANDAS HOLLARAM v. EMPEROR** Sind 832

Criminal trial—contd.

Revision—Sentence—Practice.

As a rule, the High Court is reluctant in interfering in the sentence passed by the trial Court. **GUL ZAMAN MIR ZAMAN v. EMPEROR** Pesh. 208

Sentence—Offence punishable under two different sections of Penal Code—Punishment should be under section imposing higher penalty.

Where a person is found guilty of a criminal act which is punishable under two different sections of the I. P. C., he may be convicted under both the sections, but should be punished only under that section which imposes the higher penalty. **EMPEROR v. LAVJI MANDAN** Bom. 413 (b)

Trial by jury—Defences taken by accused in alternative, inconsistent—Whether proves that evidence led on behalf of prosecution should have been believed by jury

In a criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is also entitled to the benefit of a reasonable doubt. Even if the defences taken up by the accused in the alternative were inconsistent, that would not necessarily prove that the evidence led on behalf of the prosecution, who must establish the guilt of the accused, should have been believed by the jury. **EMPEROR v. JHINA SOMA** Bom. 382

Trial by jury—Verdict—Interference.

No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce. **EMPEROR v. JHINA SOMA** Bom. 382

Custom—Essential requirements of, for legal recognition—Mere exclusion of names of daughters from khewat, if establishes their exclusion from share in father's inheritance by recognised custom

It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

The mere exclusion of the names of the daughters from the *khewat* does not go very far to establish that they were by recognised custom excluded from any share in their father's inheritance. **BARQ RAZA v. AKBARI** Oudh 441

Inheritance—Sheikhs of Mangalsi Pargana, District Fyzabad—Exclusion of daughters from inheritance.

The custom of exclusion of daughters from any share in their father's inheritance does not exist amongst all the Sheikhs of Pargana Mangalsi of Fyzabad District. **BARQ RAZA v. AKBARI** Oudh 441

Manual of customary law—Value of.

The manuals of customary law prepared from official sources are of great authority. **AISHA BIBI v. BEGUM BIBI** Sind 87

Migration—Agriculturist tribe migrating to another colony takes its customary law with it—Agriculturist of Gurdaspur District of Punjab migrating to Sind under colonization scheme, whether governed by Punjab customary law—Widows and daughters, if excluded by sons—Right to maintenance of widow is lost on her re-marriage.
Obiter per Davis, J. C.—In the Punjab when a

Custom—*conold.*

family or tribe of agriculturists moves from one canal colony to another canal colony, no question would really arise as to the binding force of their customary law. They bring with them, when they migrate, their customary laws including the customary law of succession prevailing in the district from which they migrated.

The Jat agriculturists of Gurdaspur District of the Punjab who migrated to Sind nearly forty years ago under a colonization scheme to cultivate land watered by Jamrao Canal have not adopted the system of law practised by the people of Sind but have continued to follow the Punjab customary law. Consequently amongst them widows and daughters are excluded by sons and the right of a widow for maintenance is lost by her re-marriage. *AISHA BIBI v. BEGUM BIBI* Sind 87

—*Right of burial—Custom to bury dead, when should be decided as existing.*

A Court should not decide that a certain local custom, exists unless it is satisfied of its reasonableness and its certainty as to extent and application. Where the trial Court finds that the customary right of burial exists over a portion of the disputed plot but is unable to ascertain the limits of that portion, the custom is not established as the extent of land over which the supposed customary right exists is uncertain. *HAM RAN BIJAYA PRASAD SINGH v. ABDUL GHANI KHAN* Pat. 350

Custom (Punjab) Alienation—Landlord's right to challenge alienation of house belonging to non-proprietor—Such alienations taking place for long period—Effect on onus.

Broadly stated, it may be taken as a rule that where a large number of unchallenged alienations by non-proprietors have been taking place for a very long period, the onus should be placed on the landlords to show that they have a right to control those alienations. This they may be able to show by proving a grant and then the case would be governed by the terms of that grant. To hold otherwise would be to hold that a rule of custom had been established and before a finding of fact on such a point could be upset, a certificate as regards custom must first be obtained from the District Judge.

It is true that once the onus is placed on the landlords, it is an onus which is almost impossible to discharge but that is no ground for shifting the onus when a large number of instances of sales and mortgages extending over a century have been established and in not one case has there been a successful challenge. The conclusion is almost inevitable that the landlords had no right to challenge an alienation of a house belonging to a non-proprietor unless the landlord could show that the house was built on land granted by the proprietary body out of the *shamilat* *deh*. *RANJIT SINGH v. NAWAL KHAN* Lah. 395

—*Widow—Reversioner, however distant, whether competent to challenge.*

A reversioner, however, distant would be competent to challenge a widow's alienation. The exact degree of relationship is not material in a suit for declaration by reversioner that a sale by a widow should not affect his reversionary rights. *MANDIR GITA BHAWAN, SHIRI KURUKHETRA JIRAN UDDHAR, KURUKHETRA v. SADHU RAM* Lah. 422

—*Jalaps—Succession—Batadar son, whether can succeed with ordinary sons collaterally.*

Among Jalaps, a Batadar son, that is, a son by a mother of an inferior tribe can succeed equally

Custom (Punjab)—*conold.*

with ordinary sons collaterally, although such a son does not succeed equally in the case of paternal inheritance. *SARDAR KHAN v. MOHAMMAD AKRAM KHAN* Lah. 894

—*Legal necessity—Pilgrimage to Gaya, if valid legal necessity.*

According to Hindu ideas a pilgrimage to Gaya by a widow is for the spiritual benefit of the husband and would constitute valid necessity for an alienation by her. *MANDIR GITA BHAWAN SHIRI KURUKHETRA JIRAN UDDHAR KURUKHETRA v. SADHU RAM* Lah. 422

—*Muslim agriculturist, if can give up custom and follow Muhammadan Law—Presumption in favour of parties being governed by customary law.*

There is not even in the Punjab any presumption in favour of parties to a suit being governed by customary as against personal law. It must be proved. It may be proved easily in the Punjab by the production in evidence of Government records, the *riway-i-am*, in which the customs of the agriculturists are recorded. *AISHA BIBI v. BEGUM BIBI* Sind 87

—*Person described in school register and other documents as Rajput—Some documents describing him as Pandit or Kashmiri—Person held Rajput.*

Where a person is entered in school register and other documents as Rajput though in some documents he is described as Pandit or Kashmiri, the latter description not being a caste description, the person must be considered as a Rajput. *GHULAM HUSSAIN v. SECRETARY OF STATE* Lah. 137 (a)

—*Person dying leaving grandson with step-mother—Share of step-mother—True heir.*

Where a person dies leaving behind him a grandson with his step mother, the true heir is the grandson but a half is frequently given under Customary Law to a step-mother for her maintenance and the maintenance of her daughters. She has only a life-tenure in half share thus given to her. *DHARMON v. RAN SINGH* Lah. 828

—*Village—Tests—Sohna, if village or town.*

A place which has got the public buildings which has had a population for 70 years or more of over five thousand, which has got paved streets and which collected octroi dues over 50 years ago, must be regarded as a town. The mere fact that the tenure is the place *bhatachara* does not in any way conflict with its being a town and not a village. On these tests, Sohna is not a village.

Sohna is not a village but a town. The landlords there have no right to challenge an alienation of a house belonging to a non-proprietor unless the landlord can show that the house was built on land granted by the proprietary body out of the *shamilat* *deh*. *RANJIT SINGH v. NAWAB KHAN* Lah. 395

Custom (Sind)—Succession. See Custom—Migration

Decree—Nullity—Same manager representing both plaintiff and defendant whose estates were under protection of Chota Nagpur Encumbered Estates Act (VI of 1870)—Defendant not prejudiced—Decree passed is good one and not nullity—Court should look to substance and not form of action.

The fact that the same manager represents both the plaintiff and the defendant whose estates were under protection of the Chota Nagpur Encumbered Estates Act in a suit brought in 1919 undoubtedly makes the proceedings highly anomalous but this does not make the decree passed in that suit a nullity when the defendant is not in any way prejudiced, as, the anomaly is due to the provisions of

Decree—conold.

the Act as it stood at the time of the suit. In such a case the question which the Court has to ask is whether there was a genuine and *bona fide* contest in the suit. The utmost that can be said is that the procedure adopted in the suit is somewhat irregular, but that by itself would not make the decree passed in the suit a nullity, especially when the Court has complete jurisdiction to try the suit. After all what the Court has to look to is the substance and not the form of the action and once it is clear that notwithstanding the fact that the parties are represented by the same manager, the proceedings in the suit does not represent a mere sham contest and that the suit is properly defended the decree must be held to be a good decree. **LAL TIRATHNATH SAHI DEO v. LAL MISTUNJOYA NATH SAHI DEO** Pat. 79

—Variation. **See Hindu Law**

580

Deed—Construction. **See Insurance** 173

—Construction—Direct words not used—Evidence of parties, if uninterested, whether guide to meaning of phrases used.

Where direct words are not used to convey a right and the matter is one of inference by implication from the phrases used, then the evidence of the parties, if they are not interested one way or the other in the matter, is the surest of all guides as to the meaning of the phrases used. **AMAR NATH KHOSLA v. M. C. MOLAN** Lah. 65

—Construction—Document to be construed as whole.

The document, according to the well-known principles of construction must be construed as a whole and it is not legitimate to pick out one or two paragraphs and rely upon them only and to discard the rest of the document. The intention of the parties must be gathered from the whole of the document. **FAROK AHMED MRAH v. LALIT MOHAN CHOUDHURY** Cal. 94

—Construction—It is a matter of law—Duty of Judge—Description partly correct and partly incorrect—Correct description sufficient to identify subject-matter—Land described by boundaries and area—Which prevails.

The construction of a document is a matter of law, and it is the duty of the Judge to construe the terms of the grant in accordance with law, and on his independent construction of its terms, to come to his own conclusion as to whether the lands in suit were included within the grant or not. He is in no way bound by the opinion of the Financial Commissioner, which is based upon considerations which are irrelevant in a Court of law.

When a description in a document is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected in accordance with the maxim *falsa demonstratio non nocet cum de corpore constat*, and extrinsic evidence to show that the intention of the parties was not in accordance with the part of the description which is correct is inadmissible. So, where there is a description of land in a document setting forth the boundaries and then specifying the quantity as so many acres, etc., the description in regard to the acreage is considered to be mere false description if there is an error in the quantity, and the land within the boundaries passes by the document, whether it be less or more than the quantity specified. **BAKSH ALI v. AMIR ALI MRAH** Rang. 641

Deed—conold.

—Execution of, by illiterate person upon misrepresentation of its nature—Void or voidable. *Obiter.*—Where an old and illiterate person has executed a document upon a representation that it was lease, while in fact it was gift deed, there was a misrepresentation as to the nature of the document and not merely as to its contents and there was no real execution and the document is void *ab initio* and not merely voidable. **RAJA SINGH v. CHAIGOO SINGH** Pat. 816

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15-D—Suit for account of mortgage requiring setting aside of sale of equity of redemption, if maintainable

Suit claiming merely an account of the mortgage which requires setting aside of the equity of redemption is not maintainable under s. 15-D, **Dekkhan Agriculturists' Relief Act**. **KRISHNA VITNAK MAHAR v. SHANKAR KRISHNA GANDHI** Bom. 807

s. 72—Suit falling under both cls. (w) and (y) of s. 3—s. 72, if applies—Suit for sale of mortgaged property and for personal decree in case sale proceeds were insufficient—Relief for personal decree falls under cl. (w) of s. 3 and is governed by s. 72.

Section 72, **Dekkhan Agriculturists' Relief Act**, applies to a suit falling under both cls. (w) and (y) of s. 3 of the Act. A suit may include several reliefs, some of which may be in time and the others time-barred. The question whether a suit is in time or not, cannot be decided unless each relief claimed in the suit is separately considered. In a mortgage suit where the relief claimed by the mortgagee is the recovery of the mortgage money by the sale of the mortgaged property and a personal decree is claimed in case the sale proceeds are found insufficient, the claim to recover the mortgage debt by the sale of the mortgaged property is governed by the provisions of the *Lim. Act*. But the other relief for a personal decree falls under s. 3, cl. (w), **Dekkhan Agriculturists' Relief Act**, and the period of limitation is twelve years under s. 72 of the Act. **GURAPPA BHIMANNA CHIDGUPPI v. MADWALAPPA RAMOHANDRAPPA DUMANE** Bom. 429

Divorce Act (IV of 1869), s. 7—Scope. **See Civil Procedure Code, 1908, s. 151** 884

—ss. 36, 37—Alimony—Subsequent unchastity of wife, effect—Bench passing decree nisi observing that alimony should be continued so long as wife remained chaste and unmarried—Observation, whether binding on another Bench confirming decree and making order for permanent alimony—Such order not containing *dum sola et casta* clause—Order cannot be varied or discharged on ground of subsequent unchastity.

Observations made by a Bench of the High Court which passed the decree nisi to the effect that alimony could only be paid so long as the wife remained chaste and unmarried, could have no effect beyond the period of interim alimony and would not be binding on the another Bench which confirms the decree nisi and which passes orders as regards permanent alimony. If there is no *dum sola et casta* clause in the order making the decree nisi absolute and granting alimony to the wife, that order, should not be varied or discharged on the ground of subsequent unchastity. **T. H. CHANDLER v. A. CHANDLER** All. 834

Easement—Right of water—Irrigation—Such right acquired by raiyat—Government, if can diminish supply for economy for other purposes of greater importance. In the Madras Presidency the raiyat is entitled to

Easement—concl'd.

receive the water which his lands have been accustomed to for irrigation purposes without interference by the Govt. or anyone else. The Govt. cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular *yaçut*. In years of shortage the only obligation of the Govt. is to make an equitable distribution of water. But the *raiyat* has a claim against the Govt. when it withholds from him the water which he has a right to demand taking into consideration the supply available.

It is of course manifest that the needs of the city of Madras are of every great importance and in the absence of rights in others, no one could reasonably complain of the policy of the Govt. in giving this large City a preference in the supply of water, but when others have acquired rights, the law requires as they shall be respected. The Govt. is not entitled to economize water in seasons or months of shortage in order that a perennial supply may be available for the use of Madras if this economy means at the *raiyats* in the old *yaçut* will have their customary supply diminished. MADURANAYAKAM PILLAI
SECRETARY OF STATE Mad. 476

Right of water—Right to surplus water flowing from another's land through artificial channel, proof of.

For the plaintiff to prove that he is entitled to a surplus water flowing from the defendant's land to his own land through an artificial channel, would have to prove that he was entitled to it by some right of prescription. *AN LI v. SAN BAW* Rang. 802

Right of way—Ownership of two estates not co-extensive and equal in validity—Easement, if extinguished by unity of possession of dominant and servient tenements.

The acquisition of a right of way is not extinguished, but only suspended, by unity of possession of the dominant and servient tenements where the ownership of the two estates is not co-extensive and equal in validity, the dominant tenement being held for a term of years only and the servient tenement in full right of ownership. TAN SIT SHAN U PO NYUN Rang. 605

Riparian rights—Owner of upper holding—Use by, of water for irrigation—Rights of owner of lower holding.

The proprietor of an upper tenement who claims a right to dam up a stream and to impound so much of its water as he might find convenient for irrigation, leaving only the surplus, if any, for the use of the proprietors below, can take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what would be allowed to descend. If the amount which is allowed to descend is sufficient to supply the owner of a lower holding with as much water as he needs for his own purpose, it cannot be said that the amount that goes down is materially diminished. Diminished it may be, but not materially diminished, if the owner of the lower holding has enough for his needs. The owner of the lower holding is not entitled to restrain the owner of the upper holding without any proof of damage, actual or to be feared for the future. *AN LI v. U SAN BAW* Rang. 802

Easements Act (V of 1882), ss. 1, 4—Applicability to Burma.

Although the Easements Act does not apply to Burma, the Court must have regard to that Act in

Easements Act—concl'd.

considering the question relating to an easement. TAN SIT SHAN v. U PO NYUN Rang. 605

s. 18—Villagers accustomed to making offerings for long time at particular "Isthan" situated in a house to rid their cattle of diseases—If a customary easement.

Where residents of village have been accustomed for a long period of time to make offerings when their cattle are afflicted by disease and those offerings are made at a particular Isthan in a particular room, it amounts to a customary easement within the meaning of s. 18, Easements Act giving the villagers right to continue to make the offering. KANHAI SINGH v. BASDRO SAHAI All. 334

s. 62 (f). SAN Landlord and tenant 467
Electricity Act (IX of 1910), ss. 44 (b) 26 (5)—Electricity Rules, r. 31—s. 44 (b) requirements of—Removal of meter from its old position after breaking of seals, to new position by extending service line—Offences under s. 44 (b) and r. 31, held, committed—R. 31, if conflicts with s. 26 (5).

Section 44 (b) Electricity Act does not require that the "works" laid or connected up with any other "works" belonging to the licensee must also be "works" belonging to the licensee. "Works" as defined in s. 2 (n) of the Act includes electric supply lines. The supply line, therefore, up to the point at which it enters the meter comes within the meaning of "works" as defined in s. 2 (n).

Held, that the accused in laying the additional line from the former position of the meter up to its new position was laying "works" within the meaning of s. 44 (b), and he laid that line for the purpose of connecting it with other works belonging to the licensee, namely the old supply line which terminated at the original position of the meter. His act, therefore, clearly amounted to an offence within the meaning of s. 44 (b).

Held, further that as the accused broke open the seals which had been placed by the company upon the meter, his act clearly amounted to an offence under r. 31 (1) of the Electricity Rules.

Rule 31 of the Electricity Rules does not deal with cases which s. 26 (5) contemplates but deals with the tampering with the seals placed on a meter which is already working. There is, therefore, no conflict between r. 31 and 26, sub-s. (5). M. A. BHAGVATI v. EMPEROR Bom. 506

Electricity Rules, r. 31. SAN Electricity Act, 1910, s. 44 (b) 506

Electricity Rules (1937), r. 48 (1)—Wires originally fixed on surface subsequently buried in walls—There is alteration in system and breach of r. 48 (1).

It is not in every case that the prosecution is called upon to prove that a re-wiring has altered the capacity or character of old installation. It is only when there is replacement of lamps, fans, fuses, switches and other component parts of the installation that the alteration in capacity and character have to be examined. This exception, however, will not apply to electrical installation work including additions, alterations, repairs and adjustments of existing installations. Where the wires originally fixed on the surface are subsequently buried in the walls, there is certainly an alteration in the system and not a case of replacement and a breach of r. 48 (1) is committed. Replacement means changing of old wires for new ones. HANA HOTI v. EMPEROR All. 709

r. 123—Person actually carrying out installation if guilty under r. 123.

Electricity Rules—consolid.

The person who actually carries out the installation is not guilty of any offence under r. 123, Electricity Rules: it is only the person under whose immediate supervision the work is carried out who is liable to punishment. *HONS HOTZ v. EMPEROR*

All. 709

Estoppel. See Bengal Tenancy Act, 1885, s. 26-G

587

—**Acquiescence—Act of building not bona fide—Plea, if available.**

Where an act of a person of building upon the land is not *bona fide*, he cannot avail himself of the plea of estoppel by acquiescence. *KANHAIYA LAL v. HAMID ALI*

Oudh 467

Evidence.

See Criminal trial

594

See Practice

634

—**Age—Proof of—Statement of doctor as to age based upon certain physical peculiarities—Whether legal proof—Evidence Act (I of 1872), s. 45.**

It is true that a doctor is in a better position to form an opinion about the age of a person than a layman, but the statement of a doctor is no more than an opinion. When from his statement it does not appear that he brought any scientific knowledge to bear upon his opinion, where the doctor has relied entirely on certain physical peculiarities, such as teeth, etc., his statement is not a legal proof but a mere opinion. *EMPEROR v. QUDRAT*

All. 271

—**Judgment in previous suit—Probative value**

of.

The question as to the probative value of a finding in a previous suit depends on the nature of the findings and of the issues involved in the two different suits. *PRAHLAD CHANDRA SINGH v. BILIM MAHATO*

Pat. 685

Evidence Act (I of 1872). See Bengal Tenancy Act, 1885, s. 26-G

587

—**s. 13—Scope and applicability.**

Section 13, Evi. Act, consists of two parts. The first part deals with transactions and the second part with instances. *SECRETARY OF STATE v. DISTRICT BOARD, RANGPUR*

Cal. 454

—**s. 27—Confessional statement must be voluntary.**

The general rule that a confession should be voluntary should apply to a confessional statement under s. 27.

Where a person had been persistently questioned for hours, throughout being under arrest, this process is such as to taint any result which may arise from it. It is a clear breach of the Police instructions which are not to pester people who are under arrest. The statement thus extracted cannot be considered as voluntary confession and is not receivable in evidence. *EMPEROR v. TADUTURU POLIGADU*

Mad. 829

—**s. 27—Criminal Procedure Code (Act V of 1898), s. 162—Provisions of, if contradictory**

—**S. 162, if alters s. 27, Evidence Act—Statement of accused to Police that he would point out ornaments of deceased, admissibility.**

The provisions of s. 27 of the Evi. Act are quite independent of s. 162 of the Criminal P. O., and the amendment of that section made in 1923, was not intended to abrogate or impair the effect of s. 27 of the Evi. Act. The statement made by the accused that he would produce deceased's ornaments which distinctly led to the discovery of the ornaments falls within the ambit of s. 27.

Section 27 contemplates the discovery of material evidence. The material discovered would have no value unless it is relevant to the fact in issue and

Evidence Act—contd.

connected in some manner with the crime under investigation. Any information given by an accused person showing the relevancy of a fact to the crime must form an integral part of the discovery of the fact itself, namely material evidence, although it may indirectly amount to a confession. Consequently, the statement made by the accused that he would point out the deceased's ornaments would be admissible. That would only show his knowledge of the ornaments belonging to the deceased but would not prove by itself his complicity in the crime of murder. *MOTILAL v. EMPEROR*

Nag. 310

—**s. 30—Confession of co-accused—Value of.**

The confession of a co-accused cannot be the main evidence in a case. It is the weakest possible kind of evidence, which can only be taken into consideration against the co-accused by reason of the provisions of s. 30, Evi. Act. It is not given upon oath and it is not tested by cross-examination. A statement in such a confession cannot alone be held sufficient to justify a finding of guilty of so grave an offence as that under s. 396, which is punishable with death. *AN PHUT v. THE KING*

Rang. 205

—**s. 32—Cancelled will, when can be used in support of statement made by testator.**

A cancelled will is admissible under s. 32, Evidence Act, if it is used in support of a statement made by the testator in the interest of other persons, his sons, and against his own interest. *B. L. CHODHA v. B. K. RAJ*

Nag. 210

—**s. 34—Mere entries in book account unsupported by corroborative evidence, whether sufficient to charge person.**

Under s. 34, Evi. Act, *bahi* entries are evidence, but mere entries in a book account are insufficient to charge a person. It is necessary that there should be corroborative evidence to prove the payment of specific sums. *BANWARI LAL v. HUSSAINI*

Lah. 858

—**s. 35. See Evidence Act, 1872, s. 65 (e)**

691

—**s. 35—Suit to eject defendants on ground that they were under-*raiya*s of plaintiffs—In Khanapuri proceedings which preceded finally published Record of Rights, one of plaintiffs of behalf of all was stated in decision of Khanapuri Officer to have admitted that predecessors-in-interest of defendants were co-sharers—Admissibility of such statement.**

A suit was instituted to eject the defendants on an allegation that they were under-*raiya*s of the plaintiffs. The defence was that the defendants were not under-*raiya*s but co-sharers with the plaintiffs. In the finally published Record of Rights, the predecessors of the defendants were recorded as under-*raiya*s in respect of the disputed land. But in the Khanapuri proceedings which preceded the finally published Record of Rights, M, one of the plaintiffs was stated in the decision of the Khanapuri Officer to have admitted before him that the predecessors-in-interest of the defendants were co-sharers. At that time M was acting on behalf of all the persons jointly interested in the land in dispute.

Held, that the admission contained in the decision of the Khanapuri Officer was admissible. Further more, even if the decision of the Khanapuri Officer were inadmissible for proving the truth of the admission made by M before the Khanapuri Officer, it would still be admissible for the purpose of proving that M made such a statement. *KHEDU MAHTO v. KHONKA MAHTO*

Pat. 254

—**s. 42—Decree granting additional *rai***

Evidence Act—conold.

owing to increase of land by re-formation whether evidence against persons not parties to suit, regarding time when re-formed land became fit for possession.

The recitals and findings in judgment passed in a suit for additional rent on the ground that land in the holding has increased by accretion, are not evidence against persons who are not parties to that suit. But the fact that such decrees were passed by which additional rent was imposed is evidence as regards the time from which such re-formed land became fit for possession. **ABDUL LATIF**

HABIBULLA Cal. 714

—s. 45. **SEE** Evidence 271

—ss. 65 (e), 74 (1) (iii), 35—*Powers-of-attorney—True copy in register of powers-of-attorney—Admissibility in proof of original entry.* Every entry in the register of powers-of-attorney is "a public document" within the meaning of s. 74 (1) (iii), Evi. Act, being "a document forming the act or record of the act" of an executive public officer in the discharge of a statutory duty imposed upon him. It follows that a true copy of the entry [which by virtue of s. 76, Evi. Act, is a certified copy within the meaning of s. 63 (1)] is admissible as proof of the original entry by virtue of s. 65 (e), Evi. Act. The weight to be attached to the entry depends upon the accuracy of the abstract of the power. But the Court is entitled to resume the correctness of the abstract in accordance with the usual presumption that official acts are regularly performed and hence the original entry itself is good evidence of the contents of the power-of-attorney and is relevant under s. 35, Evi. Act. **PATTU KUMARI BIBI v. NIRMAL KUMAR SINGH**

Cal. 691

—s. 92—*Oral agreement modifying registered contract of lease, is inadmissible—Transfer of Property Act (IV of 1882), ss. 106, 108—Month to month lease—Lessee allowed to construct building—Lessor, if can claim demolition—His remedy.*

Subsequent oral agreement modifying a previous contract of a month to month lease which is registered, is not admissible in evidence.

Where in case of such a month to month lease, lessee is allowed to construct a building on the land leased, it is unjust for the lessor to claim a structure to be demolished. He should give the lessee a notice to quit. **JADUNANDAN DAS v. MAHO**

Pat. 284

—s. 106. **SEE** Muhammadan Law 837

—s. 116. **SEE** Limitation Act, 1908, Art. 139 858

—s. 118—*Child witness—Duty of Court.*

When a young child is called as a witness, the first step for the Judge or Magistrate to take is to test himself by questioning the child that the child is a competent witness within the meaning of s. 118, Evi. Act. **AN PHUT v. THE KING**

Rang. 205

—s. 126. **SEE** Criminal Procedure Code, 1898, s. 94 (3) 419

—s. 145. **SEE** Civil Procedure Code, 1908, O. VI, r. 5 588

Execution—Bar to—Decree obtained by depositor against Co-operative Bank for return of deposit—During pendency of suit, compromise sanctioned by Registrar, Co-operative Societies under s. 24-A, Bihar and Orissa Co-operative Societies Act (VI of 1935)—Decree-holder no party to it—Whether bar to execution of decree.

Where during the pendency of a suit by a depo-

Execution—conold.

sitor against a Co-operative Bank to recover the amount of the deposit, a scheme of compromise under s. 24-A of the Bihar and Orissa Co-operative Societies Act is sanctioned by the Registrar of Co-operative Societies, the compromise is binding on the plaintiff depositor under s. 24-A (2) of that Act although he is not party to the compromise and a decree passed in the suit is only a security for the debt that is owing to the decree-holder and has the effect of establishing that debt as against the Bank and though the compromise is no bar to the passing of a decree, it is a clear bar to execution of the decree. The compromise bars execution, not by reason of any express provision in the Bihar and Orissa Co-operative Societies Act, but under the general law. **BUKAR CENTRAL CO-OPERATIVE BANK, LTD. v. AKHOURI BINDRAYACHAL PRASAD SINGH**

Pat. 606

—*Limitation—Implied adjudication of question of limitation—There was held no implied adjudication.*

The answer to the question whether in a particular case there has been implied adjudication of the question of limitation depends upon the circumstances of each case. If the execution Court had passed any effective order for further execution to the detriment of the judgment-debtor, it might safely be inferred that there had been an implied adjudication of the question of limitation. Mere awarding costs of execution to the decree-holder and noting the balance due under the decree are mere formal matters and of a ministerial character and do not involve any adjudication of the question whether the application is capable of being proceeded with or not.

An application for execution was beyond limitation. Although the notice was served on the judgment-debtor he did not appear and the decree-holder having expressed a desire that his application should be consigned to record room, the Court passed an order to that effect awarding costs to the decree-holder and noting the balance due under the decree:

Held, that implied adjudication of question of limitation in favour of decree-holder could not be inferred from the order. **RAMJI LAL v. MANDAI**

Oudh 650

—*Limitation—Plea of—Execution application not fructified but withdrawn and dismissed—Judgment-debtor, if barred by res judicata or estoppel from raising question of limitation later.*

Orders in execution proceedings are binding upon the parties thereto on principles analogous to those of res judicata, or of estoppel.

Where, however, no objection to execution is taken and the application for execution does not fructify, but is withdrawn and dismissed, the judgment-debtor is not debarred by the principles of res judicata or estoppel from raising the question of limitation later. **MAUNG MAUNG v. V. V. R. CHETTYAR FIRM**

Rang. 70

—*Res judicata.* **SEE** Execution—Limitation 70

Execution sale—Attachment and sale of judgment-debtor's movable property by decree-holder—True owner recovering such property from auction-purchaser—Auction-purchaser, if can recover from decree-holder money paid by him on ground of total failure of consideration.

Per Full Bench.—If a decree-holder attaches and sells in execution of a decree against a judgment-debtor (the sale proclamation saying that the right

Execution sale—consold.

title and interest only of the judgment-debtor is being sold) movable property, and such property is subsequently recovered by its true owner from the auction-purchaser, the auction-purchaser is entitled to recover from the decree-holder the money which he has paid on the ground that there has been a total failure of consideration.

Per Baguley, J.—There is a difference between a sale in which the judgment-debtor has some interest in the property sold and a sale in which he has no interest in the property sold. If the judgment-debtor has some interest in the property sold, there is no guarantee by any party or by the Court as to the extent of that interest, and, if that interest is sold, the sale becomes absolute and no more can be said or done about it in the absence of misrepresentation, fraud, etc. On the other hand, when the judgment-debtor has no attachable interest at all, nothing has been sold, and if nothing is sold, there is no sale. There is, therefore, nothing to become absolute and nothing to be set aside. There is simply a payment of money in return for nothing and the money having thus passed is returnable.

Per Sharpe, J.—The whole basis of a sale of movable property, be it a sale by the Court or not, is that something is sold. That basis is unchanged even in cases where the sale is by the Court in execution of a decree, the sale proclamation saying that only the right, title and interest of the judgment-debtor is being sold. In those cases in which it transpires that nothing whatever is in fact sold, there is, if the purchaser has paid the purchase money, a total failure of consideration. **MAUNG AYA MAUNG v. A. SCOTT & Co.** Rang. 757 F B

What passes.

In the case of all sales in execution of decrees only the right, title and interest of the judgment-debtor passes. **MAUNG AYA MAUNG v. A. SCOTT & Co.** Rang. 757 F B

Extradition Act (XV of 1903), s. 7. See Criminal Procedure Code, 1898, s. 491. 302

Factories Act (XXV of 1934), s. 71—Procedure contemplated by s. 71 (1)—Admission of offence by alleged actual offender—Whether proof that manager or occupier used due diligence or that the offence was committed without his connivance.

The complaint is made in the first instance by the Inspector of Factories against the manager or occupier under s. 60, Factories Act. The manager or occupier is then entitled under s. 71 to complain against the actual offender and if he does so, the actual offender is given notice and brought before the Court and the trial proceeds as against both persons complained against; for, the section contemplates both sets of complainants and accused being before the Court at the same time. The carriage of proceedings is with the original complainant on whom the onus lies of proving that the offence has been committed. Both parties complained against are concerned with the finding on this issue and both are entitled to cross-examine the prosecution witnesses at this stage, and to lead evidence to disprove the charge, but being accused persons they would not be entitled to give evidence themselves. If the prosecution fails to prove the offence, both the accused must be acquitted. If the offence is proved, the Court should record an order to that effect and the manager or occupier is guilty under s. 60 of the Act. Section 71, however, affords the manager or occupier an opportunity of escaping liability provided he can give satisfactory proof of

Factories Act—consold.

the facts required by s. 71 (1) (a) and (b). The onus of proof, however, is now shifted to the manager or occupier and he is entitled to call evidence to give evidence himself. The actual offender who is, the ultimate accused, would be entitled to call evidence, but not to give evidence himself. The difference in procedure being due to the fact that the actual offender occupies the role only of an accused, whereas the manager or occupier at this stage, besides being an accused, has to discharge the onus of positive proof required by s. 71 (1) (a) and (b), and in all probability alone is capable of proving certain facts of which proof is thereby required. The Crown, which has initiated the proceedings, and has throughout retained the carriage of the proceedings, is entitled at this stage to cross-examine the occupier or manager if he gives evidence, and any witnesses called by him in support of his charge, and to call rebutting evidence.

The Magistrate cannot convict the alleged actual offender or discharge the manager or occupier until the proof envisaged by s. 71 (1) (a) and (b) is before him. It is true that s. 342 (3), Criminal P. O., permits the Court to take into consideration the answers given by the accused to an admission of the offence by one of the accused is no proof that the other accused had used due diligence to prevent the offence, or that the offence was committed without his connivance. **SUPRENTENDENT & REMEMBRANCE OF LEGAL AFFAIRS, BENGAL L. N. BIRLA** Cal. 3

s. 71 (2)—S. 71 (2), scope of—Exception general rule that person primarily responsible manager or occupier.

Section 71 (2), is by way of exception to the general rule that the person primarily responsible is the manager or occupier. The whole scheme of the Factories Act is to bring pressure on the controlling authority to see that the provisions which the legislature has made for the safety and welfare of employees are carried out. **SUPRENTENDENT & REMEMBRANCE OF LEGAL AFFAIRS, BENGAL L. N. BIRLA** Cal. 3

Federal Court Rules, O. IX, r. 1—High Court, can, in Federal Court appeals, extend time fixed by O. XLV, r. 7, Civil Procedure Code, depositing printing costs—Amendment of O. XLV, r. 7 in 1920—R. 9 of Privy Council Rules, if given power to High Court to extend time fixed by O. XLV, r. 7, in Privy Council appeals—"Date of decree," meaning of.

Per Harries, C. J. and Fazl Ali, J., Agarwala, J., dissenting.—What O. IX, r. 1 of the Federal Court Rules means is that O. XLV, Civil P. O., as amended or modified by any Order in Council and in particular as modified and adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, shall govern the procedure in Federal Court appeals. As O. XLV, r. 7, Civil P. O., has been modified by Order in Council of February 9, 1920, so as to give the Court power to extend time to make a deposit in Privy Council appeals, such power is also given to the Court in relation to Federal Court appeals by reason of O. IX, r. 1 of the Federal Court Rules. Rule 9 of Order in Council of February 9, 1920, only empowers the Court to extend time when justice of the case requires it, and such power should be exercised with great caution and where there are cogent reasons for doing so. It is only where the justice of the case demands that the Court should extend time that

Federal Court Rules—concl'd.

extension should be given. The fact that the appellant who was a *karta* of the joint family had contracted small-pox which made him unable to deposit the money within period allowed by law is a cogent reason for extending the time. The High Court is not closed during the vacation, and the money can be deposited and, if tendered, will be accepted during vacation. Time, however, may be extended if failure to deposit printing costs is due to the honest impression on the part of the appellant that if the money is deposited on the opening day of the Court, it would be accepted as being within time as this is not an ordinary case of ignorance of the law, but to a large extent mistake committed due to the failure of the Court in making the position clear.

Per *Agarwala, J.*—Neither para 9 nor any of the other paragraphs of the Order-in-Council of 1920, applies to appeals to the Federal Court and, consequently, the High Court has no power to extend the time prescribed by O XLV of the Civil P. O., in the case of appeals to the Federal Court.

The phrase "date of the decree" in O. XLV, r. 7 (1), Civil P. O., means the date which the decree bears or the date upon which judgment was pronounced. The starting point of time therefore in O. XLV, r. 7, is the date which the decree bears and not the date when the decree was actually signed.

Obiter.—The meaning of O. XLV, r. 7 (1), Civil P. O., as it now stands, is plain. An extension of time may be granted for deposit of printing charges after the expiry of 90 days upon cause being shown, but such extension of time cannot exceed 60 days, and if this further period of 60 days has elapsed, the Court has no power under the rule as it stands to grant further time. The words are, mandatory and limit the discretion of the Court. If the period of 90 days from the date of the decree has expired, the Court can at most grant a further extension of 60 days. Once that period has elapsed, the Court has no power as the rule stands, to grant any further time. Rule 9 of the Privy Council Rules, however, allows the Court either to cancel the certificate or make such other order as the justice of the case demands. The words used in r. 9 are sufficiently wide to give the Court power to extend time for making deposits of printing costs in proper cases in appeals to His Majesty in Council beyond the limits fixed by O. XLV, r. 7, Civil P. O. *LACHMESHWAR PRASAD SHUKUL v. GIRDHARI LAL CHAUDHURY* Pat. 353 F B

Forfeiture. SEE *Transfer of Property Act, 1882*, s. 111 (g) 25

Fraud—Inference of from circumstances—Criterion.

Where fraud is to be inferred from the circumstances, and is not directly proved, those circumstances must be such as to exclude any other reasonable possibility except that of fraud. In other words, the criterion is similar to that which is applicable to circumstantial evidence in criminal cases. *RAJA SINGH v. CHAICHOO SINGH* Pat. 816

Gambling—Club and common gaming house, distinction.

In the case of a club, it is not usual for a charge to be made for the profit and benefit of the owner or occupier of the premises. In the case of a common gaming house, all those participating in the game pay certain amount for the benefit of the owner of the premises. The other point is that in the case of a club the place is not open to any member of the public, but only to members of the club and

Gambling—concl'd.

perhaps their guests. *EMPREOR v. KALLAPPA GURAPPA KOTAGUNSHI* Bom 315

Gaming SEE *Gambling* 315

General Clauses Act (X of 1897), s. 10—"Office," if includes office of Court—Deposit made on re-opening of Court after vacation, if within time.

An act directed or allowed to be done or taken in an office is used in s. 10, General Clauses Act in contradistinction to an act directed or allowed to be done or taken in a Court, and "office" does not here include the office of a Court, for, the office of the Court is merely the hand with which the Court performs some of its functions. Hence, the fact that the office of a Court remains open while the Court itself is closed for judicial business will not deprive a litigant of the extended time for doing an act to which s. 10, General Clauses Act, applies. The High Court is closed for ordinary business during the annual vacation. Printing costs deposited on the day the Court re-opens will, therefore, be within time under s. 10. *LACHMESHWAR PRASAD SHUKUL v. GIRDHARI LAL CHAUDHURY* Pat. 353 F B

Government of India Act, 1919 (9 & 10 Geo. V, Ch. 101), s. 80-A (3)—Power of Local Government to Legislate to regulate central subject for good government of territories outside province.

Section 80-A (3), Govt. of India Act, cannot be interpreted to mean that the local Legislature is authorized to make laws regulating a central subject for peace and good government of territories lying, outside the province. *COMMISSIONER OF WAQFS, BENGAL v. NARISINGH CHANDRA DAW & Co.* Cal. 438

—Part. VI SEE *Government of India Act, 1935*, s. 317 (1) 420

Government of India Act 1935, (25 & 26 Geo. V, Ch. 42), s. 205—Duty of High Court to consider, determine and record in every case the granting or withdrawing of certificate—No such determination by High Court—Appeal held should be dismissed.

Section 205, Govt. of India Act, 1935, imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, the giving or withholding of the certificate. On such determination the jurisdiction to entertain an appeal from such judgment, decree or final order depends, and, manifestly, such determination, whether it involves the granting or withholding of a certificate, should be recorded, not only for the information of the parties, but—a matter of equal importance—also for the certification of the Judicial Committee and the Federal Court as to their jurisdiction to entertain an appeal.

Where in a case the plaintiff sought an order for appointment of the Official Trustee of Bengal to be trustee of the estate of a deceased under the provisions of s. 10 of the Official Trustees Act which was amended by the Govt. of India (Adaptation of Indian Laws) Order, 1937, and the High Court in appeal did not record the determination of the question whether the appeal involved the granting or withholding of a certificate:

Held, that in the absence of certificate the appeal could not be entertained. *ERROL MACKAY v. OSWALD FORBES* PG 549

—s. 205—**Refusal of High Court to grant certificate—No appeal lies to Federal Court.**

A certificate under s. 205, Govt. of India Act, 1935, is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate, it is not for the Federal Court to

Government of India Act, 1935—conold.

enquire into the reasons for the refusal, against which no appeal lies to the Federal Court.

[Their Lordships warned the litigants and the legal profession that there will be no excuse in future for any ignorance of the law; and if the refusal of a High Court to grant a certificate is made hereafter, the ground of any further applications or appeals, the Federal Court shall regard them as frivolous and vexatious and an abuse of the process of the Court, and deal with them accordingly.]

KISHORI LAL v. GOVERNOR-IN-COUNCIL, PUNJAB

F C 801

ss. 317 (1), 321, Sch IX—S. 317 (1) and Sch. IX provide that provisions of Part VI, Government of India Act 1919, (9 & 10 Geo. V, Ch. 101) should continue to have effect—Hindu Women's Right to Property Act (XVIII of 1937), is therefore valid—Enactment, when becomes an Act. Section 317 (1) and Sch IX, Govt. of India Act, 1935, provide that the provisions of Part VI, Govt. of India Act, 1919, in regard to the Indian Legislature should continue to have effect notwithstanding the repeal of that Act by the Govt. of India Act of 1935. Hence Hindu Women's Right to Property Act is perfectly a valid Act although passed by the Legislature before the Govt. of India Act came into force and assented to by the Governor-General after its coming into force.

According to the provisions of s. 68, Govt. of India Act of 1919, which appear continued in Sch. IX, Govt. of India Act, 1935, the enactment is a Bill when passed by the Indian Legislature but does not become an Act until the assent is given by the Governor-General. JANAK DULARI v. SRI GOPAL

All. 420

Guardians and Wards Act (VIII of 1890), s. 7—Appointment of guardian for minor's property—Enquiry regarding minor's property should be made—Enquiry, nature of.

In an application for the guardianship of property of a minor, it must be shown that the minor has some separate property as without that there is no foundation for the application. It is true that an enquiry for the purposes of the Guardians and Wards Act is not meant to be a lengthy and elaborate enquiry, but there must be some basis for finding that there is some property at all. If the deceased father of the minor was governed by the Muhammadan Law, then the widow is entitled to her share and the balance would be the property of the minors of which a guardian could be appointed. If on the other hand this person was governed by the Customary Law, then his widow takes a widow's estate and during her lifetime the minors have no right in this property except for maintenance. No guardian of the minors can, in such circumstances, take possession of such property in the lifetime of the widow. HASSAN BI v. NEK ALAM

Lah. 809

s. 7—Guardian, appointment of—Considerations in—Question, if can be settled by compromise between rival claimants.

What the Court has to consider in appointing a guardian is the welfare of the minors on evidence produced before it and not to pass judgment in accordance with the terms of a compromise entered into between the persons contesting for guardianship. It is the duty of the Court to consider whether or not the compromise is in the interests of the minors. HASSAN BI v. NEK ALAM

Lah. 809

ss. 8, 39—Person coming within terms of s. 8, if "person interested" within meaning of s. 39. The term "any person interested" in s. 39, Guardians

Guardians and Wards Act—conold.

and Wards Act, is very wide. The matter cannot be decided merely with reference to something subjective in the mind of the applicant but some objective meaning must be given to the term. The fact that a person comes within the terms of s. 8 is quite sufficient to make him personally interested within the meaning of s. 39 and would not make him any the less a person interested merely because he is at enmity with the guardian. SRIPAT SINGH DUGAR v. MOHINI SUNDARI

Cal. 880

s. 25—Father delivering his infant daughter to another and taking no more interest in her for over 15 years—He is not entitled to order under s. 25 in his favour.

Where a father delivers his infant daughter to the custody of another and for over 15 years takes no interest in her, but allows others to do what he as a father should do, he is not fitted to exercise the rights of a father. He is certainly not a person in whose favour the Court should pass an order under s. 25, Guardians and Wards Act. T. SIVASANKARA MUDALIAR v. RADHABAI AMMAL

Mad. 647

s. 25—Hindu father is not entitled to apply under s. 25 for being appointed guardian of his own minor child.

A Hindu father is not entitled to apply under the Guardians and Wards Act, for an order appointing him guardian of the person or property of his minor child. Under Hindu Law, the father is the lawful guardian of his child and a declaration by the Court cannot increase his powers. T. SIVASANKARA MUDALIAR v. RADHABAI AMMAL

Mad. 647

Hindu Law—Adoption—Brahmin adopting daughter's son—Datta homam if essential.

The performance of the datta homam ceremony is not essential for the validity of the adoption by a Brahmin of the son of his daughter. FAMINATHA IYER v. VAGHESAN

Mad. 37

Alienation—Alienation by manager—Right of after-born co-parcener to challenge—Limitation—S. 6, Limitation Act (IX of 1908), if can be relied on

Where an alienation is made by the manager without any legal necessity and without the consent of the other co-parceners then living, it will be invalid not only against those co-parceners but also other co-parceners born after the alienation provided that the alienation has not been ratified by the other co-parceners before his birth. Here the period of limitation would run from the date of the sale, and there is only one cause of action which would arise in favour of the other members who had not consented to the sale. Successive causes of action cannot arise as new members are born year after year. Such after-born co-parcener cannot rely on s. 6, Lim Act and where he claims in his own right and not through his father, his father's insanity is immaterial. NANDLAL RAMPRATAP v. DEORAO

Nag. 881

Karta—One of two kartas assigning decree—Assignment, if can be challenged by person not member of family.

Where a joint Hindu family has two kartas, an assignment of a decree made by one of them alone cannot be challenged by a person who is not a member of the joint family. Such an alienation is not unlawful or void *ab initio* but is voidable only at the option of the other co-parceners, who alone are affected by unauthorised act. RAM KUMAR RAM SARAFF v. MOHAN LAL MAHARAJ

Pat. 788

Mortgage by adoptive mother for amount greater than required for legal necessity

Hindu Law—contd.

—Mortgagee can recover only portion required for legal necessity—Difference between sale and mortgage for legal necessity, explained.

The effect of a sale of property for a larger sum than immediate necessity requires, is not necessarily the same as the effect of a mortgage for a larger sum than is required, for, it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding. What the Court has to consider in the case of a sale is whether the sale should be set aside or not. The sale is either valid or invalid. A mortgage may, however, be valid for less than the whole amount advanced, or it may be valid for the whole amount against one defendant, and for part of the amount only against another defendant. In enforcing a mortgage the Court takes an account of what is due.

Where it is found that a mortgage executed by an adoptive mother was for a greater amount than was required for the legal necessity, the mortgagee is only entitled to that portion of the advance which was advanced for legal necessity. *PURUSHOTAM DAMODAR RAICHURKAR v. GANGADHAR KASHINATH SAKHARE* Bom 569

—Alienation—Sale of minor's property without legal necessity—Whether void or voidable—Sale not set aside by minor—Transference from him, if acquires right to sue.

The sale by the natural guardian of a Hindu minor of the minor's property when there is no legal necessity for such sale is not void but voidable and is valid until set aside. The minor on attaining majority has the right to have the sale set aside and he must do so within the period fixed by Art. 44, Limitation Act. Until the sale is set aside, the minor's interest in the property amounts merely to a right to sue and therefore a transferee from him does not get anything. *MON MOHAN BHATTACHARJEE v. BIDHU BHUSAN DUTTA* Cal 6

—Widow—Mortgage by widow to redeem previous mortgage by husband—Subsequent mortgage by her to pay off time-barred claim under previous mortgage, whether binding on reversioners.

The payment of a husband's debt, though barred, is a pious duty on the part of the widow. The Hindu Law does not recognise any bar of limitation. According to the Hindu Law leaving a debt unpaid is a sin, the consequences of which follow the debtor into the next world. Therefore, an alienation by a widow of property of her husband in order to pay off the debt of her husband even though barred by statute, is an alienation, which is binding upon the reversioners.

A Hindu widow executed a mortgage in 1913 in order to redeem a mortgage executed by her deceased husband in 1893. The widow again in 1916 executed mortgage to redeem the mortgage of 1913 and in 1934 she executed a mortgage to pay off a claim under the mortgage of 1916 which had become barred by time:

Held, that the effect of the transaction of 1913 was that the debt of 1893 was paid off and ceased to exist. The debt of 1913 was a debt due from the widow or the estate inherited by her and hypothecated in lieu of that debt. The debt made payable by the deed of 1916, was, therefore, the debt not of the deceased husband but of the widow and, therefore, the consideration of the mortgage of 1934 was the time-barred debt of her own and not that of her

Hindu Law—contd.

husband. The mortgage of 1934 was not therefore binding on the reversioners. *C. ANDRIKA PRASAD v. BHAGWAN DAS* Oudh 105

—Alienation—Widow—Necessity—Consent of next reversioner though not conclusive proof, is prima facie evidence of legal necessity.

When a document of transfer supported by consideration is executed by a Hindu widow and the document is consented to by the next reversioner that consent in itself affords *prima facie* evidence of legal necessity and it is not necessary for the transferee to adduce evidence of legal necessity beyond the evidence of the consent. The next reversioner is the person most interested in disputing the transaction and his consent will naturally afford presumptive proof of legal necessity, and if such proof is not rebutted by contrary proof, the consent, although it will not be conclusive proof of legal necessity, will be of great evidentiary value. *KAULSHAR SHUKUL v. RAM KISHORE LAL* All. 644

—Debts—Legal necessity—Debts incurred for marriage of male member, whether for necessity.

Under the Hindu Law the entire joint family property is liable for the debts reasonably incurred for the marriage of a male member thereof. *MON MOHAN BHATTACHARJEE v. BIDHU BHUSAN DUTTA* Cal. 6

—Son's liability—Father selling son's interest in joint family property, whether merely exercising power of sale possessed by son himself—Father's power, if can be limited by s. 64, Civil Procedure Code (Act V of 1908).

The recognition of the father's power to sell the son's interest for the discharge of his own debts is destructive of the principle of independent coparcenary rights in the sons. To the extent required to satisfy the father's proper debts, the father and his creditors are entitled to ignore the son's coparcenary rights in the family property. The father when he sells the family property for the discharge of his debts is not merely exercising the power of sale possessed by the son himself. The father's power cannot be limited by reason of the statutory disability imposed by s. 64, Civil P. C., upon the son as a result of the attachment of the son's interest. *DRAVYAM PILLAI v. VEERANAN AMBALAM* Mad 562

—Family business—Joint family of brothers governed by Dayabhag School starting business—Son of one of them taking very active part in firm affairs from commencement—Whether personally liable for debts of firm contracted during lifetime of his father.

Where a joint family of brothers governed by the Dayabhag School of Hindu Law start a business and a son of one of them takes such an active part in the business from its commencement as to infer that he was one of the partners, he is personally liable for the debts of the firm contracted even in the lifetime of his father. That personal liability would not cease on the death of his father and on his acquiring an interest in the family property. *FIRM HAROHANDRAI ANANDRAM v. FIRM KEDARNATH NIRMAL CHANDRA GUHA* Pat. 796

—Guardian—Paternal grandmother of minor—Endorsement of payment made by her, if can bind minor under s. 21, Limitation Act (IX of 1908)—Desirability in matter of appointment of guardian, when relevant.

The ancient texts of Hindu Law do not provide for the management of a minor's property beyond stating that the guardianship shall vest with the king. The position of the king is now taken by

Hindu Law—contd.

the Court. Custom has, however, recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. But the custom has not extended the rule beyond the mother. Neither by Hindu Law nor custom is the grandmother recognized as the lawful guardian of the minor. No member of the family other than the father or the mother has been recognized as having the right of guardianship. All other things being equal, the nearest relative of the minor should have the position of guardian but if the father and the mother have died, no relative can become the lawful guardian without an order of the Court. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of s. 21, Lim. Act, even if such person happens to be the minor's nearest living relation. Hence the endorsement of payment made by the minor's paternal grandmother cannot bind the minor.

Per *Mockett, J.*—Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else.
KARINAGISHTTI CHENNAIPA v. KARINAGISHTTI ONKARAPPA Mad 749 F B

—Joint family—Suit by minor co-parceners for accounts of ancestral property in hands of third person—Manager not joined as co-plaintiff but joined as defendant—Suit, if maintainable.

Where the father, the manager of the joint Hindu family is not joined as co-plaintiff, the minor co-parceners cannot bring a suit for accounts of the joint ancestral property in the hands of a third party, even if the father is joined as defendant and supports their claim. The minor plaintiffs cannot give that third person a receipt or quitance on settlement of his accounts, even should that person be willing to account. That can be done only by the manager, who therefore, alone is entitled to call for accounts and give a quitance or receipt on settlement. If therefore, the minor plaintiffs cannot give a good quitance or receipt on settlement of accounts, obviously they have no right to sue. Since it is the manager or karta who is alone competent to represent the family, to act for it and to bind it. The device of joining the manager as a defendant does not avoid the difficulty. *KHEMCHAND RAMDAS WADHWA v. MATHRADAS GIRDHARIDAS Sind 845*

—Maintenance—Daughter—Maintenance denied to daughter during lifetime of her father—If can file suit directly against manager of joint family—Proper course for her to be followed, stated.

A daughter, during the lifetime of her father is not entitled to bring a suit directly against the manager of the joint family property, ignoring the fact that the primary responsibility for her maintenance is upon the father and his properties, both joint and separate. The proper course for a daughter to adopt, if during the lifetime of her father, she has been denied maintenance, is not to bring a suit for maintenance against the manager of the joint family, but to bring a suit against her father claiming maintenance out of his properties, joint and separate. After she has got her decree, she may, if necessary, enforce it by the sale of her father's share in the joint family properties. This would presumably lead to a proper partition in which the rights of each branch of the

Hindu Law—contd.

family could be equitably worked out. *CHERUTTY v. NAGAMPARAMBIL RAVU Mad. 26*

—Maintenance—Minor co-parcener—Maintenance, denied to him—In suit by him for maintenance he must make also alternative claim for partition—Minor co-parcener, whether can claim maintenance without making alternative claim for partition.

A co-parcener cannot claim maintenance if he is entitled to claim partition. But although it cannot be said that in no circumstances can a Court give a decree for maintenance against the family properties in favour of the minor co-parcener, yet in the vast majority of cases, where the circumstances would justify a decree for maintenance, they would also justify a decree for partition and so it should be open to the Court to pass that decree which the Court thinks best in the interests of the minor whose rights have been denied. From this, it follows that a minor co-parcener who has been denied maintenance and wishes to claim maintenance should bring his suit in the alternative claiming partition or maintenance as the Court thinks fit, unless his guardian decides to adopt the usual form of a suit claiming partition in the property.

[*Quære.*—It is very much doubtful whether a minor co-parcener has a right to claim maintenance without at least putting it within the power of the Court to give the ordinary relief of partition should the Court think fit] *CHERUTTY v. NAGAMPARAMBIL RAVU Mad. 26*

—Widow—Arrears of—Principles applicable.

Generally speaking the same principles apply to arrears as to future maintenance, although, the Court is not bound to award arrears of maintenance at the same rate as might be considered reasonable for the future. *NARSIDASJI BALMUKUNDDASJI v. BAI JAMNA Bom. 44*

—Widow—General principle—Husband keeping carriage in his lifetime—Widow, if entitled to allowance for conveyance.

The general principle in awarding maintenance to a Hindu widow is that the amount awarded to her must enable her to live as consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in the lifetime of her husband. Where her husband had during his lifetime kept a carriage for several years, it may be regarded as a reasonable luxury and a reasonable allowance for conveyance may be awarded to the widow. *NARSIDASJI BALMUKUNDDASJI v. BAI JAMNA Bom. 44*

—Widow—Husband giving part of estate to charity—Maintenance, how calculated.

Hindu Law and opinion regard charitable gifts and bequests with favour, and if a Hindu husband of his own free will chooses to diminish his estate by giving away part of it to charity (assuming of course that he is not doing it with the object of defeating his widow's reasonable claims), the widow is entitled to say that she should be given maintenance in proportion to what the income was before the charitable gifts or bequests were made. *NARSIDASJI BALMUKUNDDASJI v. BAI JAMNA Bom. 44*

—Widow—Mere fact that widow was living away from her husband during his lifetime without any justifiable cause, whether causes forfeiture of her right to maintenance.

Obiter.—A widow does not forfeit her right to maintenance from her deceased husband's estate merely because she was living separate from her

Hindu Law—contd.

husband during his lifetime without any justifying cause but not for any improper purpose, nor is she debarred from enforcing the right against the legatees from her husband, more especially so when the husband's conduct during his lifetime clearly shows that he never regarded his wife as having forfeited her claim to maintenance. *SURATHU SITHARATHNAMMA v. PILLARISETTI SESHAMMA*

Mad. 30

— **Maintenance — Widow — Provision by husband in his will as regards maintenance to be granted to his widow, if deprives Court of power to fix reasonable maintenance.**

Any provision made by the husband in his will as regards the wife's maintenance cannot be regarded as taking the matter out of the Court's power to fix a reasonable maintenance but can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance when the provision made by the husband in his will for the maintenance of his wife and minor daughters appears to be inadequate, the Court has power to substitute a more reasonable provision. *SURATHU SITHARATHNAMMA v. PILLARISETTI SESHAMMA*

Mad. 30

— **Marriage — Sanskara includes marriage.**

The term *sanskara* includes the sacrament of marriage. *MON MOHAN BHATTACHARJEE v. BIDHU BRUSAN DUTTA*

Cal. 6

— **Partition — Member's suit for partition, withdrawn — Separation, if can be inferred from mere presentation of plaint.**

The plaint presented for partition even if withdrawn, would unless explained afford evidence that an intention to separate had been entertained. This can hardly be read as laying down any rule of law or even a presumption. It only suggests a possible inference of fact. Where a member instituted the suit at a time when he thought that he would get some benefit out of it, but when he found that there would be nothing left after payment of the debts due by the family, he did not think it worthwhile to proceed with the suit, there is no warrant for the conclusion that he became divided merely by the presentation of the plaint. *DIRAVYAM PILLAI v. VEMBANAN AMBALAM*

Mad. 562

— **Schools of law — Mitakshara — How far to be considered authority in Bengal.**

Although the Dayabhaga School of Law prevails in Bengal nevertheless the Mitakshara is to be considered as very high authority in Bengal on all questions in respect of which there is no conflict between it and the Dayabhaga. *MON MOHAN BHATTACHARJEE v. BIDHU BRUSAN DUTTA*

Cal. 6

— **Stridhan — Succession — Stridhan of maiden — Order of succession, stated.**

The *stridhan* of a maiden according to Mitakshara School goes first to her uterine brothers, on failure of them to her mother and if the mother is dead, to her father. After the father's death succession will go to father's heirs determined according to Mitakshara rules regarding succession to a male. A step-mother being an heir of the father according to Mitakshara, is entitled to succeed after father's death. The succession after her death will go to an agnate even if remote and not to cognate even if nearer. *KUMAR RAGHAVA SURENDRA SAHI v. BABU LACHMI KORE*

Pat. 179

— **Succession — Succession to stridhan of maiden and of woman married in unorthodox form.**

The rules relating to the succession to *stridhan*

Hindu Law—contd.

are the same in the case of a maiden who has no brothers and a woman married in an unorthodox form and dying without issue. *KUMAR RAGHAVA SURENDRA SAHI v. BABU LACHMI KORE*

Pat. 179

— **Succession — Hindu domiciled out of British India — Succession, whether governed by Hindu Law or Succession Act (XXXIX of 1935).**

The law of succession is to be determined according to the personal law of the individual whose succession is in question.

The Courts in India have always applied the personal law of a Hindu who has migrated from one part of India to another. The same principle applies to a case of a Hindu domiciled abroad. Hence in a case of a Hindu domiciled out of British India, Hindu Law applies in matters of succession and not the Succession Act. *C. S. NATARAJA PILLAI v. C. S. SUBBAROYA CHETTIAR*

Mad. 677

— **Mitakshara School — Test of propinquity or nearness of blood, if excluded from consideration — Religious efficacy, when to be considered.**

The Mitakshara whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude from consideration the test of propinquity or nearness of blood. The test of the right of capacity to offer religious oblations is a test of the Dayabhaga School, whereas in the Benares School, the test is propinquity. Only in competitions between persons of the same class is the matter determined on the footing of religious efficacy. *KUMAR RAGHAVA SURENDRA SAHI v. BABU LACHMI KORE*

Pat. 179

— **Suit by karta on pro-note — Plea of repayment urged by executants, not proved — Form of decree.**

In a suit on a pro-note by the karta of a joint Hindu family when the alleged partition or separation between him and other members and the plea of repayment urged by the executants of the pro-note are not proved, all that is necessary is to declare that a decree is given to the plaintiff as karta of the joint family. It is wrong to add that as the other members had pleaded that the executants of the pro-note, had repaid the money, therefore they were not entitled to any share in the amount due on the pro-note because there is no share in the amount arising or anything else. *JARNAIL SINGH v. BADADUR SINGH*

Lah. 701

— **Widow — Adverse possession — Adverse possession by widow over property not inherited from husband — She acquires absolute title to it.**

On the death of a Hindu, his widow entered into possession of his property and also of property which neither belonged to nor was held by him. There were separate mutations in respect of both the properties in the name of the widow. The Tahsildar had effected the mutations on the report of the *patwari* that the name of the widow should be entered by inheritance as there was no contest. There was no indication on the part of the widow that she had inherited the property from her husband. There was no evidence as to what claim was put forward by the widow at the time she took possession of the second property.

Held, that the widow had acquired absolute title by adverse possession to the property other than one inherited by her from her husband wherein she had only the widow's estate. The fact that the *patwari* reported the nature of transfer as by inheritance did not amount to an admission by the widow. *RAM SARUP SINGH v. MOHAN SINGH*

All. 783

Hindu Law—contd.

— **Widow — Adverse possession — Property acquired by widow by adverse possession, in her own right, becomes her absolute property.**

Property acquired by a Hindu widow or other qualified heir by adverse possession of which she takes and retains possession in her own right for 12 years or more becomes her absolute property and that she can dispose of it by means of transfer, *inter vivos* or will, but if the property is not claimed by her adversely it will become an accretion to her husband's estate. But the question has got to be determined in every case whether the widow entered into possession adversely to the reversioners, or as a widow representing her husband's estate. **KAULAS AR SHUKUL v. RAM KISHORE LAL** *All. 644*

— **Dedication by, powers of—Dedication of husband's property for spiritual benefit only of widow—Validity.**

Under Hindu Law although a widow has power to dedicate a portion of her husband's estate to religious and charitable object, the widow's act must be reasonable, having regard to the value of the estate, and its object must be such as according to the notions prevalent in Hindu society conduce to the spiritual benefit of her husband. Where a widow dedicates a part of her husband's estate for the maintenance of a deity not installed by her deceased husband and it is found that the dedication is *prima facie* for the spiritual benefit of the widow herself and not for that of her husband, the dedication is invalid. **KUMAR RAGHAVA SUBENDRA SAHI v. BABUL LACHMI KORE** *Pat. 179*

— **Maintenance—Members agreeing to pay maintenance at certain rate—Rate, when subject to variation according to family fortunes—Method of obtaining variation—Deed of such agreement, construction of—Decree awarding maintenance—Practice of Courts—Manager's power to enter in agreement regarding granting of maintenance—Past and future maintenance—Decree—Variation—Practice.**

Under the Hindu Law the widow's right to maintenance is dependent upon the family fortunes and so is liable to fluctuation both up and down in sympathy with them; and the parties concerned can contract themselves out of this and undertake to pay and receive a fixed and unvariable sum irrespective of the state of the family's finance at any given time. But they must say so in express terms. When they agree to a certain rate, and say nothing more, they are, merely reaching agreement on one question, namely the fair rate applicable to a given set of circumstances. They do not usually mean to abrogate the rest of the law which states that that rate shall be liable to variation if and when circumstances alter, and indeed, to cease altogether under certain conditions. An implied term has to be read into the contract that the agreement is subject to the usual incidents of Hindu Law and is to be read along with it and interpreted in that light. Variation is permissible only when the circumstances have altered to such an extent as to justify a variation of the figures agreed upon and they are altered before the accrual of the cause of action for maintenance. The only method of obtaining relief would be by showing that the agreement has ceased to subsist, or that the circumstances which, according to its implied meaning, will justify a variation, have come into play.

The right to alter or rescind rate of maintenance fixed for payment to a widow does not rest in the hands of either one side or the other but depends

Hindu Law—conclld.

upon external circumstances which apply equally to both.

A deed whereby it is agreed to pay maintenance to a Hindu widow must be construed in the light of the surrounding circumstances and with reference to the practice and usage in these matters: to do otherwise would result in an unjust conclusion.

In decrees where maintenance is awarded, Courts should insert words which would enable them on application to set aside or modify their orders as circumstances might require, and in such cases, the remedy would be the more appropriate one by application under the leave reserved.

The manager of a joint Hindu family has the right to settle maintenance claims. When he does so, he acts on behalf of the family as a whole; so it is bound by his action.

Ordinarily the questions regarding the payment of past and future maintenance would be separate and independent and so in the absence of an express statement to the contrary, it must be assumed that they were treated separately.

Obiter.—If a decree directs the doing of a certain thing, then that thing must be done unless and until the decree is altered or provides on the face of it for the limits of its own existence. It is not like a contract which can be varied by common consent and in which the law, recognizing the unwillingness of the average person to put into writing clauses which are too obvious to his mind to require mention, takes into consideration the surrounding circumstances. No such laxness can ordinarily be imputed to Judges. Their decrees can only be varied or altered by the Court itself and only in a particular way. **TRIMBAK v. BHAGU BAI** *Nag. 580*

— **WIDOW—Possession by, of property not legally entitled to possess—Criterion as to whether she prescribed to absolute or limited estate—Widow held prescribed to absolute estate.**

Merely possession by a Hindu widow of property to which she is not legally entitled is not sufficient to create an absolute title in her. The criterion is her own intention and conduct and the question whether she prescribed to an absolute estate or to a limited estate must be decided on the facts and circumstances of each case.

A Hindu widow had obtained mutation of certain property in the teeth of opposition by the other heirs and there was absolutely nothing to show that she claimed to be in possession as a limited estate holder:

Held, that the widow prescribed to an absolute estate and not to a limited estate. **PATIPAL SINGH v. KAMPAL SINGH** *Ouah. 137 (b)*

— **Remarriage—Effect on rights of widow to hold property.**

Obiter.—Re-marriage according to the accepted view of the Court of the Judicial Commissioner, O. P., results in the forfeiture of the widow's right to hold possession of the property that devolves on her from her husband or from his lineal heir. **PANNALAL v. SUMRANLAL** *Nag. 108*
Hindu Women's Right to Property Act (XVIII of 1937). *See* Government of India Act, 1925, s. 317 (1) *420*

Identification. See Criminal trial 310
Inam—Grant—Construction—Grant held conferred heritable and alienable estate.

Held, on construction that grant was not *saranjam* but conferred heritable and alienable estate. **DATTATRAYA VISHNU DABHOLKAR v. SADASHIV SIVARAM NISAL** *Bom. 839*

Income Tax Act (XI of 1922), ss. 2 (4), 10—
Karachi Chamber of Commerce realising measurement fees from its members—Such realisation whether taxable as profits.

Where the members of the Karachi Chamber of Commerce provide for themselves certain facilities in trade and pay for these facilities such as a measurer of merchandise, they combine as a Chamber and provide these facilities for themselves as members of that Chamber and when they pay more than is actually necessary for the provision of these services, then the surplus, whether it is handed back or not, is not a profit on trade within the meaning of ss. 2 (4) and 10, Income Tax Act. It is not a profit but it is savings and not taxable income, though interest in these savings would be income liable to taxation. The fact that the public measurer serves also the public or that the members are incorporated as a Chamber under s. 24, Companies Act, does not destroy the mutuality between the Association and its members.

Before there can be mutuality between an Association and its members, the services must be supplied by the Association to its members as such, services for which the members themselves pay from which payments any surplus is saving and not profits or gains. The nature of the services is not the test. The test is not the purpose of the Association but its nature. If the Association is of the nature of a club and its services are solely for the benefit of its members or, if not solely for the benefit of its members, the services for its members and the costs thereof are clearly separable from its services to non-members and the costs thereof, then there is no profit but merely a surplus or saving: if no, then there is a taxable profit or gain. There is in principle no difference between a club which provides a marker for tennis on payment by the individual club members and a Chamber of Commerce which supplies a measurer of merchandise on payment by its members. Both are employees of the Association provided at the cost of and for the benefit of its members, and if there is a surplus or saving on the year's working, it is not taxable profit or gain. It may be handed back; it may be kept for some future contingency; the test is whether it is the members' money. **COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND & BALUCHISTAN v. KARACHI CHAMBER OF COMMERCE.** *Sind 323*

s. 4 (2)—Assessee receiving interest on Government Bonds in England—This sum expended in England in purchasing machinery for use of assessee's business and sent to India—Whether income received or brought into British India.

What the Income Tax Act charges with tax is income and nothing but income, whether that income accrues or arises or is received in British India or is deemed so to arise or accrue or be received by reason of being brought into British India. But if income arising or accruing without British India is spent or otherwise so dealt with that it ceases to be income instead of being brought into British India, it is not chargeable under the Act merely because the thing upon which it has been expended or into which it has been turned, is subsequently brought there.

Assessee were the owners of certain sterling bonds of the Govt. of India, the interest on which was payable in England. The assessee received such interest in England and this sum was expended by their agent in the purchase in England on behalf of the assessee of certain mill stores and machinery which were then sent to the assessee in British India and there used by them for the pur-

Income Tax Act—contd.

poses of their own mills. The Income-tax Officer included this amount in the income of the assessee as being income brought into British India:

Held, that the things brought into India could, in no sense, be described as income brought into British India within meaning of s. 4 (2) and as only income could be taxed under the Act, the sum so received and expended could not be taxed. **COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND & BALUCHISTAN v. AHMEDABAD ADVANCE MILLS, LTD.** *P C 821*

s. 10. SBB Income Tax Act, 1922, s. 2 (4) 323

ss. 13, 34—Income-tax Authorities adopting particular method of assessment—If can subsequently change method—What the law requires Income-tax Officer to see in respect of system of account to be kept by assessee, stated.

It is open to the Income-tax Department while taxing an assessee either to adopt the cash system or to adopt accrual basis; but having adopted the first system or the second, they cannot be allowed to change their ground whenever it suits them to do so.

What the law requires the Income-tax Officer to see is not a system of account to be kept by the assessee in respect of a particular loan which may have been omitted in that account, but the system of accounting which the assessee regularly employs for his own purposes with respect to all the loans which he discloses. If any loans are deliberately left out from the account kept regularly by the assessee, then it is open to the Income-tax Department to disbelieve the accounts and to proceed in any way they choose by acting under the proviso but on exercising a judicial discretion. **COMMISSIONER OF INCOME-TAX, BIHAR & ORISSA v. JAG SAH MUND LAL SAH** *Pat. 83*

ss. 42, 43—Nandlal Bhandari & Sons, Indore, managing agents of a company Nandlal Bhandari Mills, Ltd., Indore, opening on behalf of latter, branch at Cawnpore under their own control under name Nandlal Bhandari Mills, Ltd., Cawnpore—Managing agents supplying goods to branch and receiving commission on sales effected there—Commission paid annually—Nandlal Bhandari Mills, Ltd., Cawnpore, held, agents of Nandlal Bhandari and Sons, Indore, within meaning of ss. 42 and 43.

It is manifest from the language of s. 43, Income Tax Act, that a person may be fictionally deemed to be an agent for the purposes of the Act who might not be an agent as that term is ordinarily understood at law. In order to show that a non-resident has a business connection with a resident of British India, it must be established that the two persons have some sort of association in a business, that is to say in a profit-making occupation or activity in British India, and when this is established, it will have to be determined whether the other conditions of ss. 42 and 43 are satisfied.

Nandlal Bhandari & Sons of Indore were the managing agents of Nandlal Bhandari Mills, Ltd., Indore, a company engaged in manufacture of textiles on whose behalf they had opened a branch at Cawnpore under their own control known as Nandlal Bhandari Mills, Ltd., Cawnpore. Nandlal Bhandari & Sons supplied goods to the branch at Cawnpore, which were sold in British India, and they received a commission on the sales so effected. By way of remuneration it was agreed that Nandlal Bhandari & Sons should have a fixed allowance and should also be entitled to

Income Tax Act—contd.

commission on the net profits of the company and to commission on the gross sale proceeds. The commission was to be paid annually when the accounts of the company were made up:

Held, that Nandlal Bhandari Mills, Ltd., Cawnpore, were and could be treated as the agents of the non-resident firm, i. e., Nandlal Bhandari & Sons, Indore, under ss. 42 and 43 of the Income Tax Act. Even if it be held that Nandlal Bhandari & Sons are only entitled to receive their commission when the annual accounts of the company were made up, the fact remained that their right to this commission accrued upon the sales effected at Cawnpore. This being the position, the commission was in the nature of profits or gains accruing or arising to the non-resident through or from a business connection in British India within the meaning of s. 42, and must therefore be deemed to be income accruing or arising in British India; and since there was a "business connection" between the branch at Cawnpore, representing in British India the company at Indore, and the non-resident firm of Nandlal Bhandari & Sons, the resident branch at Cawnpore must be deemed to be the agents of the non-resident firm within the meaning of s. 43, and the profits accruing in British India to the non-resident firm were chargeable in the name of their fictional agents in British India. **NANDLAL BHANDARI MILLS, LTD., CAWNPORE v. COMMISSIONER OF INCOME-TAX, CENTRAL & UNITED PROVINCES** All. 99

—ss. 66 (2)—*Fee of Rs. 100, is part of reference by assessee and part of cost of reference by Commissioner and falls within terms of "costs" as used in sub-s. (6). Assessee unsuccessful in reference—His contentions shown to be wrong—Taxed costs—Setting off against fees of Rs. 100 paid under sub-s. (2).*

"Fee" in sub-s. (2) of s. 66, Income Tax Act, does not mean a deposit or security. It is the price paid by the assessee for the reference and it is not unreasonable to assume that the word is used in its ordinary meaning, that is to say, it is a fee for payment for work done in connection with the reference by the Commissioner. It is part of the costs of reference by him and likewise the cost or part of the costs of the reference by the Income-tax Commissioner. Therefore, as such, it falls within the term 'costs' as used in sub-s. 6 and it is in the discretion of the Court to pass such orders in relation to it as may, in its judicial discretion, seem proper. When the assessee is successful, when it is clear that he is right in his contention, there is no reason why he should not have paid back to him as part of the costs incurred, this Rs. 100 plus any taxed costs incurred by the proceedings in Court. But on the other hand, there is no reason, if he should fail and his contentions be shown to be wrong, why he should not lose this Rs. 100 and pay as well the taxed costs incurred by proceedings in Court on the general principle that costs should follow the event. The taxed costs will not be set-off against the fee of Rs. 100 paid under sub-s. (2) of s. 66, Income Tax Act, which the Commissioner will retain as a fee. **COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND & ADEN v. CENTRAL POPULAR ASSURANCE CO., LTD.** Sind 683

—s. 66-A (2)—*Commissioner refusing to state case on question arising under s. 25 (3)—Assessee applying to High Court under s. 66 (3)—Case referred to Full Bench—On receipt of answer, Bench dealing with application under s. 66 (3) directing Commissioner to state case on point of law*

Income Tax Act—conold.

—*High Court, if can grant certificate under s. 66-A (2) or under cl. 40, Letters Patent (Mad.)*

Assessee applied to the Commissioner of Income-tax to state a case on a question arising under s. 25 (3), Income Tax Act. The Commissioner refused to state a case on the ground that the order was not prejudicial within the meaning of s. 66 (2) read with s. 33. The assessee then applied to the High Court under s. 66 (3). The High Court made a reference to a Full Bench of five Judges and the answer given to the reference was that an order refusing to interfere with a prejudicial order was itself prejudicial. On receipt of the answer given by the Full Bench to the question referred, the Bench dealing with the petition directed the Commissioner of Income-tax to state a case on the point of law involved:

Held, that the High Court had no jurisdiction to grant a certificate under s. 66-A (2), in the matter of permitting an appeal to His Majesty in Council:

Held, also that the direction which was given to the Commissioner of Income-tax to state a case was an interlocutory order in a matter in which the Court was required to act in an advisory capacity and consequently the High Court had no authority to grant a certificate permitting an appeal to His Majesty in Council under cl. 40 of the Letters Patent (Mad.) **COMMISSIONER OF INCOME-TAX, MADRAS v. VOORA SUBBRAMULU CHETTY** Mad. 4658 B

—s. 66 (3)—*Costs—Application by assessee under s. 66 (3), asking Court to direct Commissioner to state case—Costs of application should follow event.*

Whereupon the refusal of the Commissioner of Income-tax to state a case under s. 66 (2), Income Tax Act, on the ground that no point of law arose, the assessee applied to the Court under s. 66 (3), asking the Court to direct the Commissioner to state a case and the question arose as to whether the costs of the application to state a case should follow the event, or should be costs in the reference:

Held, that the right rule was that the costs should follow the event. The ultimate decision upon the point of law, whether for or against the Commissioner, could have no bearing on the question whether there was a point of law upon which a case should have been stated. **CENTRAL TALKIES CIRCUIT v. COMMISSIONER OF INCOME-TAX, BOMBAY** Bom. 556
India Tea Control Act (XXIV of 1933)—Export quota rights are assignable.

The export quota rights obtained from the Tea Licensing Committee are assignable and are of value. **PROBODH KUMAR DAS v. DANTHARA TEA CO., LTD.** PC 217

Insolvency—Appeal—Procedure—Creditor dying during discharge proceedings—Substitution of heirs—Criterion.

The procedure as regards the issue of notices on creditors is prescribed primarily in order to afford them a reasonable opportunity to appear at the time of the hearing of the application for discharge.

Where during the course of discharge proceedings started by the insolvent, a creditor who is a party to such proceedings dies, the criterion which should be adopted for the purpose of deciding whether the heirs of such creditor should be substituted is to ascertain whether or not the interests of such persons are likely to be adversely affected by their non-substitution:

Held, that the non-substitution of the heirs did not adversely affect their interest and therefore the failure to substitute did not render the appeal

Insolvency—conold.

incompetent. **ABDUL SATTAR v. DINAJPUR TRADING & BANKING Co., LTD** Cal. 145

One of beneficiaries of trust becoming insolvent—Trustee paying such money to him as would have been payable to him in ordinary course, instead of to Official Assignee—He should be directed to refund money to Official Assignee.

Where upon one of the beneficiaries of a fund becoming insolvent, the trustee instead of paying to the Official Assignee from time to time such moneys as would have been payable to the insolvent and other beneficiaries in the ordinary course in the case of the insolvent, to the Official Assignee, forms his own notions as to what the proper allowance might be and makes at the expense of the beneficiaries (including, himself) a series of payments of moneys which were in fact due and payable to the Official Assignee in insolvency, to the insolvent, the trustee should be directed to refund to the Official Assignee the money so paid. **F. M. JOSEPH v. OFFICIAL ASSIGNER** Rang. 352

Order of discharge on condition that insolvent would remain liable to debts incurred before insolvency, whether amounts to refusal to grant discharge

The object of an adjudication in insolvency is to free the debtor from the claims of his existing creditors, which are to be satisfied out of the property of the debtor which the Court takes possession of and distributes among the creditors; and for the Court to discharge the insolvent but to leave him liable to debts incurred before insolvency, defeats the object of the adjudication. Such conditional discharge amounts to a refusal to grant discharge. **JEHANGIR OURBETJI MISTRI v. KASTUR PANNAJI OSWAL** Bom. 542

Insurance—Assured assigning policy to wife—Effect—Creditor of assured, if can attach moneys in hands of wife—Construction of assignment endorsement—Reverter clause—Held amount not assets of deceased assured—Deed—Construction.

The policy in question was an endowment policy obtained by the deceased. The assured assigned this policy in favour of his wife by an endorsement on the policy itself. This assignment was duly communicated to the Insurance Company and there registered. The endorsement, which appeared in a usual form suggested by the Company provided that the benefit of all moneys to become payable under the policy was assigned to wife and declared that her receipt shall be a sufficient discharge to the Company for the same, provided, however, that in the event of her predeceasing the assured or in the event of his surviving, the date on which the said policy would mature, the benefit of the policy and the right to receive moneys thereunder should revert to the assured as if the assignment had not been made. Before the policy had matured and during the lifetime of the assignee the assured died. In execution of a decree obtained against the deceased assured, the decree-holder sought to attach the policy amount as assets of the assured in the hands of the assignee:

Held, that on its true construction the endorsement in this case operated as a present transfer in favour of the assignee, though provision had also been made for a reverter to the assignor, in certain contingencies. It did not amount to a power-of-attorney or a transfer in future. The provision for reverter only emphasised the immediate operative-ness of the transfer. If the events that happened had brought the reverter clause into operation, the creditors of the assured would no doubt have been

Insurance—conold.

entitled to treat the policy amount as having become part of the estate of the assured. But in the events that happened the assignee was entitled to recover the policy amount and there was no scope for the operation of the reverter clause. Consequently the policy amount did not form the part of the assets of the deceased and could not therefore be attached and sold. **NINKILERI LAKSHMIKUTTY KETILAMMA v. TIRUKKA MADATHIL VISHNU NAMBIAN** Mad. 173

—Life insurance—Policy, interpretation of—Proposal and declaration by assured forming basis of contract—Assured declaring that contract would become void if declaration or proposal contained untrue statements—Some statements found untrue but fraud not proved—Liability of company held ceased.

According to the terms of a life policy the representations, statements and agreements in the application for the policy were made part of the contract between the assured and the Insurance Co. The following declaration was made by the assured: "I do hereby declare that the above answers and statements are true and that I have not withheld or concealed any information and I do hereby agree that this declaration together with the proposal shall be the basis of the contract to be made..... and that if any untrue averment is contained in this declaration or in the said proposal or if it shall hereafter appear that any information has been withheld, then the said contract shall be void and all moneys which shall have been paid on account of the assurance shall be forfeited." Some of the statements made by the assured were found to be untrue. No fraud was, however, proved:

Held, that by the terms of the policy in question, the liability of the company ceased when it was found that any of the statements contained in the declaration or the proposal were untrue. **ASIAN ASSURANCE Co., LTD. v. ASA RAM** Oudh 793

Interest—Suit for compensation for breach of contract—Interest, if recoverable—Measure of damages.

In a suit for compensation for breach of contract, the plaintiff can recover the interest on the amount of compensation as he is entitled to such an amount as would compensate him for the loss which he has suffered by reason of the defendants' breach of contract. The correct measure of damages is the actual loss sustained by the plaintiff plus a reasonable rate of interest thereon. **SUBONARAIN PRASAD SINGH v. GANGA PRASAD SAHU** Pat. 63

Interpretation of Statutes—Language of statute plain—Consideration of hardship in particular cases.

Per *Thomas, C. J.*—Where the language of a statute is plain in itself, it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense. The words themselves alone must be considered to see the intention of the law given. **MAHADHO PRASAD v. JAGANNATH KUAR** Oudh 258 FB

Irrigation—Controlling authority constructing new work in interest of irrigation facilities—Its duty stated—Person suffering damages due to new work, whether has right to insist that new work should not work to his detriment.

It is the duty of the controlling authority when constructing a new work in the interests of irrigation facilities generally to take such reasonable precau-

Irrigation—conold.

tions as are obviously necessary to prevent damage to others. Although the person who suffers on account of the new work has no right to require the authorities to maintain the course of the channel for ever in one particular bed, yet he has the right to insist that any alterations which the controlling authority may find necessary, shall not work to his detriment. **RAJA OF VIZIANAGARAM v. MUDUMOORU SANYASIRAJU**

Mad. 42

Judgment—Foreign judgment—Judgment in rem—Foreign judgment declaring person as validly adopted son of another—Whether binding on Courts in British India in matters of succession to immovable property in British India.

A declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment in rem. and governs succession to movable property. The same principle applies in a matter of succession to immovable property where the law requires the personal law to be followed. Hence, although the judgment of the foreign Court declaring a person to be a validly adopted son of another person, cannot be regarded as a judgment in rem. within meaning of s. 41, Ev. Act, it is binding on the Courts in British India in matters relating to immovable property situated in British India. **O. S. NATARAJA PILLAI v. O. S. SUBBAROYA CHETTYAR**

Mad. 677

Jurisdiction. See Suits Valuation Act, 1887, s. 11

467

Administration suit—Jurisdiction how determined—Subject-matter valued for court-fee at sum below Rs. 5,000—First Class Sub-Judge returning plaint for presentation to proper Court—Appeal from order—Forum of.

In suits for accounts and administration, the court-fees payable determine the jurisdiction of the Court and the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court but on the value of the subject-matter in dispute.

Consequently, where in an administration suit the subject-matter valued for purpose of court-fee is below Rs. 5,000 and the plaint is returned by the First Class Sub Judge for presentation to the proper Court, an appeal from his order lies to the District Court and not to the High Court. **KALAWANTIBAI v. UDHAVDAS GIRDHARIDAS**

Sind 244

Khaekari tenure. See Land tenure

521

Lahore High Court's Rules and Orders, Vol. II.

Chap. I r. 68. See Companies Act, 1913, s. 234

314

Land tenure—Khaekari tenure—Rights of khaekars—Hissedar not in actual possession of khaekar land recorded in his name as khudkasht—If acquires title in it.

The pucca khaekars are in all respects equal to proprietors with the exception that they cannot sell their holding, and pay small sums called *malikana*, in addition to the quota of revenue due from the land recorded in their names. The proprietors or *hissedars* have no power to interfere with these khaekars or their land, waste or cultivated, and on the death of a khaekar without direct heirs, the lapsed holding reverts to the whole community of khaekars, and not to the *hissedar*.

If a *hissedar* brings fallow land under plough and actually cultivates it himself, he will be entitled to retain possession of the same, but he can acquire no title in khaekar land which is not in his actual

Land tenure—conold.

possession and is merely recorded in his name as *khudkasht*. **PANOHAM SINGH v. DEB RAM**

All. 521

Zabti bhogra—Assessment of—If can be challenged in civil suit.

Once the assessment is made and left unchallenged, it becomes binding upon the co-sharers' *gaontias*. When no steps are taken to contest the assessment made at the time of the settlement, it cannot be challenged in a civil suit and a partition among the co-sharer *gaontias* does not put an end to the liability for *sabti bhogra*. **HARIHAR DORA v. UPENDRA PATI**

Pat 602

Landlord and tenant—Abandonment—Chandnadar transferring holding but remaining in possession of one room of house standing on holding with leave and license of transferee—There is abandonment and landlord can recover holding.

Where a *chandnadar* after executing a *kobala* transferring his holding to another person has remained in possession of a room in the house standing on the holding with the leave and license of the transferee, it cannot be said that the relationship between the transferor and the landlord continues. There is an abandonment of the holding by the *chandnadar* and hence the landlord is entitled to recover the holding. **HALIMAN BIBI v. MUHAMMAD TAJAMUL HUSSAIN**

Pat. 250

Abandonment—Land given for residential purpose to *riyaya*—Its dedication to idol and allowing Thakardwara to be built on it amounts to abandonment—S. 62 (f), Easements Act (V of 1882), also applies to such case.

Where a land is given to a *riyaya* for residential purpose, the execution of a deed of *waqf* in respect of the land in favour of a deity, by the *riyaya* and his allowing others to build a Thakardwara on it amounts to an abandonment and the landlord has a right of re-entry. The case also clearly falls under s. 62 (f) of the Easements Act which lays down that a license is deemed to be revoked where the licence is granted for a specific purpose, and the purpose is attained or abandoned or becomes impracticable. **KANHAIYA LAL v. HAMID ALI**

Oudh 467

Ejectment—Held on facts that the plaintiffs were entitled to declaration of title and confirmation of possession through tenants who could not be ejected.

Government claimed certain lands which were reformed in 1916 and since then were in possession of the Govt.'s tenants. In 1923 Govt. acknowledged the title of the plaintiffs to these lands on condition that the tenants, would remain on land till 1930. A document for consideration in plaintiffs' favour was executed but it was not stamped as conveyance. It conveyed to the plaintiffs whatever rights the Govt. had in the land. In 1925 the plaintiffs instituted a suit against the tenants for establishing their title to and for recovery of possession of the re-formed lands:

Held, that the acknowledgment by Govt. could not deprive tenants of their rights acquired under limitation, the tenants could not, therefore, be turned out. But the tenants could not get a declaration that the plaintiffs' title was not subsisting on the date of the suit. The plaintiffs were entitled to a declaration of title to the lands through the tenants who were regarded as their tenants on the date of the suit **ABDUL LATIF v. HARBULLA**

Cal. 714

Non-occupancy ryot holding under *persiona fide* claiming title—Rightful owner establish title, whether can eject ryot.

Landlord and tenant—conold.

If a non-occupancy *ryot bona fide* holds under a person who *bona fide* claims to be entitled to the land, he cannot be ejected by the rightful owner who had established his rights against the person *bona fide* claiming title. *ABDUL LATIF v. HABIBULLA*

Cal. 714

—**Rent—Record of Rights showing rate of rent**
—**Burden of proving that rent is at reduced rate is on tenants.**

Burden lies heavily upon the tenants to prove that they are liable to pay rent at a reduced rate, in respect of a certain holding where the Record of Rights contains an entry as regards the rate of rent payable in respect thereof. *KANTI CHANDRA GHOSAL v. SUCHITRA SUNDARI DASSI*

Cal. 560

Legal Practitioner—Compromise. See **Legal Practitioner—Vakalatnama**

669

—**Misconduct—Appropriation of client's money by Advocate—Name struck off roll—Reinstatement, when advisable.**

Where an Advocate misappropriates a considerable sum of his clients, the act of professional misconduct committed by him is a very grave one and it is not possible to allow him to continue practising in an honourable profession. But that does not mean that the Court is precluded from reinstating him when adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into his profession again. *In the matter of K. J. A. VAKIL, MADRAS*

Mad. 257 S B

—**Professional misconduct—Findings on questions of fact recorded by Bar Tribunal—When accepted by High Court.**

The question whether a particular Advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently the High Court ordinarily accepts findings on questions of fact recorded by the Bar Tribunal provided the findings are not perverse. *In the matter of BHAIRO DUTT BHANDARI AN ADVOCATE*

All. 611 S B

—**Professional misconduct—Investments of his savings by Advocate, when constitute engagement in money-lending business.**

What does or does not constitute money-lending business must depend on the facts and circumstances of each case and is not capable of an exact definition. The question is a mixed question of fact and law and the answer to the question must depend on the facts found in each particular case an element of continuity and habit is essential to constitute the exercise of a profession or business.

Investments of his savings by an Advocate do not necessarily amount to engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless, if investments by way of loan are made as a matter of regular business and for gain, there can be no escape from the conclusion that such investments constitute engagement in money-lending business. *In the matter of BHAIRO DUTT BHANDARI, AN ADVOCATE*

All. 611 S B

—**Re-admission—Name struck off from roll for misappropriation—When can be re-admitted.**

Before the Court can re-admit an Advocate who has been struck off the rolls for misappropriation, the Court must be fully satisfied that he has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion is not sufficient. The Court requires solid facts and cogent reasons, not merely the opinions expressed by

Legal Practitioner—conold.

gentlemen who had given him certificates. Re-admission does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that he has become worthy to act as an Advocate. In deciding such matters the Court has a duty to the public and where an Advocate has been guilty of misappropriation, it must be shown that there is no likelihood of such an offence being committed again.

[After considering all the facts, the Court thought it fit not to re-admit the Advocate.] *In re S. AN ADVOCATE*

Mad. 417 S B

—**Vakalatnama—Vakalatnama not giving specific authority to negotiate and settle terms of compromise but merely to sign compromise application to be presented to Court—Consent of party to its presentation not obtained—Compromise decree is unauthorized.**

Where a *vakalatnama* given to a Pleader does not give any specific authority to negotiate with the defendants and settle the terms of the compromise, but merely to sign the compromise application to be presented in Court and if the consent of the party to such an application being presented to the Court had not been obtained the compromise resulting in the decree is unauthorized. *KESHAV RAM KRISHNA BHATT PADAKH v. SUBBA MANGA NAIK*

Bom. 669

Lessor and lessee—Priority of estate between lessor and lessee's assignee, when arises.

Priority of estate between the lessor and the lessee's assignee can hardly be said to arise except where the interest of the lessee has been transferred in whole to an assignee. *SUKADRO PANDEY v. RAMESHWAR PRASAD AGARWALA*

Pat. 557

Limitation—Document void ab initio—Suit to set it aside—No question of limitation arises.

Obiter.—Where a document is wholly void ab initio, it is not necessary to get it cancelled or set aside and therefore question of limitation for a suit does not arise. *RAJA SINGH v. CHAICHOO SINGH*

Pat. 816

Limitation Act (IX of 1908). See **Bombay Municipal Boroughs Act, 1921**, ss 104, 105

366

—**Act bars remedy only by way of suit—Right exists and can be enforced by other remedy.**

The rule of limitation is a rule of procedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription under s. 28, Lim. Act. It is only the remedy by way of a suit that is barred, but the right itself continues to exist; and if there is some other remedy by which that right can be enforced, the Lim. Act cannot come in the way. Thus, where the recovery of a debt is barred by lapse of time, the right to the debt is not extinguished, and if the debtor, without being aware of the bar of time pays up, he cannot sue the creditor to refund the money to him on the ground that his claim for recovery of the debt had become time-barred. *SURAT BOROUGH MUNICIPALITY v. SARIFA KARUNNIBSA*

Bom. 366

—**s. 4—Applicability to deposit of costs.**

Per *Agarwala, J.*—An "application," in s. 4, Lim. Act means an application to the Court to take some step which the Court is empowered to take only on being requested to do so, such as execute a decree, set aside an execution sale, etc. When making a deposit of costs the appellant does not move the Court to do anything. Section 4, therefore, does not

Limitation Act—contd.

apply to deposit of costs. **LAOMESHWAR PRASAD SHUKUL v. GIEDHARI LAL CHOUDHURY** Pat. 353 F B

—s. 5—*Applicability, to applications under O. XXII, rr. 3 and 4, Civil Procedure Code (Act V of 1903)*

The provisions of s. 5, Lim. Act are applicable to applications for substitution of names under O. XXII, rr 3 and 4 of the Civil P. O. **GOKARAN SINGA v. BRIJ BHUKAN SINGH** All. 402

—s. 5—*"Sufficient cause"—Delay in filing appeal held could be condoned.*

Held, Per Din Muhammad, J. (In order of reference)—that the delay in filing appeal could be condoned under s. 5, Lim. Act, as the appellant had sufficient cause for not preferring the appeal within time. **SALIG RAM v. CHARAN DAS** Lah. 877

—s. 6, *See Hindu Law* 881

—s. 14—*Governor-General in Council, if Court—Proceedings before Railway Advisory Board, if can extend time under s. 14.*

For the applicability of s. 14, Limi. Act, an enquiry by the plaintiff must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. But where the plaintiff had a recourse to the Advisory Board which is not a Court, instead of to the Railway Commissioners, he cannot be said to have prosecuted his claim in good faith and hence in such a case s. 14 cannot extend time.

Similarly though the Governor-General in Council is the supreme executive authority in India, there is no statute constituting him a Court. **MUGHJI HIRJAN & Co. v. BENGAL NAGPUR RAILWAY COMPANY LTD.** Nag. 241

—s. 21, *See Hindu Law* 749 F B

—ss. 21, 20—*Lawful guardian, who is—Acknowledgment by de facto guardian, whether prevents debt being time-barred.*

Per Krishnaswami Ayyangar, J.—A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a *de jure* guardian in contrast to a *de facto* guardian. The law does make a real distinction between a *de jure* guardian and a *de facto* guardian. A *de facto* guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decision of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

An acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time-barred. **KARINAGISETTI CHENNAPPA v. KARINAGISETTI ONKARAPPA** Mad. 749 F B

—s. 23 *See Muhammadan Law* 744

—s. 26—*Tenant of one land, if can acquire for himself or on behalf of landlord right of way, as of right upon another land of his own.*

No doubt the possession of the tenant is the possession of the landlord, but a tenant of one land cannot acquire, either for himself or on behalf of his landlord, a right of way as of right upon another land of his own; that is a principle of the English Law repeated in s. 4, Easements Act. **TAN BIT SWAN v. U PO NYUN** Rang. 605

Limitation Act—contd.

—s. 28. *See Limitation Act, 1908, Art. 133*

—s. 28—S. 28, *if affects right to movable property.* 858

Section 23, Lim. Act extinguishes only the right to immovable property if the claim to it is not enforced within the period of limitation, but it does not affect the right to movable property. **SURAT BOROUGH MUNICIPALITY v. SARIFA KARUNNIBHA** Bom. 366

—Art. 5, as amended: In 1938—*Summary suit instituted before amendment more than one year after accrual of cause of action is barred and is not revived by amendment.*

Where before January 15, 1938, a summary suit instituted more than one year after the accrual of the cause of action is barred under Art. 5, Lim. Act, as it originally stood, the suit is not revived by the amendment of January 15, 1938, which prescribes a period of three years. **KARBALAI GULAM v. EBRAHIM BUSHARI & Co.** Bom. 149

—Art. 20. *See Limitation Act, 1908, Art. 21* 749 F B

—Art. 44. *See Hindu Law—Alienation* 6

—Art. 44—*Right to question sale is personal one of minor and cannot be exercised by his transferee.*

The right to question the validity of the sale is a personal right of the minor which can be exercised by him on attaining majority. The purchasers from minor do not acquire this right by their purchase of property from him. **MON MOHAN BHATTACHARJEE v. BIDRU BHUSAN DUTTA** Cal. 6

—Art. 60—*Case falling under Art. 60—Article, if applies to interest also.*

The ordinary rule is that the cause of action for recovery of principal and of interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, two periods of limitation are not applicable. Thus in a case falling under Art. 60, Limitation Act, that Article applies to the principal as well as to the interest. **NEUPHENDRA NATH CHATTERJEE v. ARUN CHANDRA CHATTERJEE** Pat. 339

—Art. 60—*Deposit with banker—Waiver of necessity for demand—Reputation of customer's right, if waiver—Demand previous to suit, whether necessary.*

In the case of a deposit made with the banker, the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by the banker of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum. Hence in a suit by the customer to recover money deposited with the banker, the banker cannot simultaneously repudiate liability to pay this sum and insist that a demand previous to suit was essential to its maintainability. **NEUPHENDRA NATH CHATTERJEE v. ARUN CHANDRA CHATTERJEE** Pat. 339

—Art. 62—*Claim for overcharges—Article applicable.*

A suit for overcharges against a Railway Company must be instituted within three years under Art. 62, Lim. Act. **MUGHJI HIRJAN & Co. v. BENGAL NAGPUR RAILWAY COMPANY LTD.** Nag. 241

—Art. 85—*Parties having dual contractual relationship and having reciprocal demands against each other in different capacities—Accounts containing items relating to all dealings, whether mutual, open and current.*

Where between the parties there is a dual con-

Limitation Act—contd.

tractual relationship: (i) that of borrower and creditor, and (ii) that of principal and agent and in these dealings, the plaintiff as creditor has demands against the defendant, while the defendant as the principal has independent demands against the plaintiff as his agent, and the items relating to all the dealings are entered in one account, such an account is clearly a mutual, current and open account and under Art. 85, Lim. Act, a suit for recovery of the amount due on it may be brought within three years from the close of the year in which the last item admitted or proved is entered in the account. **FIRM RULDU RAM-DAULAT RAM v. BASANT RAM** Lah. 805

—**Art. 85—Shifting balance, if necessary.**
An absence of a shifting balance is not decisive in case of mutual, open and current accounts. **FIRM RULDU RAM-DAULAT RAM v. BASANT RAM** Lah. 805

—**Art. 89—Suit against agent on basis of revocation of agency—Time, when begins to run.**

Under the Lim. Act, limitation begins to run when a cause of action accrues. It is obvious that it would be the right of the agent to claim that no cause of action on the basis of revocation could arise against him until the termination of his authority as an agent. In so far as the cause of action is the revocation of the agency, he could not be sued until he had received notice of such revocation. It follows, therefore, that the period of limitation would begin to run on that date and would extend for a period of 3 years. **RAM CHANDER v. KUMAR KUNWAR** All. 233

—**Arts. 91, 144—Suit for possession of property on allegation that its sale was sham—Question of limitation, decision of—Allegation found correct—Article applicable.**

Where the allegations in the plaint, that the sale was a sham transaction or a mere paper transaction, are correct, a suit for possession of the property based on those allegations must be governed by Art. 144 and not by Art. 91. Therefore the decision of the question of limitation would depend on the decision of the question whether the sale in dispute was a sham transaction. The passing of consideration and the relationship between the parties would be very important matters in arriving at the conclusion as to whether the sale was or was not a sham transaction. **BASANT KAUER v. RAM SINGH** Lah. 343

—**Art. 93—Suit for contribution—Question of date of payment by plaintiff is one of fact—Held on facts that suit was within limitation.**

It is not safe to lay down any rigid formula for the purpose of determining the date of payment, as the question of payment being a question of fact, must be determined with reference to the circumstances of each case.

One M had a joint decree for rent against the plaintiff and defendants, and in execution of that decree he obtained from the executing Court an order for the attachment of a sum which had been deposited into X Court by a judgment-debtor of the plaintiff, to the credit of the latter. Subsequently, on August 20, 1932, the executing Court by its order directed to transfer the money to the credit of the decree-holder, and to send the payment order to X Court. On September 3, 1932, the payment order was made over by X Court to the decree-holder. The plaintiff brought a suit for contribution against defendants within three years from September 3, but beyond limitation from August 20:

Limitation Act—contd.

Held, that the suit was not barred by limitation. The payment by the plaintiff to the decree-holder must be deemed to have been made on September 3, and time began to run from that date. **GANESH MAHTO v. BHAWAN MAHTO** Pat. 73

—**Art. 116—Assignment of decree for certain amount—Portion of money kept with assignee to be paid to assignor's creditor if decree is realized—Suit by creditor of assignor to recover amount—Nature of—Article applicable.**

P who had obtained a mortgage decree against A assigned the decree to D for certain amount a portion of which was left with D to be paid to X who was creditor of P. This amount was not to be paid to X until D had realized the decree. D realized the decretal amount but refused to pay X who then brought a suit to recover the amount:

Held, that the suit was neither one for specific performance of a contract nor for indemnity but was a suit for compensation for breach of contract and was therefore governed by Art. 116, Lim. Act. **SHRONARAIN PRASAD SINGH v. GANGA PRASAD SARU** Pat. 63

—**Art. 120. See Limitation Act, 1908, Art. 123** 626

—**Arts. 123, 120—Application to recover annuity under will—Article applicable.**

Article 123, Lim. Act, applies to an application for recovering an annuity payable under a will and not Art. 120. **ANANDI PRASAD v. DULHIN KISHORI KUMAR** Pat. 626

—**Art. 139, s. 28—Lease expiring but tenant continuing in possession without paying rent—Possession not shown to be with landlord's assent—Landlord's suit beyond 12 years after expiry held barred, irrespective of effect of s. 116, Evidence Act (I of 1872).**

After the period of lease has expired, the relationship of landlord and tenant ceases and the tenant becomes a trespasser by the operation of sub-cl. (a) of s. 111, T. P. Act.

Where although the lessee remained in possession after the expiry of the lease, without paying rent, there was nothing to show that the landlord assented to the lessee continuing in possession so as to enable the Court to find under the provisions of s. 116, T. P. Act, that lessee had been holding over:

Held, that the landlord's suit for possession beyond 12 years from expiry of lease must be deemed to be barred by time, irrespective of any denial by the tenant of the landlord's title and under s. 28, Lim. Act, his right to the property extinguished. **BANWARI LAL v. HUSSAINI** Lah. 858

—**Art. 142—Applicability of Art. 143—Whether applies to suits on proprietary title.**

Article 142, Lim. Act, is very general in its scope and application. There is no reason to confine the word "plaintiff" in this Article to plaintiffs bringing their suits on possessory title only. The Article will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his possessory title. There is nothing in the Article itself, to make it applicable to suits on possessory title only. **JAI-MANGAL THWARI v. BINDSARAI SINGH** Oudh 736

—**Art. 142—Question of applicability of particular article—Duty of Court.**

In order to determine the particular Article applicable to a suit, it is the duty of the Court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of

Limitation Act—contd.

dispossession in the plaint but the facts show that the defendants entered or must have entered on the land while it was in the possession of the plaintiff, the Article applicable would be Art. 142. It would be absurd to hold that a plaintiff can at his sweet will avoid the operation of Art. 142 by framing his suit in such a manner as if there was no dispossession. **JAI MANGAL TEWARI v. BINDRASHURI SINGH**

Oudh 736

—**Arts 142, 144—Applicability of Art. 142**
—**Terms "discontinued" and "dispossessed"—Held, on facts that no question of discontinuance of possession arose and that the suit was governed by Art. 144.**

Article 142, Lim. Act, applies if the plaintiff has sued on the footing that while in possession he was dispossessed by the defendant, or if the fact be established that while in possession he was dispossessed by the defendant. The word "discontinued" in Art. 142 connotes three elements, two physical and one mental. There must be (1) actual withdrawal, (2) with an intention to abandon, and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It presupposes physical contact, a collision, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effaced by the latter.

Where a person is not in physical possession either himself or through some one else holding under him at any time after the re-formation of the land and he does not exercise any acts of possession but through a fiction of law he is in possession of the lands till the lands are actually fit for possession and he is not turned out either physically or by adverse acts of another, no question of discontinuance arises and a suit by such person for establishing his title to and for recovery of possession of such re-formed land would come within Art. 141, and not Art. 142 and the opposite party must prove adverse possession for 12 years or over before suit.

The right obtained by adverse possession for more than 12 years would be co-extensive with the assertion of the claimant. **ABDUL LATIF v. HABIBULLA**

Cal. 714

—**Art. 144.**

SEE Limitation Act, 1908, Art. 91 343

SEE Limitation Act, 1908, Art. 142 714

—**Art. 145—Applicability to suit for return of deposit with employer as security for good conduct.**

Article 145, Lim. Act, does not apply to a suit by a legal representative of a deceased employee for the return of a sum of money deposited by the deceased with the employer as security for good conduct because in such a case no cause of action arises at the date of deposit and the Lim. Act provides for time running only after the cause of action has arisen. **KAM RANBIJAY PRASAD SINGH v. BACHIA KUARI**

Pat. 336

—**Art. 164—"Due service of summons" in Art. 164 and O. IX, r. 13, Civil Procedure Code (Act V of 1908) meaning of.**

In Art. 164, Lim. Act, and O. IX, r. 13, Civil P. O., "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code

Limitation Act—contd.

but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except of course in the case where the defendant had purposely put it out of his power to have such knowledge. **K. K. N. K. A. R. CHITTAR FIRM v. AGA M. SHIBRAZEE**

Rang. 663

—**Art 182.**

SEE Civil Procedure Code, 1908, s. 48 373 (b)

SEE Co-operative Societies Act, 1912, s. 51 230

—**Art. 182—Failure to represent execution petition returned for rectification, whether extends limitation.**

It is not permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all. **MUNICIPAL COUNCIL, TANJORE v. SUNDARESAN**

Mad. 412

—**Art. 182, Expl. 1—Partition decree giving plaintiff and defendants joint possession of part of property and also separate possession of other properties—Decree must be regarded as joint—Application for execution of such decree by one of the parties takes effect in favour of all parties.**

Where a decree in a partition suit gives the plaintiffs and defendants joint possession of part of the property, though it also gives them separate possession of other properties, the decree must be regarded as a joint decree and cannot be regarded both as a joint decree and a decree held by each of the parties in severalty. If therefore an application is made by one of the interested parties for the execution of the decree within three years of the decree, it takes effect in favour of all the parties and a subsequent application made by the decree-holder within three years of the previous application but beyond three years from the date of the decree is not barred by Art. 182, Lim. Act. **SHARJU PRASAD v. DEOKI SINGH**

Pat. 59

—**Art. 182 (2)—Mortgage suit—Preliminary decree passed—Appeal therefrom—Proceedings of lower Court not stayed and final decree passed—Preliminary decree confirmed—Limitation for execution—Starting point—Fresh application for final decree, necessity of.**

The fact that an appeal is preferred against the preliminary decree in a mortgage suit does not prevent the Court from passing the final decree. Where no order staying proceedings pending the appeal is obtained, it is the duty of the trial Court to proceed to pass the final decree. That decree remains binding and in full force until set aside. Where the Court passes the final decree and the preliminary decree is confirmed on appeal, the limitation for an application for execution of the final decree runs not from the date of the final decree but from the date of decree of the Appellate Court in appeal from the preliminary decree.

The decree-holder can execute the final decree without obtaining a fresh final decree after the decision of the appeal against the preliminary decree. **A. VEERAN KUTTI v. P. P. KOYA KUTTI**

Mad. 578

—**Art 182 (5)—Application—Plaint in suit under O. XXI, r. 63, Civil Procedure Code (Act V of 1908), whether application under Art. 182 (5) —Or application made to proper Court.**

A "suit" is a proceeding which is instituted by the presentation of a plaint and is in its nature different

Limitation Act—contd.

from an "application made" under the Lim. Act.

An application which is to save limitation under Art. 182 (5), Lim. Act, must be made "to the proper Court for execution," a suit to have an order in claim case set aside cannot be treated as an application under Art. 182 (5).

A suit under O. XXI, r. 63, Civil Procedure Code cannot keep the execution proceedings pending when there has been a definite order of the executing Court dismissing the execution application: in such a case, if the decree-holder succeeds in the suit, he will have to file a fresh application for execution and re-attach the property. A plaint in such a suit cannot, therefore, be treated as an application, within the meaning of cl. 5 of Art. 182.

Nor can the filing of such a suit be an application to the proper Court for execution when the filing of the suit in the Court which has jurisdiction to execute the decree or in some other Court must depend upon the fortuitous circumstance of the value of the attached property. *MAUNG MAUNG v. V. V. R. CHETTIAR FIRM* Rang. 70

—Art. 182 (5)—Application for execution to Court which passed the decree and not to transferee Court, whether to proper Court.

After a decree has been transferred to another Court for execution, the proper Court to which a subsequent application for execution should be made is the transferee Court, as that is the Court whose duty it then is to execute the decree so far as it can be executed by that Court. Consequently, an execution application to the Court transferring the decree is not one made to a proper Court. *RAM KISEON RAM BHAKAT v. SATYA NARAIN BHAKAT* Cal. 411

—Art. 182 (5)—"In accordance with law"—Application held not in accordance with law—Failure of Court to see whether requirements of rr. 11 to 14 of O. XXI, Civil Procedure Code (Act V of 1909), are complied with—Decree-holder, if protected from consequences of time-barred application.

Although the duty is cast upon the Court under O. XXI, r. 17, Civil P. O., to see whether the requirements of rr. 11 to 14, are complied with, the decree-holder is not protected if the Court fails to do so, from the ordinary consequences which follow when his request to the Court for its assistance is barred by time.

It is a matter of policy laid down by the Legislature that applications to the Court for its assistance must be made in time whether that application takes the form of a plaint or an application in execution.

An application for execution dated February 1, 1932, which on the face of it was time-barred was not an execution application made in accordance with law, as it did not mention a previous execution application dated February 5, 1932, which it should have mentioned if the application of February 1, 1932, itself was to be in time. But the Court instead of complying with the provisions of O. XXI, r. 17, admitted the application and ordered notices to issue and costs to be deposited. In the subsequent application dated December 8, 1932, the decree-holder again failed to mention the application of February 5, 1932, but subsequently applied for amendment of the application:

Held, that the application of December 8, 1932, was barred and that there was no substance in allowing the amendment as the application of February 1, 1932, which omitted reference to the

Limitation Act—concl'd.

application of February 5, 1932, and which was consequently out of time was not in accordance with law and it therefore did not give fresh starting point for limitation. The fact that it was an error to allow the execution of February 1, 1932, did not make any difference. *DOLARAM ARATMAL v. MULOMAL RADHAKIS INDAS* Sind 835

—Art. 182 (5)—Step-in-aid—Application in accordance with law—Formal mistake about costs of previous application—Application, if not in accordance with law—Application rejected on this ground—If amounts to finding so as to act as res judicata—Res judicata.

A mistake in an execution application about the costs of the previous execution application in itself is no sufficient reason for holding that the application is not a step-in-aid of execution or is not made substantially in accordance with law.

Where an application is rejected, dismissed or struck off for mere formal defects or a bona fide mistake in furnishing details or on account of the decree-holder's absence, such an order cannot estop the decree-holder from showing that his application was not defective but in accordance with law. Rejection on the ground of decree-holder's absence and his failure to correct an unimportant inaccuracy in the costs does not amount to an express or implied finding that the application is not in accordance with law. Such a finding, therefore, cannot be *res judicata*. *MOHAMMAD ABDUL SATTAH v. RAHMUDDIN* Nag. 545

—Art. 182 (5)—Time, when runs—Final order on execution application committing judgment-debtor to civil prison—Judgment-debtor subsequently released for non-payment of subsistence allowance—Time, when runs—Execution, if pending when judgment-debtor was in prison—Sending of money order—If application to proper Court.

Before the Lim. Act was amended in 1927, the starting point for limitation was the date of an application made to a Court for execution of a decree or order. But after the amendment, the limitation runs from the final order passed by a Court on an application for execution or to take some step-in-aid of execution of decree or order.

Where final order on an application for execution is passed committing the judgment-debtor to civil prison, but the judgment-debtor is released subsequently for non-payment of subsistence allowance, the date from which the limitation runs is the date of the final order committing the judgment-debtor to civil prison and the execution proceedings cannot be said to be pending till the judgment-debtor was in prison.

Obiter.—Sending a money-order from a post office for a subsistence allowance of a judgment-debtor cannot be held to constitute an application to a Court within the meaning of Art. 182 (5), Lim. Act. *BOOMIAH v. R. M. N. R. M. CHETTIAR FIRM* Rang. 552

—Art. 182 (5)—Transferee Court not taking steps towards execution—Decree re-transferred to Court passing it—Order of re-transfer, if final.

Where the transferee Court has taken no steps towards the execution and the decree is re-transferred by it to the Court passing it, the order of re-transfer is not the final order on an application within the meaning of Art. 182 (5), Lim. Act. *RAM KISEON RAM BHAKAT v. SATYA NARAIN BHAKAT* Cal. 411

Lis pendens. See Transfer of Property Act, 1882, s. 52 81

Madras City Tenants' Protection Act (III of 1922), ss. 1 (3), 2 (4), 3, 6, 12—Benefits of ss. 3, 6 and 12, when available—Tenancy held was not created before commencement of Act and Act did not apply.

The latter part of the definition of "tenant" in s. 2 (4), Mad. City Tenants' Protection Act, refers to persons who, without a tenancy title, continue in possession after the termination of the tenancy, and the benefit of the remaining sections including s. 12, cannot be of avail to tenants unless and until they have shown that the tenancy in question was created before the commencement of the Act within the meaning of s. 1 (3).

By lease dated October 18, 1912, A leased the plot of land in suit to B for a period of ten years from October 1, 1912, the tenant being at liberty to erect a superstructure on the land. Shortly before its expiry on September 30, 1922, there were negotiations which resulted in an agreement by A to give a fresh lease at an increased rent, in order that further building operations should go on. On February 1, 1923, the formal lease was executed, under which the plot of land was leased to B for a term of ten years from October 1, 1922, at an increased rent. It provided that the lessee should always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrendered possession of the land, either on the expiry of the lease thereby granted or any other future lease or at any time, and that the price should be fixed according to the market value of the buildings as at the time of ascertainment and payment. On the expiry of the lease the lessor claimed possession and offered the present value of the superstructure as it existed at the commencement of the lease. The lessee claimed the benefit of the Mad. City Tenants' Protection Act;

Held, that though the physical possession was continuous, the possession from October 1, 1922, was attributable to a new tenancy, which was formally embodied in the lease dated February 1, 1923. The tenancy in question was not therefore created before the commencement of the Act, and the Act did not apply. **RANGANATHAM CHETTI v. ETHEIRAJULU NAYUDU** PC 571

Madras Estates Land Act (I of 1908), ss. 30, 38, 40, 178—Steps contemplated by ss. 30, 38 and 40, if can be taken in course of settlement proceedings.

There is nothing in the scheme of Chap XI, Madras Estates Land Act to restrict the authorities settling the rent to the system of payment theretofore in vogue. The provision in s. 178 against the commencement or continuation of proceedings under ss. 30, 38 and 40 of the Act during the pendency of settlement proceedings clearly implies the possibility that what could be done under these three sections might be done as part of the settlement proceedings. **A. SUBRAMANIA IYER v. K. S. VENKATARAMA IYER** Mad. 326

—ss. 170, 171, 172, 174, 178—Board of Revenue—Powers of revision—S. 172, scope of—Whether gives power to Board to set right proceedings before Revenue Officer, before procedure under s. 170 has been gone through—Whether gives powers of revision suo motu.

Section 172 of the Madras Estates Land Act, cannot be interpreted as giving powers of revision to the Board only after the re-publication under s. 170, cl. 3, had been made. All that s. 172 does is to fix the outer limit of time within which the powers of revision may be exercised. This does not necessarily imply that the Board has no power

Madras Estates Land Act—conold.

of interference before the re-publication. Its powers as an appellate authority under s. 171 can certainly be invoked and exercised independently of the question of confirmation by the Collector or re-publication under s. 170, cl. 3; under the provisions of s. 174 the orders passed under s. 171 are directed to be incorporated in the settlement record already published under s. 170 (3). Section 172 gives the Board powers of revision both *suo motu* and on the application of parties. Where the Board is satisfied that the proceedings before the Revenue Officer require to be set right, it need not wait till after the procedure under s. 170 has been gone through and can interfere at an earlier stage and give necessary directions. There is no warrant for saying that the Board has no jurisdiction to exercise its revisional powers till after the settlement record has been re-published after confirmation by the Collector. Section 172 only contemplates the Board directing a revision by the subordinate authority and not the fixing of rent by the Revenue Board itself. If, on the facts of any particular case, what the Board does in addition to what is contemplated by s. 172 amounts to little more than a mere arithmetical calculation or something of that kind, there is nothing in the nature of excess of jurisdiction in the exercise of such powers. Where, on the other hand, the Board proceeds to do something which is really more than a ministerial or arithmetical step and which if it had been directed to be done by the Revenue Officer would have involved a consideration of a number of matters which are not and cannot be before the Board at the time of passing the order, so much of the Board's order as goes beyond what is contemplated by s. 172 is done without jurisdiction.

By the order the Board of Revenue fixed the landlord's share at eighty-seven *kalam*s per *veli* instead of sixty-five *kalam*s fixed by the Collector and directed conversion into cash at certain average price per *kalam* subject to a deduction of fifteen per cent on account of the distance of the village from the nearest town market. The Sub-Collector was asked to work out money rents on the above basis:

Held, that what the Board did in the matter of fixing cash rent was not within the powers conferred upon it by s. 172. If it had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a re-settlement on that basis and not merely given him a direction to carry out a simple process of conversion of paddy rent into money rent at a price fixed by the Board itself. **A. SUBRAMANIA IYER v. K. S. VENKATARAMA IYER** Mad. 326

Madras Gaming Act (III of 1930), ss. 3, 4 (1)—Payment or sharing profits in fulfilment of betting on horse race, whether gaming.

The definition of 'gaming' in s. 3 of the Mad. Gaming Act has included only the actual wagering or betting on a horse race, and payments in fulfilment of such agreement cannot be regarded as part of such betting and is consequently not gaming. **INRE O. KANNIAH MAISTRY** Mad. 385

—ss. 6, 5—S. 6, scope of—Finding of instrument of gaming in place searched under s. 5.

Section 6, Mad. Gaming Act only enacts, that gaming instruments found in any place entered or searched under the provisions of s. 5 shall be evidence that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Police Officer. But, the section

Madras Gaming Act—concl'd.

does not say that the mere finding of gaming instruments in such a place shall be evidence of gaming. There is obviously a wide difference between a person being present at a particular place for the purpose of gaming and his gaming at the place. It is only the latter act that is constituted an offence under s. 4 (ii) of the Act and not the former. *In re O. KANNIAH MAISTRY* Mad. 385

Madras Hindu Religious Endowments Act (III of 1927 as amended by Act XII of 1935), s. 63 (2),—Appointment of additional or associate trustees and manager, whether ultra vires of Board.

The Amending Act XII of 1935 does not say that the amendment shall have retrospective effect or that the law must be deemed to have been always as laid down in the Amending Act. So the appointment of additional or associate trustees before the amendment is *ultra vires* of the Board.

The provisions in the scheme relating to the appointment of a manager by the Board and the allotment of important duties of management to him must be deemed to be *ultra vires* because they have the effect of placing the management of the institution in the hands of some one not appointed by the trustee and not responsible to him, and would thus in fact displace the trustee from the management of the affairs of the temple. *HINDU RELIGIOUS ENDOWMENTS BOARD v. TRUSTEE OF SRI VIRUPAKSHASWAMI, TEMPLES* Mad. 544

Madras Prevention of Adulteration Act (III of 1918), ss. 5 (1), 20—Rules under s. 20—Rr. 16, 18, 22—Charge under s. 5 (1) not specifying whether milk in question was cow's or buffalo's—Certificate of analysis based on assumption that it was buffalo's—Sample found to contain 3·4 per cent of milk fat—Offence held not established.

The accused had been convicted of an offence punishable under s. 5, cl. 1 (d) of the Madras Prevention of Adulteration Act. The charge was that he sold milk below the standard of purity prescribed by Government. The charge did not state whether it was buffalo's milk or cow's milk that was said to have been sold by him contrary to law. The certificate of analysis by the Government Analyst was to the effect that the sample contained 60·5 parts of genuine milk, 35·0 parts of added water and 4·5 parts of cane sugar in a total of 100 parts. This opinion was based on the assumption that the milk that was sent as sample that is the milk that was sold by the petitioner, was sold as buffalo's milk. There was no basis for this assumption that it was buffalo's milk, that was sold. The sample was found to contain 3·4 per cent of milk fat. There was nothing to show that the quantity of solid found was below the prescribed minimum:

Held, that the sample in this respect of which the offence was said to have been committed must be dealt with as if it were cow's milk that was offered for sale or sold. The minimum percentage of milk fat was only 3 per cent, under r. 16. The sample contained 3·4 per cent milk fat. It could not therefore be said that the sample was below the minimum prescribed so far as milk fat was concerned. R. 18 did not apply and the offence had not been established. *In re KRISHNA IYER* Mad. 3

Malabar Law—Family property—Acquisition by manager—Presumption.

In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made, there is no presumption that the property acquired by the manager

Malabar Law—concl'd.

is family property. The fact that an item, the character of which is in dispute is mortgaged along with another item proved to be family land, will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family. *MAMMILI KUNRI RAMAN KITAVU v. VENGILERI THANANCHERI KUNHI* Mad. 755

—Tarwad—Right of member to sue for removal of karnavan—Other members, if should be joined—Petition by one for leave to sue in forma pauperis to remove karnavan—Fact that suit would result in other member functioning as karnavan—Petition, if not bona fide

Every member of a *tarwad* has a right to see that the *tarwad* affairs are conducted by the *karnavan* properly, and if he finds that a *karnavan* has not been acting in the interests of the *tarwad*, he would have a right to sue for his removal. In such a suit other members need not be joined as plaintiffs. It is obvious, however, that when a member sues a *karnavan* for his removal, he is trying to enforce a right in which he is interested with the other members of the *tarwad* jointly, and he would apparently be doing so not only in his individual interest but in the interest of all the members of the *tarwad* as well or at all events he is taking a step which will not affect him alone but the other members of the *tarwad* also. It is, therefore, only proper that if he has not filed the suit in a representative capacity, he should implead them as parties to the action.

Where a member of a *tarwad* makes a petition for leave to sue in *forma pauperis* to remove the *karnavan*, the petition cannot be held to be not *bona fide*, merely because, as a result of the success of the suit, the other member would have to function as *karnavan*. *AYANOBHRI KOVILAKATH SANAKARA VARMA RAJA v. AYANOBHRI KOVILAKATH CHERRA RAMA VARMA RAJA* Mad. 628

Malicious prosecution—Suit for damages—Mere acquittal of accused whether absolves plaintiff from proving that prosecution was malicious and without reasonable cause.

The mere acquittal of the accused in a criminal case does not absolve the plaintiff in a suit for compensation for malicious prosecution from his duty of proving independently of the acquittal that his prosecution was malicious and without reasonable and probable cause. *GOBIND RAM v. KAJU RAM* Lah. 652

Master and servant. SEE U. P. Prevention of Adulteration Act, 1912, s. 17 799

Minor—Contract of sale by guardian on behalf of minor—Purchaser, if can seek specific performance against minor.

A guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor. The principle underlying is that a minor is not personally bound by any contract made on his behalf by his guardian. A contract for sale of immovable property does not of itself create an interest in or charge on such property. If it is a contract of purely personal nature and no personal liability can be imposed on the minor, it must logically follow that the minor cannot be compelled to perform the contract; for the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question. In every case when there is refusal to implement the contract of sale by the guardian, the breach is committed by the guardian and never by the minor. The purchaser therefore

Minor—conold.

can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him. Consequently s. 24-A of the Specific Relief Act, debars the purchaser from claiming the relief of specific performance against the minor. **KRISHNA CHANDRA SHARMA v. RISHABHA KUMAR** Nag. 156

Suit by next friend on behalf of minor dismissed with costs—No express direction in decree that next friend should pay costs—Estate of minor, if liable for costs—In execution of decree for costs property of minor attached—Minor paying money to raise attachment—Application for refund of such money, whether can be made by new next friend.

Where the plaintiff is a minor, and suit brought on his behalf by a next friend is dismissed with costs, if the Court intends the next friend to pay the costs, there should be an express direction to that effect. Where there is no such direction in the decree and the decree merely says: "The plaintiff's suit is dismissed and the plaintiff do pay to the defendants their costs of the suit," the decree must mean what it says and the estate of the minor plaintiff must remain liable to satisfy the costs. It is not necessary that the decree should state in so many words that the costs of the successful party are to be taken out of the estate of the minor losing party.

Where a suit filed on behalf of the minor plaintiff by his next friend is dismissed with costs and in execution of the decree for costs the property of the minor is attached and the minor pays money to raise the attachment, an application for the refund of the money so paid, on the ground that the decree could not be executed against the minor is maintainable by the new next friend. **MULGRAND JIVRAJ v. D. Low** Bom. 252

Mortgage—Interest—Stipulation for payment of, in nature of penalty—Stipulation held in nature of penalty and not binding on mortgagor—Contract Act (IX of 1872), s. 74.

A mortgage deed provided that the sum of Rs. 2,000 which was borrowed thereunder should be repaid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal as well as interest on the entire sum. The stipulation for payment of interest ran as follows: that in default of payment of sums due in any instalment, the sum remaining unpaid on that date shall be added to the principal and the entire amount become payable at once irrespective of future instalments, the entire sum carrying interest at 1 per cent. per mensem compound with yearly rest.

Held, that there was a clear penalty which the parties could not have intended to be enforced as damages for breach of the contract to pay annual instalments. The stipulation which required payment of compound interest at 12 per cent. per annum was therefore not binding on the mortgagor. **KURELLA RAMAMURTI v. NALAM SUBBARAO** Mad. 440 (b)

Redemption—Difference between redemption by payment in cash and by transfer of mortgagee property.

There is a material difference between a case where cash is paid in satisfaction of the mortgage debt and

Mortgage—conold.

where property is transferred in satisfaction thereof. In cases where cash is paid, the moment the money is appropriated, redemption takes place in fact, but where property is transferred, the redemption depends upon whether the title in the property sold in law has passed to the mortgagee or not. Where the satisfaction of a mortgage debt is brought about by transfer of property mortgaged, the mortgage debt is extinguished to the extent to which the transfer is valid. **KISHEN GOPAL v. ABDUL LATIF KHAN**

Oudh 114

Redemption—Several co-mortgagors—Entire equity of redemption transferred by some of mortgagors to mortgagee—Effect of—Suit by other mortgagors is one for redemption and governed by Art. 148, Limitation Act (IX of 1908).

Where there are several co-mortgagors and the entire equity of redemption in the mortgage is transferred to the mortgagee by some only of the co-mortgagors, the possession of the mortgagee as regards other co-mortgagors remains only that of a mortgagee. It therefore follows that a suit by such co-mortgagors would be a suit for redemption and not a suit for possession on payment and would be governed by Art 148 of the Limitation Act.

The mortgagee who comes into possession of land as a mortgagee is not in a position to deny the rights of any of his mortgagors to redeem the mortgage so long as the equity of redemption or any part of it subsists. **KISHEN GOPAL v. ABDUL LATIF KHAN**

Oudh 114

Suit on—Costs—Suit against mortgagors—Purchaser of mortgage property in execution of simple money decree made party—Suit not necessitated by any conduct on his part—His only defence being that he was not personally aware of mortgage—Whether can be made personally liable for costs of suit.

No doubt there is jurisdiction for the Court to award costs personally against a subsequent encumbrancer or a subsequent purchaser of the mortgaged property. But before the Court can do so, there must be a finding that the suit was necessitated by any improper conduct on their part as having repudiated the title of the mortgagee or as having raised frivolous defences in the suit, thus enabling the plaintiff to incur more costs than were necessary.

In a suit against the mortgagors the purchaser of the mortgage property in a Court sale held in execution of a simple money decree was made a party. In the plaint the plaintiff alleged that before suit he called upon the purchaser to pay the debt due under the mortgage but he did not pay the same. The plaintiff prayed for a personal decree against the purchaser enabling him to recover the costs of the suit from him. The purchaser did not set up any defence in answer to the mortgage except stating that he was not personally aware of the mortgage and that he was obliged to add a plea that he was not personally liable for costs because the plaintiff claimed a personal decree against him. The Court awarded costs against him.

Held, that the suit was not necessitated by any conduct on the part of the purchaser and hence there was no justification for awarding costs against the purchaser. The mere fact that he did not comply with the notice of demand made upon him was not a reason recognized by law for awarding costs against him. **AKELLA SURAYYA v. THUMMALAPALLI KRISHNAMURTHI** Mad. 434

Muhammadan Law—Dower—Claim for—Nature of—Simple money decree in dower suit—Subsequent bona fide transfer of property by heirs—If affected by decree—Such transfer during pendency of appeal—S. 52, Transfer of Property Act (IV of 1882), if applies.

A Muhammadan woman's claim for dower is a simple money claim. A decree for dower obtained by the widow of a Muhammadan against the other heirs even though it may be realizable from the assets of the deceased does not create a charge against those assets unless the decree specifically creates such a charge.

Where therefore subsequent to the passing of a simple money decree in, a dower suit but pending appeal the heirs of the deceased Muhammadan mortgage the property of the deceased in their hands, *bona fide* for value, the mortgage is not affected by such a decree and the decree not having created a charge on the property s. 52, T. P. Act has no application.

DURGA DAS v. HANIFA BEGAM Oudh 369

Marriage—Dissolution—Suit for, on ground of husband's impotency—Limitation—Limitation Act (IX of 1908), s. 23.

Under Muhammadan Law marriage is a civil contract and the husband's impotency is a continuing breach of contract within the meaning of s. 23, Lim. Act. Consequently, a suit by the wife for dissolution of her marriage with her husband on the ground that he was impotent at the time of marriage and at the date of the suit he was still unable to perform the sexual act is incapable of being barred by limitation. SAHIBZADI v. ABDUL GHAFUOR Lah. 744

Shafi sect of Sunnis—Marriage of adult virgin without her consent—Validity.

Under the Muhammadan Law, marriage is a contract, and even among the Shafi sect of Sunnis, the marriage of an adult virgin is invalid if it is performed without her consent and against her wish. MOHIUDDIN v. KHATIFA BI Bom. 390

Sunnis—Option of puberty—Such right is prolonged till woman has knowledge of such right—But must be exercised within reasonable time of her knowledge—Burden of proving knowledge—Evidence Act (I of 1872), s. 108.

A woman's right of repudiating the marriage performed during her minority is prolonged amongst Sunni Muhammadans until she is acquainted with the fact that she has such a right. In other words the woman has the right of repudiating the marriage within reasonable time of her knowledge of the fact that she has the power to repudiate the marriage.

The fact, that a woman has knowledge of her marriage or of her right to exercise the option of puberty at a particular time, must be specially within her knowledge, and therefore the burden of proving such fact must, in view of the provisions of s. 108, Evi. Act, be on her. AHMAH HUSAIN v. AMIR BANO All. 837

Succession—Rule of—Custom, if can oust personal law—Burden of proof.

Per *Tyabji, J.*—In the case of Muhammadans the rule of succession must be according to their personal law, that is, Muhammadan Law, "the system of law which naturally follows from their religion," except in so far as this personal law is modified or is ousted by a valid and actually prevailing custom. Among Muhammadans the system of law which naturally follows from their religion is Muhammadan Law, and in every case where a custom at variance with Muhammadan Law is alleged to be prevailing, it must be shown

Muhammadan Law—conold.

that the body of persons claiming to be bound by that custom did definitely claim to be outside the system of law governing their other co-religionists.

A Muslim may, except in the cases of a few well-defined prohibitions, affect his entire rights by making declarations, a power given equally to men as well as to women. By the very act of professing the Muslim faith, a person embraces Islam, no matter whether he be a Christian or a Buddhist or of any other religion, and no matter what customs and practices or manner of living he may have been following up to that moment, and immediately becomes subject to Muhammadan law. This is in no way affected by the fact that where it is proved as a matter of fact that a Muhammadan and his ancestors had for a very long period not adopted the practices enjoined by Islam, but had been governed by ancient and not invalid customs, the customs actually practised and followed would be given effect to. Hence the Muslim agriculturists who desire to give up the customs by which they had been bound in the Punjab and to adopt Muhammadan Law, can do so by an express declaration to that effect. AISHA BIBI v. BEGUM BIBI Sind 87

Waqf—Mujavarsnip—Succession—Female, if barred.

Under Muhammadan Law, there is no legal prohibition against a woman holding a *mutwalliship*, when a trust by its nature involves no spiritual duties such as a woman could not properly discharge in person or by deputy, and it is always a question of fact whether the duties attached to a particular office are so spiritual that they cannot be discharged by a female.

Where the duties of a *mujavar* consist of sweeping and cleansing the place, reading the *fatiha*, offering prayers and incense, and looking after the general management of the shrine, and on evidence it is found that these duties can be performed by females, then succession of a female to such *mujavarsnip* is not barred. HUSSAINBI v. KHAIRUDDIN KUTUBUDDIN Bom. 675

Mussalman Waqf (Bombay Amendment) Act (XVIII of 1935), s. 61—Mutwallis residing within jurisdiction of District Court—Waqf property situate outside jurisdiction of such Court—Such Court, if can call upon mutwallis to contribute under s. 61.

The jurisdiction of the Court is confined entirely to cases in which the *waqf* property is situate within the limits of its jurisdiction. The only *waqfs*, which can be called upon to make a contribution to the Waqf Administration Fund, are the *waqf* to which, under the principal Act, the Court directing a contribution to be made has jurisdiction. There is nothing in the Act which extends the jurisdiction of the Court to cases in which the trustees reside within the district, or in which they apply income within the district. The only relevant fact to consider is the place where the *waqf* property is situate, and s. 3 of the Mussalman Waqf Act, 1925, and also s. 6-D of the Amendment Act, make it clear that the property of the *waqf* referred to in the sections is the corpus, and not the income. Where therefore the whole of the *waqf* property consisting of immovable property and shares in companies is situate in Burma but the *mutwallis* of the *waqf* reside within the jurisdiction of the Surat District Court, such Court cannot call upon the *mutwallis* to contribute to the Waqf Adminis-

Mussalman Waqf (Bombay Amendment) Act
—conold.

tration Fund under s 61, Mussalman Waqf (Bom. Amendment) Act, 1935. **AHMED IBRAHIM SINGAPORE v. COLLECTOR OF SUBAT** Bom. 870

Nuisance. SEE TORT 554
Oaths Act (X of 1873), ss. 5, 6, 13—Oath, if compulsory—Omission in case of child—Whether renders evidence inadmissible.

Under ss. 5 and 6, Oaths Act, 1873, every person who is examined as a witness shall make an oath or affirmation and there is no exception in the case of a child of tender years. Therefore if the child is adjudged to be a competent witness, an oath or affirmation must be administered to the child before he is examined.

The word "omission," as used in s. 13, Oaths Act, includes any kind of omission and is not restricted to accidental or negligent omissions. Hence, although a child must be either sworn or affirmed before giving evidence, nevertheless if the child gives evidence without making an oath or affirmation his evidence is still admissible; but, it is for the Court to decide what weight may be given to such unsworn testimony, and the evidence of a child must always be received with great caution. **AN PHUT v. THE KING** Rang. 205

Oudh Land Revenue Act (XVII of 1876), s. 40. SEE Pre-emption 272

Oudh Laws Act (XVIII of 1876), ss. 6, 10, 11, 13—Pre-emption—Suit for pre-emption of part of property sold—Maintainability of.

A suit cannot be instituted under the Oudh Laws Act for pre-emption of part of the property sold, on payment of a proportionate share of the price. **SITLA SAHAI v. SRI RAM** Oudh 10

—s. 9—Ordinary tenant, whether member of under-proprietary village community.

An ordinary tenant in a village cannot be said to be a member of the under-proprietary village community in a village. **LACHMI NARAIN v. MUSAHHB ALI** Oudh 756

—s. 9—Pre-emption—Preferential right by drawing of lots, when determined.

The last sentence of s. 9, Oudh Laws Act, lays down the procedure of determining the order of preference where several persons having equal right of pre-emption have exercised their right of pre-emption by instituting a suit. **LACHMI NARAIN v. MUSAHHB ALI** Oudh 756

—s. 9—Sale of plot also transfers well situated on it.

The sale of a plot carries with it a transfer of the well situated on the plot when it is not sold as a separate entity. **LACHMI NARAIN v. MUSAHHB ALI** Oudh 756

—s. 20. SEE U. P. Regulation of Sales Act, 1934, s. 5 774

Oudh Rent Act (XXII of 1886), s. 3 (11). SEE Oudh Rent Act, 1886, s. 103 (10), 111

—s. 19 (1)—Applicability—Remission claimed on account of slump in prices—Section, if applies.

Section 19 (1) of the Oudh Rent Act has no application to a case where an under-proprietor claims remission on account of the slump in prices due to abundance in produce of the land. **SAKINA BEGUM v. DURGA SAHAI** Oudh 295

—s. 19 (1)—Sanction of Deputy Commissioner, if must be taken in each and every case.

The only construction to which the language of s. 19 (1), Oudh Rent Act, lends itself is that a separate previous sanction of the Deputy Commissioner for remission should be obtained in each case by a Court

Oudh Rent Act—conold.

seised of a suit for arrears of rent before it can allow that remission from the rent payable by an under-proprietor. The section clearly means that what the Court has to do in each case, when considering the question of remission, is first to determine as to what would be the amount to be allowed as a remission on equitable grounds and then to obtain the sanction of the Deputy Commissioner in respect thereof. The sanction of the Deputy Commissioner would naturally depend upon what the Court has determined to be an equitable remission. Both the Court and the Deputy Commissioner have to determine the question of remission judicially after giving due consideration to the facts of each individual case, and it is hardly conceivable that a general order of allowing remission in a particular locality was in the contemplation of the Legislature when it used the words "with the previous sanction of the Deputy Commissioner" in the section. **SAKINA BEGUM v. DURGA SAHAI** Oudh 295

—ss. 108 (10), 3 (11)—Ejectment under s. 108 (10), whether means ejectment by whole body of co-sharer landlords to whom rent is payable by landlord—Suit by tenant against one of co-sharer landlords for possession of plot—Maintainability in Civil Court.

The ejectment of a tenant contemplated by s. 108 (10), Oudh Rent Act, means the ejectment by the landlord, i. e., by the whole body of co-sharers where the tenant holds his tenancy from all of them. The landlord of the tenant is the person or persons to whom the rent is payable by the tenant. Hence a suit by a tenant in Civil Court against one of the co-sharer landlords for possession of a plot does not fall within exceptions to the general jurisdiction of the Civil Courts contained in s. 108 (10) and is maintainable. **RAM SARUP SINGH v. SARJU ADIB** Oudh 111

Pardanashin lady. SEE Civil Procedure Code, 1908, s. 47 691

Partition. SEE Co-owners 11

—Suit for—Mortgages of undivided share who has purchased property in execution of his decree depending suit, if necessary party—Purchaser at execution sale under money decree and purchaser under mortgage decree, distinction.

A partition necessarily affects the interest of a mortgagee of an undivided share, since after the partition his security is upon the divided share of the separate allotment. The mortgagee of an undivided share might be prejudiced if that share did not receive a proper allotment in severalty, and it is for the benefit of all other persons interested in the joint property that such a mortgagee should be bound by the allotment. Hence it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected.

While the purchaser at an execution sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, title and interest in the mortgaged subjects which the mortgagor had at the date of the mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor-in-interest of the owner of the equity of redemption at the date of the sale. **JADUNATH ROY v. PARAMESWAR MULLICK** P C 234

Partition—concl'd.

—*Suit for—Rights of parties added after preliminary decree, if can be adjusted at time of final decree.*

If the mortgagee has proceeded to a sale pending partition, the purchaser would become a necessary party to the partition suit.

A partition suit, in which a preliminary decree has been passed, is still a pending suit and the rights of the parties who are added after the preliminary decree, have to be adjusted at the time of the final decree.

A mortgagee of an undivided share obtained a decree against B, the son of the deceased mortgagor and purchased the property on January 11, 1930, and the sale was confirmed on February 19, 1930. In the meanwhile a partition suit was brought on August 30, 1929, to which B his mother and an unmarried sister were made parties. On October 1, 1929, a preliminary decree for partition was passed declaring the share of B subject to the charge for maintenance and other expenses of his mother and sister. The mortgagee was neither made a party nor was any decision given as to mortgagee's rights, in the decree. The mortgagee applied by applications, one made before execution sale and other after the sale but before confirmation, to be made party to partition suit and on appeal from their rejection, the High Court directed that they should be made parties "as from April 12, 1930, on which date their application was rejected," the proceedings taken before the said date, being binding upon them just as much as they would be binding upon their predecessor-in-interest." The mortgagee thereupon applied to set aside the preliminary decree so far as it declared charges upon the property but this was rejected in view of the High Court's order. The mortgagee then applied for separate allotment of his share and the allotment was made without making any charge on the property. The High Court set aside this order on the ground that in view of the previous order of that Court the preliminary decree could not be altered or modified:

Held, that the mortgagee owing to his purchase of the property was a necessary party and the previous order of the High Court need not be construed as holding that after the execution sale the ladies had the same rights against the purchasers as they had had against B's interest in the equity of redemption. The ladies' interest in the equity of redemption equally with B's must be regarded as having passed to the mortgagee. At no time was it correct to treat the mortgagee as mere assignee of B's interest. Before the sale his interest was as mortgagee and was not represented in the suit. After the sale when he was made party, his interest as complete owner was before the Court—an interest which at no time had belonged to B. At no time was it correct or sufficient to regard B as mortgagee's "predecessor-in-title," upon any question as between B and other persons claiming to be interested in the equity of redemption, a decision charging or limiting his interest had no bearing upon the rights of the mortgagee whether before the execution sale or afterwards. The property purchased by the mortgagee could not therefore be charged with the maintenance of B's mother and sister. *JADUNATH ROY v. PARAMESWAR MULLICK*

PC 234

Partnership Act (IX of 1932), s. 69—Accounting contemplated by s. 69.

The only accounting contemplated by s. 69 is the

Partnership Act—concl'd.

accounting which would be directed in a suit by a plaintiff who is the partner of a registered firm. *SATIBA MAL v. GULAB RAI* All. 113 S B

—s. 69—*Suit by plaintiff in respect of money due to him from defendant on basis of transactions in unregistered partnership between them—Partnership claimed to be dissolved before suit—Sum specified—Suit, if maintainable.*

The language of sub-s. (1) and (2) of s. 69, Partnership Act, is wide enough to cover suits relating to a dissolved firm and sub-s. (1) covers a suit by a plaintiff suing in respect of a right vested in him or acquired by him as a partner in a firm, and it is not essential that the firm should be actually in existence at the date when the suit was instituted. The words in sub-s. (1) "suing as a partner in a firm" include a suit on a cause of action which is based on a right acquired solely as a partner in a firm, and where the firm was unregistered, no such suit can be brought.

The plaintiff sued the defendant in respect of money which he alleged was due to him on the basis of transactions in an unregistered partnership into which he and the defendant had entered. It was claimed that the partnership was dissolved and that on a calculation, as the venture had been unprofitable, the defendant owed the plaintiff a specified sum of money:

Held, that the suit was barred under s. 69, Partnership Act. *CHHOTLAL v. GOPALDAS* Nag. 624

—s. 69—*Suit for dissolution by partner of unregistered firm—His right to decree for accounts, if affected.*

If a partner of an unregistered firm sues for the dissolution of partnership, he is entitled to the ordinary decree which the Court passes in such a suit. Provision is made for this decree in O. XX, r. 15, Civil Procedure Code. The right of a partner therefore of an unregistered firm to a decree for accounts in a suit for dissolution remains unaffected by the provisions of s. 69, Partnership Act, in view of the proviso contained in sub-s. (3) thereof. A partner of unregistered firm has a right in a suit for dissolution of partnership to include a claim for accounts also and he need not bring two separate suits for them. *SATIBA MAL v. GULAB RAI*

All. 113 S B

Penal Code (Act XLV of 1860), s. 109. See Penal Code, 1860, s. 115. 413 (b)

—s. 109—*No particular person found guilty under s. 4 (ii)—Conviction of accused under s. 109, Penal Code (Act XLV of 1860), read with s. 4 (i) Madras Gaming Act, propriety of.*

Where no particular person is found to have committed the offence under s. 4 (ii) of the Act, which the accused could be said to have abetted, his conviction under s. 109, I. P. O. read with s. 4 (ii) Mad. Gaming Act as accessories either before or after the betting is wrong. *In re O. KANNIAH MAISTRY* Mad. 385

—ss. 115, 117, 109—*Accused abetting commission of murder by public—Whether should be sentenced under s. 115 or s. 117—Such murder committed—Appropriate section for such offence is s. 109.*

Abetment has a reference both to the person or persons abetted, and to the offence or offences the commission of which is abetted. Section 117, I. P. O., deals with the former whatever be the nature of the offence abetted, while s. 115 deals with the latter, without having regard to the person or persons abetted. Section 115 is not confined to the abetment

Penal Code—contd.

of a single person or a specified individual or individuals, and covers the case of the abetment of a class of persons also. It does not apply only if "no express provision is made by this Code for the punishment of such abetment." The words "such abetment" evidently refer to the abetment of the offence specified in the section itself, namely an offence punishable with death or transportation for life, and only ss. 121 and 131, provide for the punishment of the abetment of such offences. There is no express provision in the Code for the punishment of the abetment of murder. Hence, the abetment of the commission of murder, whether by a single individual or by a class of persons exceeding ten, falls under s. 115. In the latter case, it may fall under s. 117 also, but as s. 117 prescribes a lesser punishment, s. 115 is the more appropriate provision for such an offence.

Obiter.—If a person abets the commission of murder by the public, and murder is committed in consequence of the abetment, it cannot be said that the offence does not fall under s. 117, but the appropriate section for such an offence would be s. 109. *EMPEROR v. LAVJI MANDAN* Bom. 413 (b)

—s. 124-A—Offence under s. 124-A, Penal Code (Act XLV of 1880)—Bail should not be granted.

The offence under s. 124-A, I. P. O., is a non-bailable one punishable with transportation for life. So the accused should not be released on bail at all. *GIANI MBHEE SINGH v. EMPEROR* Cal. 249

—s. 149—Mob armed with deadly weapons going to achieve particular object by force—Inference that all members knew that grievous hurt is likely to be caused.

If a mob armed with deadly weapons goes to achieve a particular object by force or show of force, it is reasonable to infer that all the members of the assembly know that grievous hurt, if not murder, is likely to be caused in prosecution of that object. *AMBIKA THAKUR v. EMPEROR* Pat. 529

—s. 193—Complaint for perjury in a case, when should be lodged—Interest of justice—Proper considerations.

Though it is ordinarily in the interest of justice to bring the perjurer to book and check such offences, it is the duty of the Court to see whether it would ultimately promote the interests of justice if the perjurer is prosecuted. Where it is transparent that the criminal case is calculated to hamper the fair trial in the Civil Court, no prosecution for perjury should be lodged till after the case is decided by the Civil Court. *REWASHANKAR MOOLCHAND v. EMPEROR* Nag. 400

—s. 193—Statements forming subject-matter of charge under s. 193 need not be material for decision of suit—Question arises only for purpose of sentence.

It is not necessary that the statements which form the subject-matter of a charge under s. 193, I. P. O., should be material for the decision of the suit and the question can only be considered for the purpose of the sentence in the event of a conviction. *BEHARI LAL SUD v. EMPEROR* Lah. 588

—s. 266—Agreement between purchaser and seller that commodity sold should be measured by measure produced by purchaser—No representation by purchaser that measure produced was standard one—Purchaser, if guilty under s. 266.

Where both purchaser and seller are well aware of the actual measure being used, there can be no question of fraudulent intent. It is only when the

Penal Code—contd.

seller purports to sell according to a certain standard and sells below that standard, that he can be said to be guilty of fraud.

Where therefore it has been agreed between the seller and the purchaser that a certain commodity should be measured by a measure produced by the purchaser and purchaser has not represented in any way that the measure was the standard measure, the purchaser cannot be said to have fraudulent intent and cannot be convicted under s. 266, I. P. O. *KANAYALAL MOHANLAL GUJAR v. EMPEROR* Bom. 228

—s. 266—"False measure," meaning of—Commission of offence under Bombay Weights and Measures Act, whether makes measure false within meaning of s. 266.

The fact that an offence may have been committed under the Bombay Weights and Measures Act does not make the measures false within the meaning of s. 266, I. P. O. According to the ordinary use of language, if a measure is described as false, that means that it is something other than what it purports to be. *KANAYALAL MOHANLAL GUJAR v. EMPEROR* Bom. 228

—s. 302—Conviction for murder on circumstantial evidence—Whether should not be visited with extreme penalty.

The Judge is either satisfied that the accused is guilty or he is not. There can be only two positions. If he is satisfied, the accused must get the normal punishment; if he is not, the accused must be acquitted. There is no middle course at all in judging to guilt of the accused. It is wrong to say that an accused convicted of murder merely upon circumstantial evidence should not be visited with extreme penalty. *GUL ZAMAN MIR ZAMAN v. EMPEROR* Pesh. 208

—ss. 302-149. See Criminal Procedure Code, 1898, ss. 423, 439 529

—s. 304. See Criminal trial 274

—s. 366. See Evidence—Age 271

—s. 366—Kidnapping—Prosecution must prove girl to be below 16.

In order to prove the charge of kidnapping, it is incumbent on the prosecution to prove that the person kidnapped was under 16 years of age. *EMPEROR v. QUDRAT* All. 271

—s. 376. See Evidence—Age 271

—s. 376—Charge under s. 376—Prosecution to prove girl to be under 14.

To prove the charge under s. 376, Penal Code, the prosecution is bound to prove that the girl is below the age of 14. *EMPEROR v. QUDRAT* All. 271

—s. 379—Cattle theft—Proper punishment.

Offences of cattle theft are particularly mean and despicable offences in a community where so much depends upon cattle. They are inspired by no other motive than the ordinary motive of gain which, in many other cases, prompts a thief to steal, and it must be made plain to young men who steal cattle that if they are not going to prison, they will have at least to pay a heavy fine. The fine must be such as to make it clear that cattle lifting is not profitable. *EMPEROR v. MIRO GAULAM HUSSAIN* Sind 428

—s. 424. See Criminal Procedure Code, 1898 151

—s. 424—Scope—If applies where property is openly seized by person in exercise of alleged right.

The removal referred to in s. 424, Penal Code, is *ejusdem generis* with concealment which precedes it. Section 424 is designed to meet a special

Penal Code—conold.

class of cases, and has no application to a case where property is openly seized by a person in the exercise of an alleged right. *NAND KISHORE v. EMPEROR* All. 151

s. 426. See Criminal Procedure Code, 1898, s. 106 753

s. 477. See Criminal Procedure Code, 1898, s. 530 415

Pensions Act (XXIII of 1871), s. 4—*Suit relating to property subject of grant—Plaintiff's claim independent of grant—If falls under s. 4.*

The Pensions Act is to be construed strictly in favour of the right of suit. A suit relating to property which has been the subject of a grant, but in which plaintiff's claim is quite independent of the grant is not a suit relating to a grant of land revenue within the meaning of s. 4, Pensions Act. *DATTATRAYA VISBNU DABHOLKAR v. SADASHIV SHIVRAM NISAL* Bom. 839

Possession. See Criminal Procedure Code, 1898, s. 145 346

Practice. See Hindu Law 580

—*Evidence—Question of appraising oral testimony of witness—Opinion of trial Court, value of.*

Where it is a question of appraising the oral testimony of a witness, the Court of Appeal will no doubt attach a great deal of importance to the opinion of trial Judge regarding the value of such testimony unless facts and circumstances render it unsafe to do so. *JNANADA GOVINDA CHAUDHURY v. BIRENDRA NATH GOSWAMI* Cal. 634

—*Objection not raised in pleadings and no issue framed on the point—It cannot be raised after evidence in case has been recorded.*

Where an objection on a certain point is not taken in the pleadings and consequently there is no issue on that point, the party is not entitled to raise it after the evidence in the case has been recorded. *BARQ RAZA v. AKBARI* Oudh 441

—*Pleadings—Mofussil pleadings, construction.* Mofussil pleadings should not be construed too strictly, if to do so, would work injustice. *NAESIDASJI BALMUKUNDASJI v. BAI JAMNA* Bom. 44

—*Precedent—Federal Court.* High Court is bound to follow the Federal Court decision and to give effect to it. *BISHUN SINGH v. PALAKDHARI SINGH* Pat. 129

—*Privy Council—Relief claimed solely on ground that defendant worked coal under particular portion of land—Allegation failing—Defendant found to have taken coal from different portion—Plaint not amended to include relief in this respect—Claim cannot be allowed in appeal to Privy Council.*

Where the plaintiff has only alleged in his plaint that the defendant had worked some coal under land comprised in plaintiff's underlease in a particular direction, and has claimed relief solely on this ground but has failed to prove the allegations and it has been found that the defendants had taken coal to a small extent from under land in different direction and no application to amend the plaint was however made at any stage of the proceedings so as to include relief in respect of such working, the plaintiff cannot be heard to claim such relief in appeal to the Privy Council. *CHANDAN MULL INDRA KUMAR v. CHIMAN LAL GIRDHAR DAS PAREKH* PG 219

Pre-emption—*Mousa Safipur—Right of pre-emption in respect of grove—Village area included in own—Whether becomes town.*

If a village area is incorporated in a town, it

Pre-emption—conold.

does not become a town within the meaning of s. 8 of the Oudh Laws Act so that the right of pre-emption shall not be presumed.

The *wajib-ul-ars* of Monza Safipur shows that there exists a custom of pre-emption in that mousa, and such a right therefore exists in respect of grove land situated in a mahal of that mousa and paying revenue. *RAUF AHMAD v. FAHMIDA BEGUM* Oudh 277

—*Musafidar paying no rent—Rent no determinable under s. 40, Oudh Land Revenue Act (XVII of 1876)—If can pre-empt.*

Where a *musafidar* pays no rent and it has not been shown that his rent has to be determined by the Settlement Officer under s. 40, Oudh Land Revenue Act, 1876, he is neither an under-proprietor nor a proprietor and is therefore not entitled to pre-empt. *PARBHU DAYAL v. BISHESHWAR NATH* Oudh 272

Presidency Towns Insolvency Act (III of 1909), ss. 51, 57—*Official Assignee establishing that transaction within contemplation of s. 57 took place after commencement of insolvency—Onus to prove that it took before adjudication.*

Under the doctrine of "relation back" the property of an insolvent on the making of the order of adjudication vests in the Official Assignee as from the commencement of the insolvency, that is to say, from the date of the act of insolvency upon which the adjudication is made. As from that date the insolvent ceases to be owner of the property and cannot deal with it. He cannot make payments to creditors or give good and valid discharges. Section 57 of the Presi. Towns Insol. Act, however, provides an exception to the doctrine by affording protection to *bona fide* transactions taking place between the commencement of the insolvency and the date of the order of adjudication in those cases where the person with whom such transaction takes place had no notice of the presentation of the petition by or against the debtor. When the Official Assignee has established that a transaction within the contemplation of s. 57 took place after the commencement of the insolvency, the onus lies on the person seeking to uphold the transaction to prove that it took place before adjudication and that he had no notice of the presentation of the petition. A denial in the objections filed by him is insufficient to discharge the onus. The objections are mere pleadings. *OFFICIAL ASSIGNEE, KARACHI v. DHANOMAL MOHANLAL* Sind 778

Presumption—*Part of share in village sold—Presumption that corresponding share of vendor's house is also sold, if arises.*

When a part of a share in a village is sold, no presumption arises that similar share of the house of the vendor standing on the share is also sold, though such presumption arises when the whole share is sold and nothing is reserved. *BACHAN LAL v. GOBARDHAN* Oudh 373 (a)

Principal and agent—*Admission by Eastern Bengal Railway is on behalf of Government.*

Admissions by the agents of the Govt. and are therefore binding on the latter. *SECRETARY OF STATE v. DISTRICT BOARD, RANGPUR* Cal. 454

—*Notice to agent* See Transfer of Property Act, 1882, s. 100 33

Privileged communication. See Criminal trial 419

Privy Council. See Practice 219

—*Practice—Question of fact not put in issue*

Privy Council—conold.

in lower Courts—Board not satisfied, that evidence already taken establishes that facts if fully investigated would have supported plea—Such plea cannot be entertained by Board.

The question of assent by the executors at the time of the mortgage of the property, regarding the trust of the mortgaged property is a question of fact, and when this question had not been put in issue or maintained in the Courts below and their Lordships are not satisfied that the evidence already taken establishes beyond doubt that the facts, if fully investigated, would have supported the plea, they cannot in accordance with the practice of the Board, entertain this plea at such a late stage. **SUNIL KUMAR KERR v. SISTER KUMAR KERR** PC 575

—Rules—R. 9. **SHR Federal Court Rules O. IX.** 353

r. 1 353
Probate. SHR Will 17
—*Wide divergence in case put up in petition and case made in evidence—Strict scrutiny of will is required.*

Where the case of petitioners for grant of probate, carries certain elements of suspicion, the Court should, in such circumstances, insist on a very strict standard of proof, and ought not to make a grant unless it is satisfied that the suspicion has been removed. Where a wide divergence between the case put up and the case made in evidence is found, strictest scrutiny of will is required. **JANADA GOVINDA CHAUDHURY v. BIRENDRA NATH GOSWAMI** Cal. 634

Provincial Insolvency Act (V of 1920), s. 5. **SHR** 857
Civil Procedure Code, 1908, O. IX

—ss. 6 (b), (c), 9, 53, 54—*Partition between brothers, if transfer to defeat or delay creditors—S. 6 (b), applicability—If applies where transfer has effect of preferring one creditor over other.*

The partition between the brothers constituting a joint Hindu family, of the family houses cannot be treated as a transfer with intent to defeat or delay the creditors. When the debts are incurred by some of the brothers only, on account of a new business started by them, the share of the other brothers is not liable for such debts and the partition does not prejudice the creditor.

Clause (b) of s. 6 would apply only to those cases where transfer is intended to defeat all the creditors as a whole. It has no application to the case where the transfer has the effect of preferring some creditors over others. **HARDWARE LAL v. CHHOTY LAL** Oudh 771

—s. 6 (6). **SHR Provincial Insolvency Act, 1920, s. 25** 489

—s. 17. **SHR Insolvency—Appeal** 145

—s. 25—*Intent to defeat and delay, must be gathered from consequences of the debtor's act.*

The "intent to defeat or delay the creditors" is to be gathered from the consequences of the debtor's act, and if the transfer has the effect of substantially reducing the area, which was available to the creditors for realizing their debts by temporary alienation, and if the transfer by itself is not enough to bring in sufficient money to discharge the existing liabilities, the transfer must be deemed to have been made with intent to defeat and delay creditors although the primary motive of the debtor in effecting the transfer might be different. **BHAGWAN DAS v. MOHAMMAD NAWAZ SHAH** Lah. 489

—s. 25—*S. 25, scope of—Creditor proving act of insolvency of debtor—Debtor alleging his ability to pay—Duty of Court.*

Provincial Insolvency Act—conold.

The provisions of s. 25 relate to the defence that the debtor may put up even though the petitioning creditor satisfies the conditions required by the Insolvency Act and therefore it cannot be said that his ability or inability to pay his debts is not a circumstance into which a Court may enter when once the act of insolvency has been proved. It is the duty of the Court to enter into the matter and if satisfied that the debtor is able to pay his debts, must dismiss the creditors' petition. **BHAGWAN DAS v. MOHAMMAD NAWAZ SHAH** Lah. 489

—s. 25, 6 (6)—*Unliquidated assets—Assets realizable at creditor's instance being less than debts due, debtor not willing to pay debts due for long time nor making efforts to liquidate assets—Debtor is deemed to be unable to pay debts.*

The mere presence of unliquidated assets does not necessarily prove that these assets are capable of being liquidated. Unliquidated assets cannot be sufficient to discharge debts until they are liquidated and until those steps are taken, whether willingly or unwillingly by the debtor, it cannot be said that, at the time when the petition is put in praying for his insolvency, he is able to discharge his debts in the ordinary sense of the term, namely that he is able to pay them off by making legal tender of the sum demanded. The fact that he might pay them off if a purchaser was available and if he had time given to convert his assets into cash, does not affect the question whether at the time of the presentation of the petition and up to the time when this point arises for decision he is or is not able to pay his debts. Hence although he has assets which if liquidated would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present, he must be held not to be able to pay his debts and hence liable to adjudication as an insolvent. The mere fact that the "value" of the immovable property owned by the debtor is in excess of his liabilities is not sufficient to prove his ability to pay his debts regardless of all other considerations. A person may own very valuable properties but they may not be marketable at all or there may be no prospect of any purchaser forthcoming to buy them within a reasonable time even though the owner has made and is willing to make every possible effort to raise money on them to meet his liabilities. It will be idle to contend in such cases, that the mere fact that the debtor owns valuable properties is *per se* sufficient to justify a finding that he is "able to pay his debts." What he has to show in each particular case is whether he possesses such realizable assets, as can within a reasonable time be made available to meet all his liabilities. Where it is obvious that the assets realizable at the instance of the creditors are much less than the debts due to them, and there is no reasonable prospect of the debtor paying them by voluntary alienation of his land and the debts have been due for a considerable time; but no effort whatever has been made by the debtor to pay off the creditors nor has he any present intention of paying them anything by liquidating any of his assets, it must be held that the debtor is "unable to pay his debts" and that no "other sufficient cause" has been shown under s. 25 of the Provincial Insolvency Act for the dismissal of the creditors' petition. **BHAGWAN DAS v. MOHAMMAD NAWAZ SHAH** Lah. 489

—s. 28—*Hindu father adjudged insolvent—Son's share in family property, if vests in Official*

Provincial Insolvency Act—contd.

Assignee—Creditor of son, whether can attach son's share without leave of Insolvency Court—Such attachment, if defeats Official Assignee's right to sell son's share to discharge father's lawful debts.

Section 28 (2), Provincial Insolvency Act, refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver; the son's share does not vest in him and hence proceedings can be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interests in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised. While the interest of the son remains unsold or un-attached, the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right, he may lose it and he loses it if the interest of the son is attached by a creditor of the son. *ARUNACHALAM CHETTIAR v. SABARATNAM CHETTIAR*

Mad. 159

—s. 28—Hindu father adjudicated insolvent—By some reason he losing power to sell son's interest—Conveyance by Official Receiver, effect of.

If due to some reasons the insolvent father has lost the power to sell his son's interest in the joint Hindu family property for his antecedent debts the conveyance executed by the Official Receiver can have no greater effect the reason being that the Official Receiver has no greater power than the insolvent. *DIRAVYAM PILLAI v. VEERANAN AMBALAM*

Mad. 562

—s. 28 (2)—No leave of Court obtained—Suit must be dismissed.

Prohibition in s. 28 (2), Provincial Insolvency Act imposes a condition precedent to the commencement of the suit, and if the leave of the Court is not obtained, the suit must necessarily be dismissed. *JHANGIR CHURSETJI MISTRY v. KASTUR PANNANI OSWAL*

Bom. 542

—ss. 35, 27—Ex parte order of adjudication passed on clearance day—Propriety.

The orders and circulars issued by the High Court should be followed by the lower Courts and the Court should not hear the case *ex parte*, on the last clearance day and pass an order of adjudication. *HANDEYAL BABU LAL FIRM v. LAKHU SAO*

Pat 857

—s. 37—Adjudication annulled—Official Receiver, if can sell leasehold rights of insolvent

All that the Insolvency Judge can do on the annulment of the adjudication is to direct that the property of the insolvent should vest in a certain person. Even if he passes a vesting order, the Receiver can only hold the property for the benefit of the creditors, and the creditors would have to enforce their claim by a proper suit. The property cannot be sold in any case by the Insolvency Court.

Where, therefore, the Insolvency Judge has annulled the adjudication, no further proceedings can be taken by the Official Receiver for the sale of the leasehold rights of the insolvent. *LAL DIN v. OFFICIAL RECEIVER, LYALLPUR*

Lah 520

—s. 42—Powers of Court under s. 42, extent

Provincial Insolvency Act—contd.

of—Transfers effected long before insolvency petition but having considerable effect on insolvency—Order refusing discharge, if can be based on such transfers.

Section 42, Provincial Insolvency Act, gives the Court wide authority to examine the insolvent's conduct whether before or after the insolvency. Fraudulent transfers by the insolvent prior to insolvency come within the purview of s. 42 (1) (i). But there must be some limit regarding the alleged fraudulent transfers upon which the order of discharge can be refused and the Judge ought not to take into his consideration conduct which could not have had anything to do with the bankruptcy either in producing it or in affecting it in any way after its commencement. Only such conduct or affairs as may or can have had some effect upon the bankruptcy ought to be taken into consideration. But where the transfers have considerable effect upon the insolvency then an order refusing discharge can be based on such transfers although they might have been effected long before the application for insolvency. *ABDUL SATTAR v. DINAJPUR TRADING & BANKING Co. LTD.*

Cal. 145

—s. 42—Word 'assets,' meaning of—Insolvent not guilty of misconduct specified in s. 42 (b) to (h) and paying eight annas in rupee—Absolute order of discharge, whether must be passed—Order suspending discharge, till scheduled debts are fully paid up—Validity.

If the word "assets" used in relation to insolvency proceedings is not qualified in any way, as in the expression "future assets", it is generally understood to mean the amount actually in existence available for division among the creditors of the insolvency.

The effect of s. 42 of the Pro. Insol. Act is such that the Court must grant an absolute order of discharge, provided that the insolvent pays eight annas in the rupee and is not guilty of the misconduct specified in s. 42 (b) to (h). An order directing that the insolvent's discharge should be suspended until such time as his scheduled debts are fully paid is one without jurisdiction. *O. FLEMING v. OFFICIAL RECEIVER, PEROZHPORE DISTRICT*

Lah 551

—ss. 42, 53, 54—Questionable transactions falling under s. 42 but not avoidable under ss. 53 and 54—Review of.

In view of the wide powers conferred upon the Court by s. 42 of the Act, the Court has power generally to review any questionable transactions covered by that section which are in any way relevant to the insolvency even if such transactions could not be expressly avoided under ss. 53 and 54 of the Act. *ABDUL SATTAR v. DINAJPUR TRADING & BANKING Co. LTD.*

Cal. 145

—s. 42 (1) (i)—Fraudulent transfer—Onus to prove fraud.

In an application by debtor for discharge, if the creditors allege that the debtor's case comes under s. 42 (1) (i) by reason of some fraudulent transfers effected by him, the onus would lie upon the creditors to prove fraud, if any, in respect of the transaction. *ABDUL SATTAR v. DINAJPUR TRADING & BANKING Co. LTD.*

Cal. 145

—s. 53—Transfer in good faith and for valuable consideration—If void under s. 53

Transfer of property to a third person made in good faith and for valuable consideration is not void under s. 53 even if it has the effect of preferring some creditors over others. *HARDWARE LAL v. CHHOTAY LAL*

Oudh 771

Provincial Insolvency Act—conold.

ss. 53, 54. See Provincial Insolvency Act, 1920, s. 42 145

s. 54—S 54, applicability.
Section 54 covers transfers in favour of creditors only. *HARDWARI LAL v. OHHOTY LAL* Oudh 771

s. 56—Court, if can appoint additional Receiver (other than Official Receiver) for special purpose.

Section 58, Provincial Insolvency Act, does not operate to prohibit the Court appointing an additional Receiver (other than Official Receiver) for a special purpose. The Act contemplates the appointment of some one other than the Official Receiver in special circumstances and the Court has power to appoint an additional Receiver when the case demands it. All that the law requires is that the estate shall be represented by a Receiver appointed in the insolvency proceedings. *GOPI CHINA JOGAYYA, GOPU SESHAYATHARAM & COMPANY v. MANAPALLI BAPANAYYA* Mad. 154

Provincial Small Cause Courts Act (IX of 1887), s. 17—Purpose of security.

It is clear from the language of s. 17, Provincial Small Cause Courts Act, that the purpose for which security has to be furnished is to ensure the performance of the *ex parte* decree in case that decree is not set aside. The security to be furnished is not for the performance of the ultimate decree that might be passed in the event of the *ex parte* decree being set aside. *PULIN CHANDRA CHATTAPADHYA v. KUTRA MORAN GHOSH* Cal. 413 (a)
Public trust See Trust 305

Punjab Debtors' Protection Act (II of 1936), s. 2 (6)—Sum advanced without interest, for purchase, whether loan.

A sum given without interest as a payment in advance for a property which is to be sold, cannot be called a loan within the meaning of the Punjab Debtors' Protection Act. *SHIB LAL v. GOBINDI* Lah. 613

Punjab Pre-emption Act (I of 1913), s. 4—Agricultural land—Land not used for agricultural purposes for over 20 years—Land held not agricultural.

The expression "agricultural land" in the Punjab Pre-emption Act has a technical meaning in that Act—the definition of the expression being practically the same as in the Punjab Alienation of Land Act. According to that definition, the land must have been used for agricultural purposes or purposes subservient to agriculture. When the land was not so used for a period of nearly 20 years, but has been lying uncultivated except for one year, when there was a garden on a portion of it, it cannot be held to fall within the said definition. *MANDIR GITA BHAWAN SHREI KURUKHETRA JIRAN UDDHAR, KURUKHETRA v. SADHU RAM* Lah. 422

Railway—Risk-notes, Forms A and H—Case of non-delivery of consignments—Liability of Railway Company, if can be assumed—Onus.

The language of risk-notes (Forms A and H) clearly shows that even in the case of the non-delivery of the consignment, it cannot be assumed that the Railway Co., is liable to pay damages to the consignor. It is true that the onus in a case of non-delivery of consignment lies on the Railway Co., in the first instance to disclose how the consignment was dealt with throughout the time it was in its possession or control and if it is found upon the evidence adduced by the Railway Co., that there was misconduct on the part of its servants, the Railway Co., would be liable to damages without any further evi-

Railway—conold.

dence on behalf of the consignor. If it is found, however, that the evidence produced on behalf of the Railway Co. does not fairly lead to the inference that there was misconduct on the part of its servants, the burden of proving such misconduct shall then shift on to the consignor. *SECRETARY OF STATE v. SADHU LAL JAISWAL* All. 435

Railways Act (IX of 1890), s. 41—Jurisdiction of Civil Court to investigate into Railway Company's liability created by statute.

Chapter V of the Railways Act, provides the detailed remedies under ss. 72 to 82. Chapter V of the Act gives a particular remedy against the Railway Company for a liability created by the statute itself, and s. 41 excludes the jurisdiction of the Civil Court. It is to be inferred that the litigant is confined to this remedy which has been specially provided. *MUGHJI HIRJEE & Co v. BENGAL NAGPUR RAILWAY COMPANY LTD* Nag. 241

s. 77. See Limitation Act, 1908, Art. f2 241

s. 77—"Over charges", what are.

An overcharge is simply a charge of more than is permitted by law. The word should be interpreted in a wide sense *MUGHJI HIRJEE & Co. v. BENGAL NAGPUR RAILWAY COMPANY LTD.* Nag. 241

s. 77—S. 77, if contemplates notice in anticipation

A notice claiming overcharges upto a certain date does not operate as notice for similar future claims.

The object of s. 77 of the Railways Act is to prevent stale and dishonest claims for loss and not as a means to enable the Railway authorities to deprive their customers of just dues: but the Railway authorities are entitled to have due notice of the total extent of the claim preferred against them. *MUGHJI HIRJEE & Co. v. BENGAL NAGPUR RAILWAY COMPANY LTD.* Nag. 241

ss. 77, 41, 28, 30—Overcharges, claim for—S 77, if provides remedy.

Section 77, Railways Act, assumes the possibility of claims for overcharge, but where such a claim lies in law then it cannot succeed unless notice within six months has been given. It does not provide a remedy under the Act; it only cuts down the remedy in cases where claims would lie according to the general law. *MUGHJI HIRJEE & Co. v. BENGAL NAGPUR RAILWAY COMPANY LTD.* Nag. 241

Record of Rights—Preparation of—Duty of Revenue Officer—Must see nature of possession.

The duty of the Revenue Officer at the time of preparing the Record of Rights is not confined merely to ascertain who is in actual occupation of the land and to record the land in his *khatian*. The Revenue Officer has to ascertain and record very much more than that. He has to ascertain not merely who is in physical occupation of the land but he has to ascertain further whether such occupation amounts to possession and the nature of such possession. *SECRETARY OF STATE v. DISTRICT BOARD, RANGPUR* Cal 454

Village records in Kumaun Garhwal—Reliability.

The village records in Kumaun Garhwal are not always reliable documents. *PANCHAM SINGH v. DHB RAM* All. 521

Registration Act (XVI of 1908), s. 17 (1)(c)—Entry of advance, without receipt, for purchase, if receipt.

The entry, that is no more than a memo. of a sum advanced for a purchase of a property is not a receipt of money received for a sale of an immov-

Registration Act—conold.

able property and therefore does not need registration. *SHIB LAL v. GOBINDI* Lah. 613

—s. 32—*Proper presentation—Deed held not invalid on account of defect in registration.*

Where a *pardanashin* lady executes a sale deed and her husband hands it over to the Sub-Registrar, who then comes out of his office where the lady is on an *ekka* and there ascertains from her if she had executed it and had received its consideration and having satisfied himself goes back to his office and makes an endorsement on the back of the deed that the lady presented it for registration, the deed is not invalid on account of the defect in its registration. *BARQ RAZA v. AKBARI* Oudh 441

Religious endowment—Creation of—Existence of image or idol, if necessary—Essentials to be shown—Offerings to Brahmin residing there, effect of—Dedication to demon, effect of—Place, attachment of, in execution.

There need not be some image or idol or some dedication in order that the particular "Than" should be considered to be a religious place where the public had a right of worship. No particular act is necessary to signify a dedication. It is enough if the public have been going there and making offerings. The mere fact that these offerings were made to a Brahmin family does not show that it was a case of Brahmin family "carving out a livelihood from these offerings." Such offerings are always handed over to Brahmin *Pujaris* and the fact that the *Pujaris* take the offerings does not in any way detract from the right of the persons who make the offerings to continue to do so. Similarly the fact that the place is not connected with a deity but with a demon does not make any difference. The portion of the house in which the "Isthan" is situated is not, therefore, liable to sale in execution of decree. *KANHAI SINGH v. BARDHO SAHAI* All. 334

Remand. See Civil Procedure Code, 1908, s. 151. 828

Res judicata. See Limitation Act, 1908, Art. 183 (5). 545

—*Execution proceedings—Decision held not res judicata in subsequent execution proceedings.*

Res judicata in execution proceedings is not governed by the specific terms of s. 11, Civil P. O., which applies only to suits. It is only the general principles of *res judicata* that apply in execution proceedings. Where the subject-matter of the previous execution proceedings is not the same as in the subsequent execution proceedings, the decision about the judgment-debtor not being proved to be an agriculturist in the previous execution application is not *res judicata* in the subsequent execution application. *BALDEV SINGH v. SHREE SINGH* Lah. 609

—*Objection by judgment-debtor that he is governed by custom in matter of succession, allowed by executing Court but disallowed by Appellate Court—In appeal High Court not going into question of custom but reversing lower Appellate Court's decision on other grounds—Plea that judgment-debtor, is governed by custom, if res judicata in subsequent suit.*

Executing Court allowed the objection by the judgment-debtor that he was governed by custom in the matter of succession. On appeal, that finding was reversed by the District Judge. On appeal to the High Court, the High Court declined to enter into the question of custom but on other points re-

Res judicata—conold.

versed the findings of the District Judge and restored those of the executing Court :

Held, that it could not be fairly argued that any part of the District Judge's judgment had been left intact so as to make the findings arrived at by him binding on the parties. Consequently, the plea that the judgment-debtor was governed by custom could be reargued in subsequent suit. *FIRM JITHU MAL-HARI PARSHAD v. TELU* Lah. 232

Revision—Court-fees, decision on, adverse to applicant—Revision, if maintainable.

Orders about court-fees adverse to an applicant can be the subject of revision, and the same principle would apply where it is found that any clear provision of law has been disregarded. *In re FATMAHI* Nag. 372

Riot. See Criminal trial 594

Riparian rights. See Easement 802

Sale of Goods Act (III of 1930), s. 30—Scope of.

The general principle of law is that only the owner can give a good title to another of his own property and the law has always done its best to protect the rights of the legal owners. The power given by s. 30 (2), Sale of Goods Act, is in a sense of compromise which enables, in certain circumstances, a person, who is not a legal owner, to transfer the title. *MAUNG AYE MAUNG v. A. SCOTT* Rang. 757 F B

Second appeal—Court's duty is only to see whether evidence is admissible and proper for consideration.

The Court is not concerned in second appeal with the weight that is to be attached to the evidence but whether the evidence is admissible and proper for consideration. *SHOBHALAL v. SIDHREAL* Nag. 169

—*Finding as to whether lands were totally unfit for cultivation—Interference in second appeal.*

The question whether the lands were totally unfit for cultivation for the years in suit, is a matter for the Court below and the High Court cannot interfere in second appeal, when the lower Appellate Court has accepted the finding of the trial Court that the entire land has been diluviated and no area was cultivable in the years of the suit. *NIKENDRA NATH CHATTERJI v. JUGAL PRASAD MANDAL* Pat. 144

—*Finding based on conjecture and misunderstanding of evidence.*

Finding of fact based partly on conjectures and partly on a misunderstanding of the evidence is liable to be set aside in second appeal. *GHULAM HUSSAIN v. SECRETARY OF STATE* Lah. 137 (a)

—*Finding of fact—Available evidence not considered—Whether binding.*

Finding reached by lower Court without considering all available evidence is not binding on second appeal *GOBIND RAM v. KAJU RAM* Lah. 652

—*Finding of fact based on evidence—If can be set aside—Question of fact at issue—Case depends on evidence.*

The fact that the lower Court has omitted to mention a certain piece of evidence does not show that it did not consider it and in any case where the finding is based on evidence, the finding is not liable to be set aside in second appeal, even if the High Court is inclined, to come to a contrary conclusion.

Where a question of fact is at issue, each case must depend on its own merits and on the evidence led in that case. *RANJIT SINGH v. NAWAB KHAN* Lah. 395

—*Finding of fact based on misconception of*

Second appeal—conclod.

nature of contract—High Court, if can be addressed on facts.

Where the finding of fact on question of non-payment of rent was itself based on an obvious misconception of the nature of the contract between the parties:

Held, that the High Court in second appeal could be addressed on facts. **BANWARI LAL v. HUSSAINI**

Lah. 858

Inference drawn from circumstances—Finding involves legal question.

Though a Court of second appeal is not competent to question the soundness of a finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may, therefore, be questioned by a Court of second appeal.

Where there is no direct evidence of alleged fraud and only an inference is drawn from circumstantial evidence, then the finding involves the legal question as to whether the circumstances are such that the necessary inference can legally be derived. **RAJA SINGH v. CHAICHOO SINGH** *Pat. 816*

Inference from document.

In a matter of legal inference from the documents, it is open to the High Court in second appeal to form its own opinion. **RAM SARUP SINGH v. MOHAN SINGH**

All. 783

Point of law patent on record can be raised for first time in second appeal.

A point of law patent on the record can be raised for the first time in second appeal. **BALDEV SINGH v. SHREE SINGH**

Lah. 609

Question of law can be raised.

A plea of law, which goes to the very root of the case, can be entertained in second appeal. **SARHH DIN v. GAURI SHANKAR**

Oudh 25

Question of law, if can be entertained for first time.

When a question of law is raised for the first time in second appeal upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. **SILLA SAHAI v. SRI RAM**

Oudh 10

Securities Act (X of 1920)—Government promissory note, transfer of, how made.

Government promissory note can only be transferred by endorsement on the note itself. **R. EZEKIEL v. THE PROVINCE OF BENGAL**

Cal. 214

Specific Relief Act (I of 1877), s. 39—Suit for declaration that document is void—Prayer for cancellation, if essential—Court, whether can order cancellation without such prayer.

A plaintiff may bring a suit for a declaration that a document is void without seeking its cancellation, and if he does so, it is open to the Court though there is no prayer for it, to order the document to be delivered up and cancelled. The wording of s. 39, Specific Relief Act, suggests that the Court may order cancellation, though there is no specific prayer for it.

A suit for a declaration that a certain mortgage, purporting to have been executed by the plaintiff, was a forged document and of no legal effect, and also for an injunction restraining the defendants from ever enforcing their supposed rights under such document, can be treated as a suit for a declaration simpliciter under s. 39, Specific Relief Act, in spite of the prayer for an

Specific Relief Act—conclod.

injunction and the Court can in its discretion order the document to be delivered up and cancelled. **BULAK RAM v. GANGA BISHUN CHAUDHURI**

Pat. 123

s. 41—Minor transferor entering into transaction of transfer—Alleged misrepresentation as to age—Transaction not influenced by misrepresentation—Consideration, if should be ordered to be refunded.

Where a minor by false representation as to his or her age induces another to enter into a transaction, it is just that the latter should be refunded the money that was paid to the minor as consideration.

But where the misrepresentation of his age by the minor transferor has no influence on the transaction of the transfer and the parties would have still entered into the transaction, in spite of the misrepresentation as to transferor's age, the alleged misstatement as to the age cannot be regarded as inducement to enter into the transaction nor does it support the theory that the transferor has misrepresented his age on the occasion. In such a case it is not proper to exercise the discretion under s. 41, Specific Relief Act, in favour of a transferee from a minor upon the cancellation of the instrument of transfer on the ground of the transferor's minority at the time of the transaction, unless the transaction has been the consequence of the false representation by the minor as to age, by ordering the refund of the money paid to the transferor as consideration. **MO MAUNG U v. MA BLA ON**

Rang. 733

Stamp Act (II of 1899)—“Lease” definition of, is wider than that given in Transfer of Property Act, s. 105. SEE Stamp Act, 1899, Art. 35 (a) (i)

227

s. 2 (5) (b)—Scribe of pro-note signing it with words “money was paid in my presence”—Whether attests it—If makes document bond—Transfer of Property Act (IV of 1882), s. 3.

The mere fact that a person says that the money was paid in his presence does not mean that he becomes an attesting witness, and this cannot *per se* amount to “attestation.”

Where therefore a scribe of a promissory note signs the pro-note by adding the words that “money was paid in my presence,” it does not amount to attestation and the document does not thereby become a bond. **HAR NARAIN LAL v. UDAN SINGH**

Oudh 3478 B

—ss. 2 (16), 6—Document held lease as well as agreement.

Held, on construction that the document executed by the lessee was a lease as well as an agreement and was, therefore, chargeable only as a lease under s. 6, Stamp Act. **SHABAN ALI v. MOHAMMAD ISHAQ**

All. 391

—s. 40 (2). SEE Stamp Act, 1899, s. 60 (1)

401

—ss. 60 (1), 40 (2)—Reference under s. 60 (1) —Proper time for—If competent after certificate by Collector under s. 40 (1) (a).

The proper time for making the reference under s. 60 (1), Stamp Act, is before the Court passes an order impounding the document. Where the document has been impounded and sent to the Collector under s. 38, the certificate of the Collector is conclusive of the matter under s. 40 (2) and subsequent reference under s. 60 (1) is incompetent and High Court has no jurisdiction to entertain it. **HIMAYATULLAH v. PARBHOO DATTA**

Oudh 4018 B

—Sch. I, Art. 1—Document, when comes

Stamp Act—contd.

within mischief of Art. 1—Document held did not so come.

In order to bring a document within the mischief of Art. 1, Sch. I of the Stamp Act, what has to be established is that it is an acknowledgment of a debt created in order to supply evidence of such debt. This article requires something more than an acknowledgment of a debt. The primary question is whether the document was brought into existence with the "dominant intention" of supplying evidence of the debt. The fact that the document is apt to serve other purposes does not absolve the Court from enquiring, as it is enjoined to do by Art. 1, what was the purpose for which it was meant.

There was a running account between A and B throughout the period of transaction consisting on the one hand of the loans by A to B and on the other hand of price of goods supplied by B to A. It was the practice at the end of each month, for A to submit B a statement. Each statement opened by bringing forward from previous month the balance of the account. The statement then stated the cash loans made by A to B and on the other side the value of the goods supplied by B to A. At the end a balance was struck below which B put his signature accompanied by no other writing and handed it over to A which then remained in his possession:

Held, that taking into consideration the course of business between these two parties, and the facts that these transactions were continuing transactions, and at no point of time was it ever contemplated that any of these particular balances, except possibly the last one, would ever become payable in cash by B to A, the real purpose for which these documents were brought into existence was not the supply of the evidence of an actual debt, that that money was actually due, but simply as one of a series of statements of accounts which for the convenience of the parties were exchanged at fixed intervals. It was not, therefore, a document required to be stamped under Art. 1, Sch. I, Stamp Act. *ROSHAN N. M. A. KARIM OMRE & Co. v. MOHAMED EBRAHIM*

Rang. 508

Sch. I, Art. 1—*Question whether certain document falls within mischief of Art. 1, if can be decided on authority of one decision—Precedents.*

On the question whether a particular document in suit amounts to an acknowledgment of a debt, one decision can hardly be an authority for another, for each case must depend on its own circumstances. *ROSHAN N. M. A. KARIM OMRE & Co. v. MOHAMED EBRAHIM*

Rang. 508

Art. 35 (a) (i), (viii)—*Lease of house on monthly rental—Term not fixed—Tenancy terminable on month's notice—Lease held does not fall under Art. 35 (a) (i) but under (viii)—"Lease," definition of, in Stamp Act is wider than that given in Transfer of Property Act (IV of 1882), s. 105.*

A lease may be from month to month and yet be for an indefinite period. The language of the Stamp Act is perfectly clear and it is only when a term of less than 12 months' duration is specified that a lease can be said to purport to be for such a period and therefore chargeable as such. Where no term is fixed, the document is *ex facie* one for an indefinite period.

Even if a document is such that it could not be deemed to be a lease within the meaning of s. 105, T. P. Act, it would still come within the Stamp

Stamp Act—conold.

Act because the definition of "lease" in the Stamp Act is wider and more comprehensive than the definition of it in the T. P. Act. The two Acts are not complementary of each other and where the language employed in one Act is perfectly clear, the Courts should not go to another Act for interpreting the term used in that Act.

A lease of a certain house was granted on a monthly rental of Rs. 30. The instrument did not fix a term but it was stated that either party could terminate the tenancy on giving one month's notice:

Held, that the lease was one which did not purport to be for a definite term. It did not therefore fall under Art. 35 (a) (i) but under (viii) of Stamp Act. *NOOR AHMAD v. MAHMUD ALI*

Lah. 227

Succession Act (XXXIX of 1925), s. 214—*Debtor—Employer with whom money is deposited as security for good conduct, if debtor to estate of deceased employee.*

Where an amount is deposited with the employer by the employee as security for good conduct, the employer is obliged to return that amount when the employee leaves the service or dies and the employer is, therefore, a debtor either to the employee or to his estate within the meaning of s. 214, Succession Act. *RAM RANBIJAY PRASAD SINGH v. BACATA KUARI*

Pat. 336

s. 263—*Defendant dying pending suit—Executors not taking step to get themselves substituted—Letters of administration granted to administrator ad litem—Revocation of—Supplementary grant of probate.*

Where during the pendency of a suit on a mortgage the mortgagor dies and no steps are taken by his executors to get themselves substituted although repeatedly asked to do so, they cannot subsequently apply for revocation of the grant of letters of administration made to the administrator *ad litem* though they can be given a supplementary grant of probate keeping the grant to the administrator *ad litem* intact. *In the goods of Mst. GOLAB DAYH*

Oal. 341

s. 263 (d). *See* Succession Act, 1925, s. 281

431

s. 273. *See* Civil Procedure Code, 1908, s. 10

377

ss. 291, 263 (d)—*Surety to administration bond—Discharge—Default of administrator—Surety, if discharged—Administration completed—S. 263 (d), if applies.*

A surety to an administration bond cannot discharge himself without an order of the Court. He is not a common law surety and cannot be regarded in the light of surety under the Contract Act.

His liability is immediate and permanent and is only to disappear on the fulfilment of the obligations by the administrator. Default by the latter is no ground for discharging the bonds; it may be ground for revoking the grant or taking other steps to control the administration.

Section 263 (d), Succession Act does not apply to cases where the administration has been completed. *In the goods of NANI LAL DAS*

Cal. 431

s. 295. *See* Civil Procedure Code, 1908, s. 10

377

s. 302—*Application under, to recover annuity payable under will—Maintainability.*

An application under s. 302, Succession Act to recover an annuity payable under a will is maintainable. *ANANDI PRASAD v. DULHIN KISHORI KUNR*

Pat. 626

Succession Act—contd.

s. 307—Parties dealing with executors, if have duty to enquire into facts outside will—Mortgage executed by executors held gave good title to mortgagees—Held on construction of will that no restriction was imposed on statutory power of disposal of executor.

Much of the usefulness of the statutory power conferred by s. 307, Succession Act, on executors in India would be nullified, if a duty to enquire into facts outside the will as they existed immediately prior to the testators' death was imposed on parties dealing with executors.

A testator who was the owner of a printing, publishing and book-selling business which he had started and carried on, died leaving a will whereby he had appointed two of his sons executors and directed them to carry on the business among other things. The property contained among other properties some immovable property used as the family dwelling house and for printing press. The executors subsequently executed a mortgage of these properties. The mortgage deed made a reference to the will and the authority given to the executors to carry on the business and stated that the amount was required to fulfil the contract made with the Govt. for the exclusive licence to publish certain Govt. publications:

Held, on construction of the will that the will did not impose any restriction on the statutory power of disposal.

Held, further that it was necessary to assume, that, in a question between the executors and the beneficiaries, the executors were not entitled to use the immovable properties for the purposes of the business. But the mortgagees had no duty to enquire into facts outside the will as they existed immediately prior to the testator's death and they, therefore, got good title from the executors. **SUNIL KUMAR KHERR v. SIBIR KUMAR KHERR** PC 575

ss. 332, 335 (2)—Executor, if can give assent to legacy before obtaining probate of will—Mortgage executed by executor in his individual capacity as legatee—Money applied for his own use—Inference as to assent to legacy.

The estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the powers of an executor, under the Probate and Administration Act, even though probate has not been obtained. The executor, therefore, has power to give assent as an executor before he obtains the probate of the will.

Where the executor executes a mortgage in his individual capacity as a legatee with respect to the properties bequeathed to him and applies the money to his own use, and not to administer the estate of his testator. The executor assents to the legacy in his own favour on the date he gives the mortgage. **INDU PROYA DEBI v. DURGHA CHARAN MITRA** Pat. 866

s. 379, (1) (3)—Application for succession certificate—Deposit of amount equal to fee payable under Court Fees Act—Application allowed on condition of furnishing security—Condition not fulfilled—Amount held should be refunded.

The applicant applied for a succession certificate and under s. 379 (1) of the Succession Act, deposited Rs. 370 equal to the fee payable under the Court Fees Act. The application was allowed subject to the applicant's furnishing security. This, she was unable to do, and papers were ordered to be filed. She then applied for refund of the deposit of Rs. 370:

Held, that the first condition of s. 379 (3), that the sum should be received under sub-s. (1)

Succession Act—contd.

was fulfilled and therefore the refund should be granted. *In re FATMABI* Nag. 372
Suits Valuation Act (VII of 1887), s. 11—Fact that appeal had to be brought in Subordinate Court instead of in High Court, whether prejudicially affects its disposal.

The mere fact that an appeal had to be brought in a Subordinate Court instead of the High Court cannot be held to have prejudicially affected the disposal of the appeal on the merits. **KANHAIYA LAL v. HAMID ALI** Oudh 467

s. 11—Objection to jurisdiction not raised in lower Courts—Cannot be raised in second appeal.

Where objection to jurisdiction is not raised either in the trial Court or in the Appellate Court, it cannot be allowed to be raised in second appeal. **KANHAIYA LAL v. HAMID ALI** Oudh 467

Surety. SBE Contract Act, 1872, s. 128 573

Survey—Survey line over big river—Presumption.

It is a fundamental principle that a survey line cannot be taken over a big river without taking offsets with theodolite from points on the first bank. That in such cases such method is used is to be presumed. **ABDUL LATIF v. HABIBULLA** Cal. 714

Survey of small area—Star observations, necessity of.

When the place to be surveyed is comparatively small in area, star observations are not necessary. **ABDUL LATIF v. HABIBULLA** Cal. 714

Tort—Common carriers—Liability for loss of goods.

Common carriers, are liable for the loss of goods entrusted to them for carriage unless the loss be due to an act of God or of the King's enemies. **CHOKKA DHANAMMA v. COBOMANDEL COMPANY, LIMITED** Mad. 16

Negligence—Issue whether driver's negligence was cause of accident, is one of fact.

The issue whether the driver's negligence was the cause of the accident can be treated as a question of fact. **KANSHI RAM v. MRS. OWEN ROBERTS** Lah. 599

Negligence—What is—Ordinary, prudent and reasonable man is not required to drive on assumption that he shall meet obstruction on highway.

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The ordinary, prudent and reasonable man is not required to drive on the assumption that he will meet with improper obstructions on the highway. Merely because the ordinary man knows that at times others unlawfully place obstacles on the highway, drive at a furious pace, turn across the road without giving the recognized sign, he is not to be penalized, when he is behaving as a reasonable and prudent man would.

The question of contributory negligence is one of fact. **KANSHI RAM v. MRS. OWEN ROBERTS** Lah. 599

Nuisance—Injunction—Muhammadans erecting mosque on site belonging to them—Hindus objecting—Injunction restraining Muhammadans, if can be granted.

The people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship provided that, in the performance of their worship, they do not cause material annoyance to their neighbours. That the Hindu community objects to the erection of a

Tort—concl.

mosque on the site belonging to the Muhammadans and that acute feelings will be aroused if the building is used as a mosque are not grounds which the law can recognize for the granting of the injunction. Where the Muhammadans of the village are admittedly the owners of the site and they wish to utilize it for the purpose of a mosque, there is nothing unlawful in using this site for a mosque and therefore they are entitled to utilize it for the purpose. A man must enjoy his own property in a manner which will not do injury to others, but the erection of a mosque on land owned by Muhammadans cannot be regarded as constituting an injury in law to persons of another creed. **KHAJI DODDA KHAJI SARIB v. CHIGAMALLA NANJAPPA** *Mad 554*

Trespass—Lawful entry—Burden of proof
—Stranger entering on premises built by employer on his land for housing workmen for convenience of his business—Entry without permission of employer—Such person must show that his entry was justified—Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Temporary injunction in suit for declaration and injunction, when could be granted—Prima facie case and balance of convenience must be made out.

Where the employees are housed by their employer for the convenience of his trade in the houses built on his own land, the relationship between them are not those of landlord and tenant at all. These workmen therefore are mere licensees of the employer and the entire property is in the occupation of the employer. If, therefore, a third person enters upon such land without the permission and against the wishes of the employer, the burden of showing that the entry was lawfully justified lies on such a person.

In a suit for a declaration and injunction it was alleged by the plaintiff that the defendant accompanied by some persons armed with lathis was trespassing on the plaintiff's land and was staging demonstrations thereon which were calculated to overawe and intimidate the plaintiff and his workmen:

Held, that if the plaintiff had made out a *prima facie* case and the balance of convenience was on his side, the temporary injunction under O. XXXIX, r. 2, Civil Procedure Code, if prayed for, could be granted. **DALMIA CEMENT, LTD. v. NARAINDAS ANANDJI BROHAR** *Sind 57*

Trade Unions Act (XVI of 1926), s. 18—Scope—
Does not afford immunity to trade union for an act of deliberate trespass.

Section 18, Trade Unions Act, does not afford immunity to a trade union or to an officer thereof for an act of deliberate trespass. **DALMIA CEMENT, LTD. v. NARAINDAS ANANDJI BROHAR** *Sind 57*
Transfer of Property Act (IV of 1882), s. 3. See Stamp Act, 1899, s. 2 (5) (b) *347 S B*

ss. 3, 5, 130—Dissolution of partnership—
Certain partners paid off and in return assigning their interest in assets of partnership to remaining partners—Whether amounts to transfer of property—Assignment to those remaining partners of debts due to firm can only be made by writing signed by other partners.

The definition of "transfer of property" is sufficiently wide to cover cases in which on dissolution of a partnership, certain partners are paid off and in return, give up or assign their interests in the assets of the partnership. Where those partners arrange that the remaining partners are to be entitled to the debts due to the firm, such an arrangement amounts

Transfer of Property Act—concl.

to a transfer of an actionable claim, and under s. 130. Transfer of Property Act, such a transfer could be made only by a writing signed by the other partners, **VIRBHANDAS SHAMSING v. DASUMAL KESHOWDAS**

Sind 28
—ss. 6, 130—Claim to debt which cannot be conferred by action is not property—Part of debt, whether assignable—Act, if makes distinction between whole debt and part of debt—Held on facts that assignment was of a distinct and separate debt and not part of debt.

Per Fasl Ali, J.—Under the T. P. Act, "debts" are actionable claims. It follows that a claim to a debt which cannot be enforced by action, as for example, when the debt is barred by limitation, is not property. The same limitation must apply to a part of a debt; and, in order to determine whether or not it is property, whether an action can be sustained to recover it. Thus if claim to a part of a debt cannot be enforced under O. II, r. 2, Civil P. C., it is not an actionable claim and s. 130 can have no application to it.

The T. P. Act does not recognise any distinction between a whole debt and part of a debt. Both may be transferred under that Act, if they come under the category of "actionable claims" as an actionable claim is "property." The transferee of a part of a debt may, however, find that what is transferred to him is not an actionable claim as under O. II, r. 2, Civil P. C. a single cause of action cannot be allowed to be split up into several causes of action. Order II, r. 2 being a rule of procedure, it does not affect the right of transfer, that is to say, it cannot make what is transferable non-transferable. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt from enforcing his claim and thereby make the transfer nugatory:

Held, on facts that the assignment was not an assignment of part of a debt but was in substance and in fact an assignment of a distinct and separate debt. It was accordingly a valid assignment which gave the assignee a right to sue. **DURGA SINGH v. KESHO LAL** *Pat. 514*

s. 6 (e). See Hindu Law—Alienation *6*
—s. 6 (e)—Sale of minor's property—
Purchaser in possession—Minor has merely right to sue.

Where a minor's property is sold and the purchaser goes into possession and is still in possession, all the interest which the minor has in the property is a mere right to sue to get the sale set aside and the transfer of such a right is prohibited by s. 6 (e), Transfer of Property Act. **MON MOHAN BHATTACHARYA v. BIDHU BHUSAN DUTTA** *Cal. 6*

s. 11—Absolute estate—Words repugnant to, should be ignored.

Where an instrument recites that the donor has conveyed properties to the donees on account of affection, in consideration of service being rendered by them to the donor and, because they were the donor's only heirs, and with power to enjoy them with all rights, the intention of the donor is to create absolute estate and any subsequent words which are repugnant to an absolute title must be ignored. **OFFICIAL RECEIVER, WEST TANJORE v. SAMUDRAVIJAYAN CHETTIAR** *Mad. 288.*

s. 11, Proviso—Maintenance decree creating charge on certain properties—Decree-holder transferring portion of arrears but stipulating that assignee shall not bring to sale charged properties—Restrictions held valid.

Transfer of Property Act—contd.

In a decree for maintenance there was a charge upon certain property for the payment of the amount. Upon certain arrears falling due, the decree-holder transferred a portion of such arrears, but in order to safeguard his rights in regard to the realization of the rest of the arrears the decree-holder while transferring a portion of the arrears clearly stipulated that the assignee, should not have the right to bring the charged property to sale:

Held, that even if s. 11, T. P. Act, were to apply, the restriction imposed upon the transferee would be covered by the Proviso to the section and would therefore be valid. CHINNA VENKATAPPA NATANIM BHADUR VARU v. GURBA SUNDARAJULU NAIDU

Mad 427

— s. 41—Consent—Entry in survey register, whether evidence of.

The mere fact that an entry is made in the survey register in favour of transferor is not evidence of consent within meaning of s. 41, T. P. Act. PHRUMAL MOOPPAN v. SUBRAMANTIA MUDALIAR

Mad. 768

— s. 52.

SEE Civil Procedure Code, 1908, O. XXI, r. 102

424

SEE Muhammadan Law

369

— s. 52—Family property mortgaged to satisfy ancestral debts—Subsequent suit by widow for maintenance claiming it to be made charge on property—Sale of property to mortgagee during pendency of widow's suit—Widow's suit decreed—Sale, if affected by *lis pendens*.

The basis of the doctrine of *lis pendens* is that parties to a suit cannot be allowed to shorten the arms of the Court in dealing with the suit by transfers to a third party.

Ordinarily a suit by a Hindu wife for maintenance against her husband is a personal suit, and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendens*. But the doctrine of *lis pendens* does apply to a suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property. Although in the administration of a Hindu's estate, binding debts would take precedence, over mere claims for maintenance, or residence, on the part of the female members of the family; and a mortgage of family property for the satisfaction of ancestral debts binding on the family is not affected by any subsequent charge created on that property for widow's maintenance, yet the sale of the property in favour of the mortgagee during the pendency of the widow's suit for maintenance claiming maintenance to be made a charge on the property is affected by the doctrine of *lis pendens* and is subject to the final decree in the widow's suit. GANGUBAI PANDURANG DOMBE v. PAGUBAI NARAYAN KORN

Bom 81

— s. 53. SEE Transfer of Property Act, 1882, s. 100

33

— s. 53—Suit against creditor by transferee—Creditor, if can plead s. 53 as personal defence—Whether must bring representative suit to avoid transfer.

It is true that if such a creditor institutes a suit to avoid a transfer, he must do so "on behalf of or for the benefit of all the creditors." The reason of the rule is that the debtor should not be harassed by a multiplicity of suits by each and every creditor. But this does not mean that the creditor, even when he is defendant, must defend the suit on

Transfer of Property Act—contd.

behalf of the whole body of creditors. He may plead s. 53, T. P. Act, as a personal defence to the suit against him, and it is not necessary that he must file a representative suit to avoid the transfer. The addition of para 4 to s. 53, sub s. (1), by amendment of 1929 makes no difference, and it has no application to a creditor who has to defend a suit filed against him by a plaintiff claiming under a transfer voidable under s. 53. It is, therefore, open to the defendant to resist the plaintiff's claim on the ground that the assignment taken by him is voidable at his option. BAI HAKIMBU v. DAYABHAI RUGHNATH

Bom 655

— s. 53—Transfer by judgment-debtor to delay or defeat his creditor decree-holder—It is voidable at decree-holder's option even if he may subsequently become auction-purchaser.

Under s. 53, T. P. Act, only a defeated or delayed creditor or a subsequent transferee has the option to impeach the transfer. An auction-purchaser, who is not the decree-holder himself, is not a creditor of the judgment-debtor, and it cannot be said that the transfer was intended to delay or defeat him, since he stepped in after the transfer by operation of law. Nor is he a subsequent transferee within the meaning of sub-s. (2). If, however, a person can prove that he was the creditor and decree-holder of the judgment-debtor and the assignment of the property made by the judgment-debtor was intended to delay or defeat him, then the assignment is voidable at his option, though he may subsequently become an auction-purchaser. A decree-holder does not lose his right to the benefit of s. 53, by himself becoming an auction-purchaser. BAI HAKIMBU v. DAYABHAI RUGHNATH

Bom. 655

— s. 53—Transfer to one creditor in preference to other, when valid.

It is open to the debtor to convey his property to either of his creditors in preference to the other, although it is effected to avoid the execution of his decree by the latter. But in doing so he must not reserve any benefit for himself. The transfer of property to one creditor for a price far in excess of the debt due to him and the retention of the excess amount for his own benefit indicate an intent to defeat or delay the other creditors, especially when he has no other property left.

Such an assignment should not be upheld even to the extent of the amount which was actually due to the creditor. BAI HAKIMBU v. DAYABHAI RUGHNATH

Bom. 655

— s. 53-A—Right under—Confers no right of action on transferee in possession under unregistered contract of sale—Available only by way of defence.

The amendment of the Transfer of Property Act, effected by the enactment of s. 53-A confers no right of action on a transferee in possession under an unregistered contract of sale. The right conferred by s. 53-A is a right available only to the defendant to protect his possession. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. PROBODH KUMAR DAS v. DANTIMARA THA CO., LTD.

PC 217

— s. 55 (4) (b)—Title passing to vendee—His suit for possession—Court, while decreeing possession, if can incorporate statutory charge under s. 55 (4) (b)—Vendor, how can enforce that charge—Recourse to separate suit.

Where title in the property has passed to vendee notwithstanding the non-payment of part of purchase

Transfer of Property Act—contd.

money, although in a suit for possession by the vendee of immovable property it is not competent to the Court to pass a decree for possession conditional on the vendee paying the balance of the purchase money, it is open to the Court, while decreeing possession to the vendee to incorporate in the decree the statutory charge under s. 55(4)(b) of the Transfer of Property Act, in favour of the vendor for the unpaid purchase money. It is true that the unpaid vendor in India is only entitled to a statutory charge provided for under s. 55(4)(b) and that the vendee under s. 55(1)(f) is entitled to possession, but there is no reason why the unpaid vendor should be driven to a separate suit to recover his unpaid purchase money. When he has a charge on the property which he is called upon to deliver to the purchaser, that charge continues to operate upon the property even when the possession of it passes to the vendee. It would therefore obviously be the proper course, to avoid multiplicity of litigation, to declare in the decree granting possession to the vendee that it is subject to the charge of the vendor to the extent of the purchase money that remains to be paid. If the decree incorporates this charge it would be open to the vendor to enforce it by seeking execution of that decree *SHOBHALAL v. SIDHDLAL* Nag 169

—s. 55 (4) (b)—Unpaid vendor's charge—English and Indian law, difference between.

The equity which arises in favour of the vendor who has not received his purchase money is no doubt recognised in English Law which gives him a lien, that is a right to enforce payment out of the interest he has transferred and this lien continues even after he has parted with the legal estate. The reason is that as soon as the contract of sale is made, the seller is deemed to part with the equitable estate, but in India contract of sale does not of itself create interest in or charge on such property, (s. 54 of the Transfer of Property Act) In India the vendor is no doubt entitled to a charge for unpaid purchase money but that is a right which comes into existence not at the date of the contract for sale but on the completion of the conveyance. This charge is created by the statute. Thus while in England the vendor's lien is a creature of equity and is capable of being moulded to suit the circumstances of each case, the statutory charge is rigorous and inflexible. *SHOBHALAL v. SIDHDLAL* Nag 169

—s. 58 (c)—Amendments to s. 58 (c), construction.

The amendment to s. 58 (c) does not provide that if a transaction is embodied in one document, it must of necessity be regarded as a mortgage by conditional sale and not an out and out sale. *BISHAN LAL v. BANWARI LAL* All. 487

—s. 58 (c)—Mortgage by conditional sale and out and out sale—Deed held out and out sale.

Whether a deed is a mortgage by conditional sale within the meaning of s. 58 (c), T. P. Act, or an out and out sale is a question which falls to be determined on a consideration of the terms of the deed itself and of the surrounding circumstances.

A vendor executed a sale deed by which she conveyed the property in dispute to the vendees for certain sum. The deed contained a condition that if she should re-pay the amount of the sale consideration to the vendees within one year, the vendees would be bound to re-transfer the property to her provided she paid the money out of her pocket. In other words it was a condition of the transaction that the

Transfer of Property Act—contd.

obligation to re-transfer would not bind the vendees if the vendor mortgaged or transferred the property to a third party for the purpose of raising the money to pay back the amount of the sale consideration to the vendees. In the earlier part of the deed there was a recital of the fact that the property was subject to prior encumbrances and that as the creditors were making pressing demands it was proper to sell the property to pay off the debt.

Held, that the terms of the document were consistent only with an intention upon the part of the executant to sell the property absolutely and to retain for herself the right to repurchase within one year. *BISHAN LAL v. BANWARI LAL* All. 487

—s. 58 (c)—Mortgage by conditional sale and sale with condition of re-purchase—Difference.

A mortgage by conditional sale is transaction essentially different from a sale with a condition of re-purchase. In a sale with a condition for re-purchase, the ownership vests in the transferee from the date of the document and there is no question of any debt being in existence after the transaction. In a case of mortgage by conditional sale, the debt subsists and a right to redeem remains with the debtor. *ABDUL LATIF v. ABDUL GANI SERANG* Cal. 393

—s. 91. *SHR* Transfer of Property Act, 1882, s. 100

—s. 100 as amended by s. 50 of Act XX of 1929, ss. 5, 2 (d)—S. 50 of Amending Act is retrospective.

The amendment of s. 100, T. P. Act in s. 50 of Act X of 1929 is in a section which is not mentioned by s. 63 of that Act as not retrospective and therefore s. 50 of the Amending Act which amended s. 100, T. P. Act is retrospective. *RAI INDRA NARAIN v. MOHAMMAD ISMAIL* All. 597

—s. 100—Agreement creating charge offending against latter part of s. 100—Validity.

The first part of s. 100, Transfer of Property Act, deals with substantive rights and the second with the manner in which they are to be enforced, that is to say, with the adjective or procedure law. That being so, the latter portion of the section cannot be said to govern the former. An agreement which clearly falls within the definition cannot therefore be invalidated altogether simply because it contains provisions which offend against the procedural law, as laid down in the latter portion of the section. *RENUKABAI v. BHOSAN HAPSAJI JUNGHARB* Nag 33

—s. 100—"Transfer" in s. 100, if includes auction sale or auction-purchasers

The word "transfer" in s. 100 as amended must be read as defined in s. 5. This definition cannot include an auction-purchaser as he is not a person to whom the judgment-debtor has conveyed his property. Section 100, as amended, does not therefore refer to auction sales or auction-purchasers. Therefore an auction-purchaser is not protected by s. 100. *RAI INDRA NARAIN v. MOHAMMAD ISMAIL* All. 597

—ss 100, 53, 91—Charge, how created—In default of payment of maintenance, the plaintiff given right to cultivate fields by taking possession—Whether creates charge—Mortgage of such fields with notice, effect of—Enforcement of charge against mortgagee—Form of decree—Burden of proving that transfer was for value and without notice—Conduct which can be regarded as wilful abstention from making inquiry—Notice to agent, is constructive notice to principal.

The agreement which provides that in default of

Transfer of Property Act—contd.

payment, of maintenance by one party to the plaintiff, the latter would be at liberty to cultivate the fields by taking possession of the same, the intention is that the plaintiff is to look to the profits from this land for her maintenance, for a particular period. That clearly creates a charge. It does not amount to a mortgage, for there is no transfer of any interest in the property charged and such a charge cannot be enforced by sale of the land. When the parties themselves expressly contract that the remedy for default in payment shall be delivery of possession for a particular period, namely during the lifetime of the charge holder and not sale, the Courts would not be justified in substituting a totally different contract for the one made.

Where the property thus charged was mortgaged, the mortgagee having the constructive notice of the charge and there being default in payment of maintenance, the charge was sought to be enforced against the mortgagees:

Held, that the decree should approximate as near as may be to a decree for foreclosure; that is to say, the defendant must be given the chance of redemption if he desired to keep the property in his possession. The relief was an equitable one and so could be moulded to suit the requirements of the case. The possession of a mortgagee who takes with constructive notice of the charge, is that of a trustee, or to be more accurate resembles that of a trustee, under s. 91 of the Trusts Act. Consequently, he is as much bound to fulfil the obligation which attaches to this property as the mortgagor himself. An equitable lien arises under the law.

Whether the matter falls squarely within a 100 Transfer of Property Act, or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice.

Where a mortgagee knows about the law of registration, and also that if he wants to make sure that the property mortgaged to him was free from encumbrances, it is necessary for him to search the registers and yet while actually instituting a search or rather causing one to be made, refrains from making the same, his conduct can only be regarded as wilful abstention.

Where the registers of the Registrar contain a reference to a particular agreement creating a charge on particular property on the date on which they were examined on behalf of the mortgagee, an omission to look at the entries against this property and to look into them carefully must be held to be due either to wilful abstention or to gross negligence and the mortgagee must be held to have constructive notice of the charge. *Renukabei v. Bhoban Hapsaji Jungheer* Nag 33

s. 101—*Suit on mortgage by subsequent mortgagees—Prior mortgagees who purchased equity of redemption and in possession of property made party—Subsequent mortgagees, if can sell property subject to prior encumbrances, without redeeming them—Prior mortgagee, whether can remain in possession until prior mortgages are redeemed.*

Where in a suit on mortgage by the subsequent mortgagees, the prior mortgagee who has purchased the equity of redemption and is in possession of the property, is also made a party, the subsequent mortgagee can sell the property mortgaged to him subject to the prior encumbrances under the earlier mortgages without redeeming them. The prior mortgagee is, however, entitled to remain in possession until the prior mortgages are redeemed.

Transfer of Property Act—concl'd.

irrespective of the question of limitation. *HARI RAM v. MUNSHI SINGH* All. 126

s. 105 See Stamp Act, 1899, Art. 35 (a) (i) (viii) 227

ss 106, 108—Month to month lease—Lessee allowed to construct building—Lessor, if can claim demolition—His remedy. See Evidence Act, 1872, s. 92 284

s. 108—Joint lease—One co-lessor alone cannot enforce covenant.

Where a co-proprietor alone sues to enforce a covenant of lease but the other co-proprietor who though does not decline to join as co-plaintiff is impleaded as co-defendant with the lessee, and comes forward with the latter in establishing an oral agreement made by the lessee with his father which modifies the lease, in the circumstances one of the joint lessors or lessees cannot enforce the covenants of the lease. *JADUNANDAN DAS v. MARC* Pat. 284

s. 111. See Limitation Act, 1908, Art. 139 858

s. 111 (g)—Forfeiture—Essentials—Lessor, must give notice to lessee.

Under s. 111 (g), Transfer of Property Act in order to work a complete forfeiture, it is not only that the lessee should have renounced his character as such but the lessor should have given notice in writing to the lessee of his intention to determine the lease. *SAHEB DIN v. GAURI SHANKAR* Oudh 25

s. 114. See Bihar Tenancy Act, 1934, s. 15 278

s. 116. See Limitation Act 1908, Art. 139 858
ss. 3, 5 28

s. 137—Negotiable instrument, transfer of otherwise than by endorsement—Oral assignment validity of in Punjab.

Section 137, T. P. Act, is no bar to the transfer of a negotiable instrument otherwise than by endorsement. The T. P. Act not being in force in the Punjab an oral assignment is valid in this province. *RAM RATTAI v. GOBIND RAM* Lah. 421

Trust—Public trust—Dedication—Nature of evidence to prove—Inference from user—Value of public user as evidence of dedication—Held, that grant was not made by way of trust for public religious purpose but to grantees and his heirs in perpetuity.

It would, be an error in method if the subsequent history of the temple is not looked at in the light of the grant of the property. While it is certainly possible that in the course of years the temple should have been so dealt with as to become dedicated for the benefit of the Hindu public as a public temple, such a dedication requires to be proved. Where the general effect of the evidence is that the family have treated the temple as a family property, dividing the various forms of profit whether offerings or rents, closing it so as to exclude the public from worship when marriage or other ceremonies required the attendance of the members of the family at its original home, an erecting *samadhs* to the honour of its dead, in these circumstances, it is not enough to deprive the family of their private property to show that Hindus willing to worship have never been turned away even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual *mela*. Worshipers are naturally welcome at a temple because of the

Trust—conold.

offerings they bring and the repnte they give to the idol; they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference, if made from the fact of user by the public, is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should, in all circumstances, desire to discourage popularity. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right.

Held, that the grant was not a grant to the idol or an endowment of a temple or a gift made by way of trust for a public religious purpose. The grant was to the grantee and his heirs in perpetuity. The reference to the grantee's heirs, and the Arabic terminology *naslin ba'da naslin wa batnan ba'da batnan* (descendant after descendant and generation after generation) were not reconcilable with the view that the grantor was in effect making a *waqf* for a Hindu religious purpose, even if it be assumed that this was not otherwise an untenable hypothesis. *BHAGWAN DIN v. GIE HAR SAROOP*

P C 305

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 2 (2), Proviso 1, Expl. VII—*Expl. VII, whether independent of first proviso.*

Explanation VII to s. 2 (2), U. P. Agriculturists' Relief Act is independent of the first proviso and it is not an addition to cls. (a) to (g) of s. 2 (2). The word "explanation" has wrongly been used. It is more like a "Proviso" than an "explanation."

There is no absurdity or ambiguity in the Expl. VII. *MAHADRO PRASAD v. JAGANNATH KUAR*

Oudh 258 F B

s. 2 (2) (g)—*Property presenting appearance of bungalow and compound in residential area—Whether "land" under s. 2 (2) (g).*

An area held by a person was a walled compound within which there was a bungalow and some out-houses. In the compound there were two old trees and a small vegetable garden. The property thus presented the appearance of a bungalow and compound in a residential area.

Held, that under the Tenancy Act, the compound could not be held to be "land" and it was, therefore, not land within the meaning of s. 2 (2) (g), U. P. Agriculturists' Relief Act. *SHRO PRASAD v. KALKA PRASAD DHAWAN*

All. 41

s. 7. See Civil Procedure Code, 1908, s. 20 (c)

U. P. Court of Wards Act (IV of 1912), ss. 17 to 23—*Claim notified under s. 17—Creditor or decree-holder, whether precluded from suing or executing decree—Court of Wards, if under statutory liability to discharge debt or decree even if time-barred.*

There is nothing in ss. 17 to 23, U. P. Court of Wards Act which would justify the argument that remedies under the general law are suspended as soon as a claim is notified under s. 17 of the Act. There is

U. P. Court of Wards Act—conold.

nothing in the provisions of the Act which would show that a creditor or decree-holder is precluded from instituting the suit or executing the decree after notifying his claim under s. 17 or that the Court of Wards is placed under a statutory liability to discharge that debt or decree in spite of the fact that the enforcement of that debt or decree in a Civil Court may become in the meantime barred by time. *ANAND BEHARI LAL KHANDELWAL v. DEPUTY COMMISSIONER BARA BANKI*

Oudh 290

s. 21 (3)—*Court of Wards, if can acknowledge or pay off time-barred debt of its ward.*

There is no provision in the Court of Wards Act which would entitle the Court of Wards to acknowledge or pay off a time-barred debt of its ward. *ANAND BEHARI LAL KHANDELWAL v. DEPUTY COMMISSIONER, BARA BANKI*

Oudh 290

ss. 21 (3), 17 to 23, 52—*Exclusion of period under—How calculated.*

Section 21, U. P. Court of Wards Act lays down that the time shall not run against the decree-holder so far as the execution of the decree is concerned in respect of which the creditor has notified his claim during the period mentioned in cl. (3):

Held, that the application for execution was barred much before the date when the application under s. 4 of the U. P. Encumbered Estates Act was made. *ANAND BEHARI LAL KHANDELWAL v. DEPUTY COMMISSIONER, BARA BANKI*

Oudh 290

s. 52—S. 52, applicability—Words "without discharging" in Chap. IV, meaning of.

Section 52, applies to cases where the estate is released from the superintendence by the Court of Wards before the ascertainment of debts, and ss. 20 and 21 apply where the debts are ascertained by the Collector under Chap. IV of the Act. Chapter IV of the Court of Wards deals not with discharging the liabilities of the ward but with their ascertainment only, and the words "without discharging the liabilities thereof in the manner provided in Chap. IV" in s. 52 mean and stand for "without ascertaining the liabilities thereof in the manner provided in Chap. IV." *ANAND BEHARI LAL KHANDELWAL v. DEPUTY COMMISSIONER, BARA BANKI*

Oudh 290

U. P. Encumbered Estates Act (XXV of 1934), ss. 4, 9 (5) (a)—*Joint debtors who have not joined in making application under s. 4 must be made parties—Subsequent transferees of mortgaged property made parties to mortgage suit and decree passed—Transferees, whether joint debtors with mortgagors.*

Section 9 (5) (a) of the U. P. Encumbered Estates Act makes it compulsory that joint debtors, who have not joined in making the application under s. 4, should be made parties to proceedings before the Special Judge. The definition of debt in s. 2 (a) covers a decretal debt also so that where in a mortgage suit the subsequent transferees from the mortgagors are made parties and a decree is passed against them, the transferees must be deemed to be joint debtors with the mortgagors and in an application under s. 4 by the mortgagors, the transferees must be made parties to the proceeding. *SHAMBHOO DAYAL v. KUNDAN LAL*

Oudh 5

ss. 4, 13—*Proceedings before special Judge—Creditor dying during pendency of proceedings—Failure to bring his legal representatives on record—Effect—Whether extinguishes creditor's claim.*

U. P. Encumbered Estates Act was passed with a view to provide for the relief of encumbered estates in the United Provinces. The Preambles indicate that the

U. P. Encumbered Estates Act—contd.

relief under the Act is given to the landlord who is the owner of the encumbered estate. Ordinarily in a suit, relief is granted to the plaintiff in the suit. The landlord must, therefore, in view of the wordings of the Preamble, be regarded as the plaintiff in the proceedings under the Act, and the position of the creditor is that of the defendant. If therefore a claimant creditor dies during the pendency of the proceedings before the Special Judge, r 4 and not r. 3 of O. XXI, Civil P. O., applies. The omission to bring on record the legal representatives of the deceased creditor has the effect of causing an abatement of the debtor's application only so far as the legal representatives of the deceased creditor are concerned and not of extinguishing the claim of the creditor. **GOKARAN SINGH v. BRIJ BHUKAN SINGH**

All. 402

—s. 7 (1) (a)—Word "other execution process," meaning of.

A mere order of transferring a decree is not issuing a process for the execution thereof, and the words "other execution process" used in the latter part of cl. (a) of s. 7 (1) of the U. P. Encumbered Estates Act do not refer to and cannot cover an order transferring the decree for execution to another Court. **GOMTI v. JUGAL KISHORE**

Oudh 280

—ss. 7 (1) (a), 14, 18—Transfer of decree for execution to Court in Bengal—Subsequent application by judgment-debtor under s. 4 forwarded under s. 6—Execution pending in Court in Bengal, if can be stayed.

It is clear from O. XXI, rr. 5 and 6, Civil Procedure Code, that the proceedings in connection with an application for transfer of the decree start with an application for transfer to the Court which passed the decree and end when that Court has complied with the requirements of r. 6 of O. XXI. Thereafter no proceeding remains pending in that Court. It may be that, the execution Court does not on an order of transfer lose its jurisdiction over the execution proceedings for certain purposes but it is very different from saying that the execution proceedings remain pending in that Court. Hence where the judgment-debtor makes an application under s. 4, U. P. Encumbered Estates Act, after the decree is transferred for execution by the Court at Unao in Oudh which passed the decree to the Court at Oomilla in Bengal and an order has been made by the Collector under s. 6 of that Act, there are no proceedings pending at the date of the order under s. 6 in the Court at Unao and cl. (a) of s. 7 (1) does not apply to the case, and the execution proceedings pending in the Court at Oomilla cannot be stayed. **GOMTI v. JUGAL KISHORE**

Oudh 280

—s. 7 (1) (a) and (b)—Cl. (b), if applies to suits or proceedings remanded by Appellate Court—Cls. (a) and (b) do not apply to suits instituted by landlord.

Clause (b) of s. 7 (1), U. P. Encumbered Estates Act, applies to a suit or other proceeding filed by a party after the passing of an order under s. 6 and does not contemplate suits or proceedings remanded by a Court of Appeal for trial *de novo*.

Moreover, both the clauses of s. 7 (1) contemplate suits or proceedings against landlords for enforcement of debts due by them and not to suits or proceedings that the landlord themselves are entitled to institute under any law; e. g., suit under s. 33, U. P. Agri. Rel. Act. **B. AMBIKA PRASAD v. MAQBULUNNISA**

Oudh 726

U. P. Encumbered Estates Act—conold.

—s. 9 (5) (a). **SEN U. P. Encumbered Estates Act, 1934, s. 4** 5

—s. 14. **SEN U. P. Encumbered Estates Act, 1934, s. 7 (1) (a)** 280

—s. 14—Decree under s. 14—Effect of.

When a decree under s. 14 of the U. P. Encumbered Estates Act, is passed, then by virtue of s. 18 of the Act the effect of the decree passed by the Special Judge would be to extinguish the previously existing rights of the decree holder-creditor. These rights will be substituted by the decree of the Special Judge. **GOMTI v. JUGAL KISHORE**

Oudh 280

—s. 14, cls. (4) (a) (5) (6)—Cl. 6, whether makes distinction between a case where prior debt of date earlier than December 31, 1916, is renewed by successor-in-interest of original debtor and case where that liability is undertaken by person other than such legal representative.

Clause (6) of s. 14, U. P. Encumbered Estates Act, makes no distinction between a case where the prior debt (principal plus interest), of a date earlier than December 31, 1916, is renewed by the successor-in-interest of the original debtor, and a case where that liability is undertaken by a person other than such legal representative.

A mortgaged certain property to B for Rs 20,000 on April 26, 1915. He then mortgaged the same property together with other property to C for one lakh rupees on May 26, 1921, leaving out of the consideration a sum of Rs. 20,000 for payment to A. C did not pay this amount. C then executed a mortgage on July 28, 1923, in favour of A for Rs. 30,000. The principal amount of Rs. 20,000 and interest thereon up to that date amounting to Rs. 1,831-14-9 was set off towards the mortgage consideration and a sum of Rs. 8,115-1-3 was received in cash. The estate of C went under the management of Court of Wards and the manager applied under s. 4, U. P. Encumbered Estates Act. A claimed Rs. 63,958 on the basis of his mortgage:

Held, that the principal amount for the purposes of s. 14 consisted of Rs. 20,000 originally advanced by A on April 26, 1915, and Rs. 8,115-1-3 further advanced in cash on July 28, 1923, both of which were still due at the date of the application. Under s. 14 (4) (a) the claimant was not entitled to more than that amount as interest. Thus he would get only Rs. 56,230-2-6 and no more. **DHURU COMMISSIONER KHERI, MANAGER COURT OF WARDS, MAHERWA ESTATE v. K.B. KHUSHWAQT RAI**

Oudh 731

—s. 18. **SEN U. P. Encumbered Estates Act, 1934, s. 7 (1) (a)** 280

U. P. Land Revenue Act (III of 1901), s. 175
SEN U. P. Land Revenue Act, 1901, s. 233 (m), (1) 338

—s. 233 (k)—Question of title not raised in partition proceedings—Partition completed—Question cannot be raised subsequently in Civil Court.

If a question of title affecting the partition of a *mohal* which might have been raised in the partition proceedings is not raised and the partition is completed, s. 233 (k) of the U. P. Land Revenue Act, debars the parties to the partition from raising the question subsequently in a Civil Court. **PATIPAL SINGH v. RAMPAL SINGH**

Oudh 137 (b)

—ss. 233 (m), (1), 175—Sale for arrears of revenue—Setting aside of, on ground of fraud—Suit in Civil Court, if barred.

Sub-s. (m) of s. 233, U. P. Land Revenue Act

U. P. Land Revenue Act—*consold.*

does not deal with a suit to set aside a sale for arrears of revenue. It deals with claims from collection of revenue, but clearly is not intended to embrace the special case in sub-s. (1). Hence a suit in the Civil Court to set aside a sale for arrears of land revenue on the ground of fraud is not barred. *RAM KUMAR LAL v. RAM CHARITTA LAL* All. 338

O. P. Municipalities Act (II of 1916), s. 337—

Declaration that certain locality is notified area—Proprietors, if divested of their proprietary rights.

There is absolutely no authority for the contention that the declaration that a certain locality is a notified area divests the proprietors of the land of their proprietary rights. Section 337 of the U. P. Municipalities Act is not at all an authority for this proposition. *KANHAIA LAL v. HAMID ALI* Oudh 467

U. P. Prevention of Adulteration Act (VI of 1912), s. 17.—*Offence committed by servant or agent, under s. 17—Master, if liable.*

In view of the fact that there is no specific provision either in the U. P. Prevention of Adulteration Act or in the rules framed under s. 16 making a master liable for any act done by his servant or agent, a master cannot be held liable for an offence committed by his servant or agent under s. 17. *MURARI LAL v. EMPEROR* All. 799

ss. 17, 16—*Rules framed under s. 16, r. 8—Breach of—Servant or agent of licence-holder if can be charged for breach of r. 8.*

It is only the licence-holder who can be penalized under s. 17, U. P. Prevention of Adulteration Act, if he commits a breach of r. 8 framed under s. 16 of the Act. Any other person, whatever his relation to the licence-holder may be, cannot be rightfully charged with an offence under s. 17 for committing a breach of r. 8 for that rule does not cast any duty upon him. *MURARI LAL v. EMPEROR* All. 799

U. P. Public Gambling Act (III of 1867), s. 3—*Prosecution must prove commodity in respect of alleged gambling.*

It is incumbent on the prosecution under the law to prove by definite evidence the commodity in respect of which the alleged *satta* gambling was going on. The vague and general statement by the prosecution witnesses that *satta* gambling was going on proves nothing in law. *CHIRANJI LAL v. EMPEROR* All. 256 (b)

U. P. Regulation of Sales Act (XXVI of 1934), ss. 5, 3, 4—*ss. 3, 4 and 5, whether repugnant to s. 20, Oudh Laws Act (XVIII of 1876)—S. 5, if excludes application of s. 20, Oudh Laws Act.*

There is no repugnancy between the provision of s. 20, Oudh Laws Act requiring permission of the Local Govt. to a sale of ancestral property and the provisions whereby the Deputy Commissioner executes a decree under the U. P. Regulation of Sales Act. It is true that it does not appear at what stage the permission of the Local Govt. is to be obtained, but it seems obvious that permission must be taken after the valuation has been carried out. The provisions of the earlier Act are capable of being combined with the provisions of the latter Act, and the mere fact that the provisions of s. 5 of the Regulation of Sales Act have a mandatory tone, does not exclude the application of s. 20 of the Oudh Laws Act. *HAR GOVIND PRASAD v. MAHARAJ KUNWAR* Oudh 774

Vakalatnama. See Legal Practitioner 669

Wajib-ul-arz—If binds riyayas not parties to it.

The fact that the *riyayas* in the *abadi* were not parties to the *wajib-ul-arz* is no ground for reject-

Wajib-ul-arz—*consold.*

ing the *wajib-ul-arz*. It is binding on the *riyayas*. *KANHAIA LAL v. HAMID ALI* Oudh 467

Interpretation—Custom of pre-emption on transfer of share—If applies to portion of it.

When a *wajib-ul-arz* says that there is a custom of pre-emption on a transfer of a share, it applies not only to a transfer of a complete share but also to a portion of it. *RAUF AHMAD v. FAHMIDA BEGUM* Oudh 277

Will—Absolute estate given by testator to his widow—Direction to widow to pay certain annuity—Validity of such bequest.

Where a testator by his will gives an absolute estate to his widow and the will contains directions to the widow that it would be proper on her part to pay a certain amount annually to a certain institution out of the income of the property and that the said amount shall all along be continued to be paid every year by the widow, the condition does not cut down the estate and the bequest to the institution is not invalid. *ANANDI PRASAD v. DULHIN KISHORI KUBER* Pat. 626

Attesting witness—Scribe, when can be attesting witness.

A scribe may no doubt be an attesting witness to a will but it must be shown that the signature of the scribe was put down for the purpose of attesting the document. *JANADA GOVINDA CHAUDHURY v. BIRENDRA NATH GOSWAMI* Cal. 634

Bequest to dharma.

A bequest for *dharma* is too vague and uncertain to be given effect to. *KUMAR RAGHAVA SURENDRA SAHI v. BABUL LACHMI KOBIR* Pat. 179

Execution—Burden of proof—Propounder stranger to family and attesting witnesses men of opposite camp, if lessens the burden.

The burden of proving due execution of the will is always on the propounder, and the burden is not lessened by the fact that the propounder is a stranger to the family and the attesting witnesses are men of the opposite camp. The Court is of course competent to disregard the testimony of some of the attesting witnesses and pronounce in favour of the will, if it is satisfied from the evidence collectively or from the circumstances of the case, that the requirements of law have been complied with and that the witnesses who had spoken against the will had not spoken the truth. *KHDAR NATH TUSHNIAL v. RAJ KUMAR DAS* Cal. 17

Probate—Part of will lost—Probate, when can be granted.

Under s. 233, Succession Act, probate may be granted if the whole will is lost but the contents are proved. But if only a part of the will is lost, probate may also be granted if the contents are proved. Where all but the first page which is lost are found to be genuine, and as to the first page the evidence is sufficient to show the contents, Probate of the will can be granted. *KHDAR NATH TUSHNIAL v. RAJ KUMAR DAS* Cal. 17

Testamentary capacity—Presumption.

If, the will is a natural one, and due execution is proved, testamentary capacity is ordinarily presumed. *KHDAR NATH TUSHNIAL v. RAJ KUMAR DAS* Cal. 17

Witness—Credibility—Old age, if guarantees truthfulness.

The fact that a witness is an old man of 75, by itself carries no guarantee of truthfulness, if his evidence is otherwise unworthy of credence. *JANADA GOVINDA CHAUDHURY v. BIRENDRA NATH GOSWAMI* Cal. 634

WORDS AND PHRASES:—

"Jote," meaning of.
The word 'jote' by itself is an ambiguous word which may mean a tenure or a holding. **ABDUL LATIF v. HARIBULLA** Cal. 717

Workmen's Compensation Act (VIII of 1923), ss. 12, 3—Principal's liability to compensate workmen employed by contractor—Wilful disobedience of workman—Liability of employer—Tests—At time of accident workman doing work for which he was employed, but having no right to go to place where he died—Employer's liability.

Section 12, Workmen's Compensation Act, shows that the principal who employs a contractor shall be liable to compensation to workmen whom he did not immediately employ but who are employed by the contractor. But before the principal is made liable, it must be established that the contractor was entitled to expect such workmen to do his work at his orders and that he was entitled to dismiss such workmen. It must be shown that there was a contract of service between the workmen and the contractor. Where there is only an agreement by which certain selected persons could come when they chose and do work on their own account which would get for them remuneration from

Workmen's Compensation Act—contd.

the contractor, the principal is not liable to compensate such workmen.

Under s. 3, in spite of there being wilful disobedience on the part of the workman concerned, an employer may be liable in respect of injury which results in death provided the accident arose out of and in the course of a person's employment. In considering this question the ambit or scope of a man's employment must be looked at in relation to the contract which he has made with his employer. There is one test which is always applicable, and it is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yes, the accident arose out of his employment.

In a case where the workman met with his death when he was doing the very thing which he was employed to do, the mere fact that he had no right to be working in the place where he was when he met his death, does not show that the accident did not arise out of and in course of employment and the employer would in such case be liable to compensation under s. 3. **LEE SHI v. CONSOLIDATED TIN MINES OF BURMA, LTD.** Rang. 847

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

FORFEITURE ON BANKRUPTCY

Testators not infrequently insert in their wills a provision that the interest of any beneficiary is to determine if he assigns, charges or otherwise disposes of the property settled upon him, or becomes bankrupt or does something whereby it would become payable to or vested in some other person. Such a clause is generally both easy to understand and to apply. Some doubts have, however, arisen as to the effect of the clause where, at the date of the testator's death, the beneficiary in question was a bankrupt but obtains his discharge before any moneys are actually paid to him. These doubts have now been cleared up by Lord Justice Luxmoore's judgment in *Re Walker, Public Trustee v. Walker* (161 L. T. Rep. 223). This decision clearly explains the operation of such a clause, both when the beneficiary has his bankruptcy annulled and when he obtains his discharge.

Until the recent decision, the authorities had all dealt with the position when the bankruptcy was annulled. The legal result of such annulment was considered by Lord Hatherly in *White v. Chitty* (1 Eq. 372). In this case a life interest had been given by the testator to a son but such interest was to cease on bankruptcy. The son was bankrupt at the testator's death. The bankruptcy was annulled within four months of the death and before any moneys became payable to the son. In these circumstances the learned judge held that the effect of the annulment was to prevent the operation of the forfeiture clause.

The matter was again considered in *Ancona v. Waddell* (40 L. T. Rep. 31; 10 Ch. D. 157). In this case a share of residue was given to a beneficiary by the will, which contained a clause of forfeiture in case the beneficiary should become insolvent or be declared bankrupt. The beneficiary was a bankrupt at the death of the testator, but the bankruptcy was

annulled within five months, before any income became payable to the beneficiary. Vice-Chancellor Hall held that there had been no forfeiture. He said that the test was not whether in fact the money had been paid over or how the money actually stood, but it was whether "it could be said that there was any actual income of the share which could be treated as payable to or retained for or appropriated for the benefit of this residuary legatee."

In *Re Forder* (137 L. T. Rep. 538; (1927) 2 Ch. 291), Mr. Justice Olauson, as he then was, had to consider the position of an undischarged bankrupt in the following circumstances. Under the will of his mother, E. F. was entitled to a share of the income of her residuary estate, and in addition, in certain contingencies, to the whole capital. The will contained a provision that in the event of any beneficiary becoming bankrupt or assigning or charging his or her share, such beneficiary should forfeit such share. At the death of the testatrix E. F. was an undischarged bankrupt; after four months the bankruptcy was annulled. This summons was taken out to determine whether E. F. had forfeited his interest by reason of his bankruptcy, and if so, whether the annulment thereof operated to avoid such forfeiture.

On the hearing of the summons by Mr. Justice Olauson, it appeared from the evidence that during the period which elapsed between the death of the testatrix and the annulment of the bankruptcy, there was no income available for distribution. In these circumstances the learned judge held that, although the share and interest of E. F. had vested in possession, yet as the annulment occurred before any rights arising by reason of the bankruptcy were sought to be enforced, and as no income was paid or could have been paid in respect of his interest, the annulment was in time

to save his interest under the will from forfeiture. Upon appeal further evidence was called, showing that during the crucial period income in fact was available for distribution. This income, but for the forfeiture clause, would have vested in E. F.'s trustee in bankruptcy, consequently the annulment was not in time to save the forfeiture.

The Effect of Discharge.

In *Re Walker (sup)* Lord Justice Luxmoore had to consider the position where the bankruptcy was not annulled, but the beneficiary obtained his discharge. In this case the testator had given to his brother an annuity during his life or until he should become bankrupt or do something whereby the income would become payable to some other persons. In the event of the failure of these trusts in the lifetime of the annuitant, there was a gift over of the annuity to his children.

The testator's brother was adjudicated bankrupt in 1937. On the 15th November, 1938, he applied for his discharge and an order was made on that date suspending his discharge for a month and discharging him as from the 15th December, 1938. On the 16th November, 1938, the testator died. His will was duly proved by the Public Trustee on the 14th March, 1939. In these circumstances, the Public Trustee took out an originating summons for the determination of the question whether the life interest of the brother had determined by reason of his bankruptcy.

It was strenuously contended that as the brother had obtained his discharge before any grant of probate had been taken out to the testator's estate, no payment could have been made to the bankrupt and the position was the same as if the bankruptcy had been annulled.

Lord Justice Luxmoore rejected this contention. He pointed out that under the Bankruptcy Act, 1914, the effect of an annulment and of a discharge are not the

same. Under section 29, where an adjudication is annulled, unless the court appoints to the contrary, the property of the debtor reverts to the debtor for all his estate or interest therein. There is an immediate reversion in the debtor. Under section 28 the effect of a discharge is to release the bankrupt from all debts provable in the bankruptcy, but there is no provision for reversioning the bankrupt's property in him. Under section 38 the property which vests in the trustee in bankruptcy is, "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve upon him before his discharge."

In the present case, therefore, the annuity, which took effect on the testator's death, would, but for the forfeiture clause, have vested in the brother's trustee in bankruptcy, and could have been dealt with by the trustee. As between the trustee and the bankrupt the trustee's title was complete at the death. Before the trustee had reduced the annuity into possession, the bankrupt, however, could, under section 47, have disposed of the annuity for value to a third party. The learned judge accordingly held that the forfeiture clause had operated to transfer the annuity to the children of the bankrupt.

This decision makes it clear that in cases of this character, if the bankruptcy is annulled before any payment can in fact be made, nothing vests in the trustee in bankruptcy, and accordingly the clause does not operate. Where, however, before the annulment, moneys are available and payable to the bankrupt, these moneys vest in the trustee, and although the bankruptcy is subsequently annulled, the clause operates. It must also operate where there is a discharge. In this case, whether any moneys are payable or not, all the bankrupt's interest in the testator's death vests in the trustee and that interest is not divested by the discharge.—*The Law Times*.

ABSENCE OF COVENANTS FOR TITLE, &c.

The fear of the next purchaser is often before the eyes of a purchaser's adviser. He may be ready to pass over some right to which he is strictly entitled, but the next purchaser may not be so lenient, and it may be too late when the next purchaser has come on the scene.

For instance, suppose that A, when he

buys from B has not taken any covenant for title from the latter, what will be A's position when he sells to C? In *Re Scott and Alvarez's Contract* (1895, 1 Ch. 596) it was argued on behalf of the purchaser that the inability of the vendor to give him a complete string of covenants for title was a reason why specific performance should

not be forced upon him. To this Lord Justice Lindley replied: "There is a doubt and, in my opinion, a very considerable doubt, whether any reported decision can be found which says that a purchaser who can obtain the legal estate can get out of his purchase because he cannot get a good string of covenants." We know of no such decision, and unless one can be produced, the dictum of the Lord Justice, holds good (*Dart's Vendors and Purchasers*, 8th edition, p. 662). As the greater includes the less, this rule will include a case in which a vendor has conveyed "as trustee," when apparently he ought to have conveyed "as beneficial owner." A conveyance "as trustee" does not prove that he was a trustee, but merely that there is to be deemed to be included in the conveyance the appropriate covenant which a trustee would have given (Law of Property Act 1925, s. 76), and as the purchaser could not have successfully complained if there had been no covenant, still less can he do so when he has the benefit of a trustee's covenant, though it should have been a beneficial owner's.

Prima facie a purchaser has the right to production of title deeds not in the vendor's possession, and to an acknowledgment or the benefit of an acknowledgment, of that right. Sometimes, however, documents are outstanding in a third person's possession and an acknowledgment cannot be obtained. A vendor then falls back on the Law of Property Act, 1925, s. 45, sub-s. (7), which provides that "the inability of a vendor to furnish a purchaser with an acknowledgment of his right to production

and delivery of copies of documents of title or with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on completion of the contract, have an equitable right to the production of such documents". What is meant by "inability"? It is obviously stronger than "difficulty," and if the vendor could obtain an acknowledgment from a person having possession of the documents, though he would have to pay his costs, he could not plead "inability": (see Wolstenholme and Cherry's *Conveyancing Statutes*, 12th edition; p. 306; Williams on Vendor and Purchaser, 4th edition, p. 701).

According to Dart (*ante*, p. 417): "Generally, every person who has an interest in the land has an equitable right to the production of all deeds which affirmatively prove his title, but not to those which do not." That is the rule in the case of litigation, where a party has been directed to make discovery to another party of the documents in his possession or power relating to any matter in question, and it appears to be a convenient rule on which to act in conveyancing.

In *Re Jenkins' Contract* (142 L. T. Jour. 240), the title deeds common to two properties were held by a firm of solicitors on behalf of all parties. One of the properties was sold, and the purchaser required that the title deeds should be handed over to him, but Mr. Justice Neville held that the purchasers' equitable right to the deeds was sufficient and that the contention failed.—*The Law Times*.

Extracts from Contemporaries.

Evacuation and Desertion.

A woman told the magistrate at the Tower Bridge Police Court that she, and her young baby had been evacuated to Worthing, but after three days, as she did not like it, she returned to London. Her husband now refused to allow her any money unless she returned to Worthing. She asked for advice.

The magistrate: "You had no business to return after you had been evacuated by the Government for your own safety. My advice to you is to obey your husband. No doubt he wants you and the baby to remain in a safe area."

A husband who takes this line in all sincerity, commits no matrimonial offence. He is not neglecting to maintain her and

her infant child but making her maintenance conditional on her acceptance of conditions eminently reasonable at the present time and imposed for her own and her child's safety and comfort. Nor is there any desertion involved in coercing her, by means other than violent, into accepting the provision made for her and the child elsewhere.

The essence of desertion, as we have been frequently reminded lately, is the intention to terminate the marital relationship, and the existence or non-existence of this intent is a fact in each case which comes before the Courts. Should a husband take advantage of the situation in such a way as to indicate an intention to desert a wife innocently separated from him,

he would be guilty of desertion, but where there is a temporary separation due to war conditions and manifestly in the true interests of the complaining spouse, it would be very difficult to establish a charge of desertion. There may, however, yet be some very knotty problems for justices to solve under the Summary Jurisdiction (Separation and Maintenance) Acts.—*Justice of the Peace.*

Limited Neutrality.

Exceedingly interesting questions of constitutional and international law combined are raised by the "neutrality" which was proposed for South Africa and is actually in effect for Eire. They offer occasion for large additions to the voluminous literature on the subject—after the war.

Meanwhile the sound way to take the matter is to realize that the British Commonwealth of Nations is less an empire than a league, and to be gratified at the great measure of unanimity with which its members go into the war, understanding its causes and its aims, and the necessity for sane communities to hold together in face of attempted domination of free peoples by force, backed by perfidy and effrontery unexampled in modern times.

"Neutrality" of any members of the British Commonwealth of Nations will, no doubt, be observed by the enemy just so long as it suits him to do so, but then that is true of the unqualified neutrality of independent peoples. The neutrality of Belgium was no obstacle to the Germans in 1914, the neutrality of Switzerland or Holland or any other small people will be no obstacle to the Nazis in 1939. It is not to be supposed that the small peoples are assuming the almost crushing burden of permanent mobilisation of their military forces for any reason other than fear of aggression from Germany. Whether a state is neutral or not seems now to be a question solely of fact—it used to be one of mixed fact and law—and the facts are too often beyond the control of the would-be neutral.—*Justice of the Peace.*

Dogs and Cats.

We heard recently from Manchester that a number of the city Council had put down a motion, inviting them to call for inclusion in the national register of dogs and cats, with a view to immediate extermination, except where kept for use on farms. The ostensible reason is danger to human beings,

particularly children, of attacks by dogs, and disease caused by dogs and cats, and their consumption of food which human beings need.

While nearly all Englishmen like nearly all dogs, and some find cats quite likeable—at any rate their own—there is a dissentient minority, to whom (as to the fanatics in other fields) a war is an opportunity to express antipathy. We remember that the same sort of suggestion cropped up regularly in 1914–18, but even in the modified form of an increase in the price of dog licences, it was not adopted.

Some fall in the canine and feline population there must be, resulting from evacuation and the prohibition of taking pets into air raid shelters. Evacuation is reputed already to have been followed by a plague of mice in one suburban borough, and every student of Darwin knows how cats benefit red clover. Our four footed friends are valued companions, of the poorer family especially, and we do not see their enemies prevailing.—*Justice of the Peace.*

International Law.

We have had before us the report of the Fortieth Conference of the International Law Association at Amsterdam in 1938. It is almost painful reading in the light of present events.

Pitt, when Napoleon was having his will in Europe, is credited with crying out that the map of Europe should be rolled up. In the same way we are much tempted, in a time when so much is happening which is the negations of international law, to put such volumes as this on a high shelf as having very little relation to the hard realities of life as we are living in.

This is going too far, though it is not possible to coin a draft convention for the protection of civil populations without a wry smile, so soon after Nazi frightfulness has wreaked its cruelties upon Polish civilians, and when we are all carrying about gas masks because we know we cannot trust the pledged word of a great nation not to make gas attacks on civilians.

Neutrality, too, is another subject for sour reflection. In this shrunk world there can be no true neutrality. If the United States legislates in one form she favours one side, if in another she favours the other side. There are in fact all degrees of neutrality, but many of them are a sham. Russia, for instance, professes neutrality in the present war, but she completed the ruin of Poland, whether with the best intentions, as she professes, or not.—*Justice of the Peace.*

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

ALIENS AND ENEMY ALIENS

It would be interesting to trace out, even in outline, the history of our legislation about aliens from its start in 1905 to the present hour. Space forbids such a recital. Let us say that the 1905 Act made a start by prohibiting the landing of aliens from immigrant ships except at ports at which there was an immigration officer to give them leave. Mild powers of expulsion were given to the Secretary of State, but he was directed to support those whose expulsion he ordered until some ship belonging to the owner whose vessel had brought them came to one of our ports. Then the alien was handed to him with the Secretary of State's compliments and a bill for his keep—which we hope was always paid. All this, however, went by the board when the 1905 Act was repealed by an Order in Council made under the Aliens Act of 1914 and the amending measure of 1919. These were war and post-war measures and armed the Crown with drastic powers, to be exercised by Order in Council for registration, control and expulsion of aliens. The Principal Aliens Order (S. R. & O., 1920, No. 448), to which we have just referred, was made under the 1914 and 1919 Acts. It was amended by successive Orders made in 1923, 1925 and 1931. Lastly, on the eve of the outbreak of war, a fresh Order in Council (No. 994) was issued on the first of September. A humane provision in the Principal Order told the Stationery Office to re-print and re-issue it with the Amendments as soon as these were made. We sincerely congratulate that hard worked institution on the fact that *inter horrentia Martis*, they brought out the Principal Order amended with prompt efficiency.

It is in this Order that our readers will find all the administrative law about aliens. We imagine that those who will take more interest in them are the employers of governesses or servants who are

of alien nationality. Some of them may be aliens from friendly countries, others of German nationality and therefore now enemy aliens. The Aliens Order, as amended up to date, deals with both and by successive regulations (Reg. 6, *et seq.*) says what must be done about them. Let us observe in passing that the vital provisions on this subject were recast in 1939. Even the most industrious text writers have not had time to place them in their books; so that reference to those books may possibly be misleading.

Now take the case of the French maid or Swiss nurse. She is no enemy alien but an alien she is. What is her obligation? If she is over 16 she must forthwith (here the new Order drops "as soon as may be" and uses the more peremptory word) furnish the local registration officer with a number of particulars. These will be found in the First Schedule to the Order and are twelve in number—name and sex, present address, nationality, date and country of birth, date and mode of arrival, address, last address abroad, and a number of others. It is well to notice that when the alien is giving these particulars the immigration officer has power to ask for anything else he thinks well, and that, as the Order stands, the alien must comply with his request. She must either produce a passport with photograph or some other document establishing her nationality, or explain why she cannot do so. Whenever anything (such as change of residence) occurs which makes her particulars inaccurate, she must report it to the local immigration officer within 48 hours. She may then be asked for a recent photograph and must give any particulars which he requires in order to keep his register accurate. She must send him word when and if she is going to change her residence and the place to which she is going, and must call on the local registration officer

within 48 hours of her arrival and introduce herself to him. If she is away from home for 14 days, she must let the officer who functions at the place where she is located on the fifteenth day know of her whereabouts and let him know when she returns to her registered home.

The alien gets from the officer a registration certificate and must produce this whenever she does anything which makes inaccurate the record which it contains, so that he may, if necessary, note the change on that document—as he does in his register.

One must suppose that there are wandering aliens in England—such as gipsies or itinerant waiters and servants. Provision is made for them. They have to report to some immigration officer and the Order hopes that they may have some respectable English friend who will answer for them. If they have, certain provisions are made. But this is not a frequent case and we need not describe them.

Enemy Aliens

Now as to the enemy alien, the law is more strict. If over 16 years of age, he must give the particulars already mentioned as to be given by friendly aliens; and give the same information so as to keep the register accurate. But while free movement from place to place is allowed to friendly aliens, the enemy alien is forbidden to move unless the registration officer approves of the change in writing, and unless he is informed of his new whereabouts. The friendly alien is allowed to move about for two weeks before he says anything to a registration officer, but the enemy alien may only have that liberty for twenty-four hours. After that he must report daily to the local police unless the registration officer says that he need not do so. Moreover, he (the enemy alien) may not travel more than five miles from his registered residence without a "travel permit" from his registration officer. Wandering enemy aliens are treated more strictly than those who wander but are not enemies; for the provisions which allow non-enemies to find a respectable person to answer for them do not apply in their case.

These are the main provisions which affect employers of governesses and servants for whom we are to-day stating the law. They do not apply to aliens who touch our coast on ships and land—unless they land for discharge. Every

alien must always be ready to produce to the police or an officer of the Forces or an immigration officer either his certificate or a passport with photograph. If he fails, he may lawfully be detained for inquiries.

Duties of Hotel-keepers

We may within the compass of a single article summarise the duties of hotel-keepers, though they are not immediately relevant to the purpose of to-day. In the word "hotel-keeper" we comprise everybody who provides lodgings or sleeping accommodation for reward. Every such person must always keep a register of his alien guests over 16, be they enemies or not. When a guest arrives, his name and nationality and date of arrival must be stated, and the hotel-keeper must enter the date of his departure. The Secretary of State may call on hotel-keepers to inform the local registration officer about his guests with any particulars which he (the S. of S.) prescribes. Every guest (alien or not) at a hotel must give his name and nationality but if he is an alien he must also give any particulars which the S. of S. may direct. Here the Order has been tightened up by giving the S. of S. power to ask for what he likes from time to time. The hotel-keeper's duty is to insist on the giving and signing of the statement of particulars and to keep the record for two years, during which the police can at any hour insist on seeing it. Lastly, there is a new provision which tells the ordinary householder what he is to do if he either knows or suspects that someone who is staying in his house is an alien. He must, so far as he can, satisfy himself that the person, if an alien, is obeying the law as to reporting and registration. If he cannot so satisfy himself, it becomes his duty to report the presence of the suspect to the immigration officer.

This new rule, which invokes the active help of the ordinary householder in detective work may cause some misgivings. It is apparently enough—to impose this duty on the householder—that there should be facts which would arouse suspicion in the mind of the ordinary reasonable man. If there is, and a particular householder either does not feel suspicious, or when he feels something like it, turns his mind to other subjects, then we think he might be convicted of breach of the Order.

Much litigation took place during and after the late war as to who is an alien

and who is not. At one time it was thought that an alien enemy could not, according to our law, throw off his nationality in war-time; but after the war was over judicial heads cooled, and decisions were given to the effect that this might be done. These matters, however, must

be left for discussion at some future time. It was enough to-day to state the law on a matter which we know is troubling the minds of many of our readers—and of their less fortunate friends.—*The Law Journal*.

RECITALS IN DEEDS

Drafting in emergency practice, perhaps more than in any other sphere, requires the closest contact with the viewpoint of the parties to the document, who often enough may personally need to resort to its contents to ascertain their own position in the ordinary course of business. Wherever unnecessary in such documents, it seems better to avoid not so much technical terms, as technical turns of phrase.

For some reason or other, the average layman appears to be obfuscated by recitals, and the preliminary "Whereas" arouses in him the attitude of mind which stigmatises all that follows as so much "legalese," if such an analogue to "journalese" may be said to exist. The old form of recital by way of preamble to a statute has become rooted in institutional life in the United States of America, working its way downwards to the vocabulary of the typical American citizen, while in this country it has become limited to Parliamentary enactment, and even there with decreasing frequency. Thus to warn off the layman there is nothing more effective than a preliminary "Whereas," be that the prelude to narrative or to introductory recitals. But for wartime documents, or any other documents, for that matter, of everyday use or recourse the layman should not be warned off, and thus a substitute for the recital becomes a paramount necessity.

Conveyancers have evolved a formula which effectively takes the place of recitals and in fact adds to the clarity and consecutiveness of a document. The formula was reached by an earlier effort to condense recitals by way of stating the effect of certain recited documents and circumstances, rather than by narrating them in terms of historical or logical order. Sir Howard Elphinstone, in his *Introduction to Conveyancing* in the first edition, dated as far back as 1871, referred to this method, observing (p. 85) that when "well done it gives rise to very concise and intelligible drafts." In the latest edition the author states that it is now adopted by most of the leading conveyancers where the state of the title admits of it (7th ed., p. 76). *Prideaux* in the current 23rd

edition (p. 72) refers to the scheduling of documents and facts, the recitals referring to the contents of each schedule or each part of a schedule, stating shortly the result. The *Encyclopaedia of Forms and Precedents* (2nd edition), and the volume "Sale of Land" in the new 3rd edition, to which a cordial welcome may be extended, as well as the Cumulative Supplements, show many illustrations of the method. As an instance see Cumulative Supplement No. 12, pp. 1176-7: "Whereas under the instruments specified in the first schedule hereto the entirety of the hereditaments specified in the second schedule hereto is now vested in, etc."

This system does not dispense with, although it curtails the length of, recitals, and it retains that preamble nature which appears so forbidding to laymen. A method, however, has been devised whereby the narrative effect of recitals is secured without anything at all in the form of a preamble. A definition clause gives the meanings of compendious terms used in the draft, one schedule sets out a material clause in some governing document such as a will or settlement, while a second schedule sets out certain facts and events which require to be placed on record, and can be so headed.

Recitals in form are completely obviated, while the function of narrative recitals is performed by the second schedule without any preliminary heralding. The method is to be highly commended for such documents as may be frequently resorted to by laymen. The language of such a schedule can be colloquial rather than technical, so that he who runs may read. The sooner concessions to the phraseology of ordinary conversation in documents of an informal businesslike character are granted the quicker will such documents be readily acceptable to the layman, however much the terminology may go against the grain of the "pure conveyancer." The avoidance of recitals and their substitution by narrative and explanatory schedules are, however, the main points to be borne in mind.—*The Law Journal*.

Extracts from Contemporaries.

Deodands.

No bad relaxation for the lawyer, when wearied by the daily round and common task of his professional calling, is to turn over some old legal treatise or statute book, which will be found to have many a quaint story to tell of customs and laws which long held sway but which have since been swept into the limbo of the past. Among these old laws or customs were those relating to what were called "deodands," which showed a wonderful vitality, subsisting as they did in full force till the middle of last century, when Parliament, persuaded of their inutility or folly, intervened and abolished them altogether, this legislation being inspired by Lord Campbell who described deodands as "the disgraceful remnant of superstition and barbarism."

What was a deodand?

The word "deodand" denoted something offered to God, and this because in early times the church or the poor had the ultimate benefit. In England, however, a thing became a deodand when the coroner's jury had duly found it to be the cause of death, which, however, must have happened within a year and a day of the casualty. To give some illustrations of deodands, and how they came to be so, we may turn to some of the old books, where we read that if a man in watering his horse is drowned, the horse is a deodand; so also if a man fall into the water and is carried under a mill wheel whereby he is killed, the wheel is forfeited, but not the mill. But it seems that if a person under the age of fourteen fell from a cart or horse, neither the horse nor the cart was a deodand because the youth was not of discretion to look to himself; if, however, a horse, bull, or the like killed him, or if a cart ran over him, the animal or the cart was a deodand and was forfeit to the king, who usually granted it to his almoner to distribute in charitable uses. In every indictment for murder or manslaughter the indictment had to allege what the instrument was that was used by the prisoner, and its value.

Railways and deodands.

In the early days of railway traction, accidents were not uncommon, and the companies soon felt this old law as to deodands anything but interesting, as it is to us nowadays, for if the accidents resulted in the death of passengers, the engine, or whatever it was that occasioned the casualty, was forfeit as a deodand. As late certainly as 1840 we read of an accident near Howden station of the Hull

and Selby railway, caused by the accidental fall of a huge iron casting from one of the trucks five of the passengers being killed. The coroner's jury returned a verdict of accidental death, but laid a deodand of £500 on the engine and carriage. An incident such as this drew pointed attention to this old law and led to its abolition by the Act 9 & 10 Vict. c. 62 which provided that "from and after September 1, 1846, there shall be no forfeiture of any chattel for or in respect of same having moved to or caused the death of man; and no coroner's jury sworn to inquire upon the sight of any dead body, how the deceased came by his death, shall find any forfeiture of any chattel which may have moved, to or caused the death of the deceased or any deodand whatsoever and it shall not be necessary in any indictment or inquisition for homicide to allege the value of the instrument which caused the death of the deceased, or to allege that the same was of no value." In connection with this measure it is interesting to add that as the deodand went, at least nominally, to the Sovereign, the then Lord Chancellor stated in the course of the discussion that it was necessary to have the Queen's assent to the introduction of the Bill, and this in fact he had obtained.

A Gleam of humour.

On a subject so funereal as deodands, it might be thought that there was no room for anything in the nature of humour to enter; but the old circuit days contrived to lend a little jocularity to it by reference to the necessity in connection with deodands for finding the specific value of the thing which caused the death. Thus Lord Eldon used to recall an incident that happened at York while he attended the circuit there as a junior. As he told the story it was as follows: while Sir Thomas Davenport, a very dull orator, was making a long speech, a chimney-sweeper's boy, who had climbed up to a dangerous place in front of a high gallery, having been put to sleep by him, fell down, and was killed. Whereupon Eldon—still of course plain John Scott—being then Attorney-General of the circuit, indicted Sir Thomas in the grand court for the murder of the boy, and the indictment (according to the rule of law which required that the weapon should be described, and that there should be an averment of its value, or that it was of no value) alleged that the murder was committed with "a certain blunt instrument of no value, called a long speech."—*The Law Times*.

INDIAN CASES

1940

JOURNAL

Vol. 185

IMPERIAL ACTS

ACT No. XXXV of 1939

THE DEFENCE OF INDIA ACT, 1939.

Received the assent of the Governor-General on the 29th September, 1939, and is published in the Gazette of India, Part IV, dated, 30th September, 1939.

An Act to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences.

Whereas an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences;

And whereas the Governor-General in his discretion has declared by Proclamation under sub-section (1) of section 102 of the Government of India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war;

It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. Short title, extent, commencement and duration.

(1) This Act may be called the Defence of India Act, 1939.

(2) It extends to the whole of British India, and it applies also—

(a) to British subjects and servants of the Crown in any part of India;

(b) to British subjects who are domiciled in any part of India wherever they may be;

(c) in respect of the regulation and discipline of any naval, military or air force raised in British India, to members of, and persons attached to, employed with, or following, that force, wherever they may be; and

(d) to, and to persons on, ships and aircraft registered in British India wherever they may be.

(3) This section shall come into force at

185—J. 3

once, and the remaining provisions of this Act shall come into force in such areas and on such date or dates as the Central Government may, by notification in the official Gazette, appoint.

(4) It shall be in force during the continuance of the present war and for a period of six months thereafter.

CHAPTER II.

EMERGENCY POWERS.

2. Powers to make rules.

(1) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower any authority to make orders providing for all or any of the following matters, namely:—

(i) ensuring the safety and welfare of His Majesty's forces, ships and aircraft, and preventing the prosecution of any purpose likely to prejudice the operations of His Majesty's forces or the forces of His Majesty's allies;

(ii) prohibiting anything likely to prejudice the training, discipline or health of His Majesty's forces;

(iii) preventing any attempt to tamper with the loyalty of persons in, or to dissuade (otherwise than with advice given in good faith to the person dissuaded for his benefit or that of any member of his family or any of his dependents) persons from entering, the service of His Majesty;

(iv) preventing anything likely to assist the enemy or to prejudice the successful conduct of war, including—

- (a) communications with the enemy or agents of the enemy,
- (b) acquisition, possession without lawful authority or excuse and publication of information likely to assist the enemy,
- (c) contribution to, participation in, or assistance in, the floating of loans raised by or on behalf of the enemy, and
- (d) advance of money to, or contracts or commercial dealings with the enemy, enemy subjects or persons residing, carrying on business, or being, in enemy territory;
- (v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers, or to promote feelings of enmity and hatred between different classes of His Majesty's subjects;

Explanation.—To point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of His Majesty's subjects does not amount to promoting such feelings within the meaning of this clause.

- (vi) requiring the publication of news and information;
- (vii) regulating the conduct of persons in respect of areas, the control of which is considered necessary or expedient, and the removal of persons from such areas;
- (viii) requiring any person or class of persons to comply with a scheme of defence;
- (ix) ensuring the safety of ports, dockyards, lighthouses, lightships, aerodromes, railways, telegraphs, post offices, signalling apparatus and all other means of communication, sources of water-supply, works for the supply of water, gas or electricity and any other place or thing, the protection of which is necessary for the defence of British India;
- (x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial

to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do, or abstain from doing, anything;

- (xi) the control of persons entering, departing from, or travelling in, British India, and of foreigners residing or being in British India;
- (xii) prohibiting or regulating traffic, and the use of vessels, buoys, lights and signals, in ports and territorial, tidal and inland waters;
- (xiii) restricting the charter of foreign vessels;
- (xiv) regulating the structure and equipment of vessels used or likely to be used by the Central Government, for the purpose of ensuring the safety thereof and of persons therein;
- (xv) regulating work in dockyards and shipyards in respect of the construction and repairs of vessels;
- (xvi) prohibiting or regulating the sailings of vessels from ports, traffic at aerodromes and the movement of aircraft, and traffic on railways, tramways and roads, and reserving, and requiring to be adapted, for the use of the Central Government, all or any accommodation in vessels, aircraft, railways, tramways or road vehicles for the carriage of persons, animals or goods;
- (xvii) impressment of vessels, aircraft, vehicles and animals for transport;
- (xviii) prohibiting or regulating the use of postal, telegraph or telephonic services, including the taking possession of such services and the delaying, seizing, intercepting or interrupting of postal articles or telegraphic or telephonic messages;
- (xix) regulating the delivery otherwise than by postal or telegraphic service of postal articles and telegrams;
- (xx) the control of any trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to, articles or things of any description whatsoever which can be used in connection with the conduct of war or for maintaining supplies and services essential to the life of

- the community ;
- (xxi) ensuring the ownership and control of mines by British subjects ;
- (xxii) controlling the use or disposal of, or dealings in, coin, bullion, securities or foreign exchange ;
- (xxiii) the control of any road or pathway, waterway, ferry or bridge, river, canal or other source of water-supply ;
- (xxiv) the requisitioning of any property, movable or immovable, including the taking possession thereof and the issue of any orders in respect thereof ;
- (xxv) prohibiting or regulating the possession, use or disposal of—
 - (a) explosives, inflammable substances, arms and ammunitions of war,
 - (b) vessels,
 - (c) wireless telegraphic apparatus,
 - (d) aircraft, and
 - (e) photographic and signalling apparatus and any means of recording information ;
- (xxvi) applying the provisions of the Sea Customs Act, 1878, and in particular section 19 thereof, to the prohibition or restriction of the import or export of goods to a particular person or a particular class of persons ;
- (xxvii) prohibiting or regulating the bringing into, or taking out of, British India and the possession, use or transmission of ciphers and other secret means of communicating information ;
- (xxviii) prohibiting or regulating the publication of inventions and designs ;
- (xxix) preventing the disclosure of official secrets ;
- (xxx) prohibiting or regulating meetings, assemblies, fairs and processions ;
- (xxxi) preventing or controlling any use, calculated to prejudice the public safety, the maintenance of public order, the defence of British India or the prosecution of war, of uniforms, flags and insignia and of anything similar thereto ;
- (xxxii) ensuring the accuracy of any report or declaration legally required of any person ;
- (xxxiii) preventing the unauthorised change of names ;
- (xxxiv) preventing anything likely to cause misapprehension in respect of the identity of any official person,

official document or official property or in respect of the identity of any person, document or property purporting to be, or resembling, an official person, official document or official property ;

- (xxxv) entry into, and search of, any place reasonably suspected of being used for any purpose prejudicial to the public safety or interest, to the defence of British India or to the efficient prosecution of war, and for the seizure and disposal of anything found there and reasonably suspected of being used for such purpose.

(8) The rules made under sub-section (1) may further—

- (i) provide for the arrest and trial of persons contravening any of the rules ;
- (ii) provide that any contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules, or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both ;
- (iii) provide for the seizure, detention and forfeiture of any property in respect of which such contravention, attempt or abetment as is referred to in the preceding clause has been committed ;
- (iv) confer power and impose duties—
 - (a) upon the Central Government or officers and authorities of the Central Government as respects any matter, notwithstanding that that matter is one in respect of which the Provincial Legislature also has power to make laws, and
 - (b) upon any Provincial Government or officers and authorities of any Provincial Government as respects any matter notwithstanding that that matter is one in respect of which the Provincial Legislature has no power to make laws ;
- (v) prescribe the duties and powers of public servants and other persons as regards preventing the contravention of, or securing the observance of, the rules ;
- (vi) provide for preventing obstruction and deception of, and disobedience to, any person acting, and inter-

ference with any notice issued, in pursuance of the rules ;

(vi) prohibit attempts by any person to screen from punishment any one, other than the husband or wife of such person, contravening any of the rules ;

(vii) empower or direct any authority to take such action as may be specified in the rules or as may seem necessary to such authority for the purpose of ensuring the public safety or interest or the defence of British India ;

(ix) provide for charging fees in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the rules.

(4) The Central Government may by order direct that any power or duty which by rule under sub-section (1) is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged—

(a) by any officer or authority subordinate to the Central Government, or

(b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws, by any Provincial Government or by any officer or authority subordinate to such Government, or

(c) by any other authority.

(5) A Provincial Government may by order direct that any power or duty which by rule made under sub-section (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under sub-section (4) to be exercised or discharged by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being an officer or authority subordinate to the Central Government.

3. Effect of rules, etc., inconsistent with other enactments.

Any rule made under section 2, and any order made under any such rule, shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

4. Special powers to control civilian personnel employed in connection with His Majesty's forces.

The Central Government may, by notification in the official Gazette, direct by general or special order that any persons who, not being members of His Majesty's forces, are attached to, or employed with, or following, those forces, shall be subject to naval, military or air force law, thereupon such persons shall be subject to discipline, and liable to punishment for offences, under the Indian Navy (Discipline) Act, 1934, the Indian Army Act, 1911, or the Indian Air Force Act, 1932, as the case may require, as if they were included in such class of persons subject to any of those Acts as may be specified in the notification.

5. Enhanced penalties.

(1) If any person, with intent to wage war against His Majesty or to assist any State at war with His Majesty, contravenes any provision of the rules made under section 2 or any order issued under any such rule, he shall be punishable with death, or transportation for life, or imprisonment for a term which may extend to ten years, and shall also be liable to fine.

(2) If any person—

(a) contravenes any such provision of, or any such rule or order made under, the Indian Aircraft Act, 1934, as may be notified in this behalf by the Central Government, or

(b) in any area notified in this behalf by a Provincial Government, contravenes any such provision of, or any such rule made under, the Indian Arms Act, 1878, the Indian Explosives Act, 1834, or the Explosive Substances Act, 1908, as may be notified in this behalf by the Provincial Government,

he shall, notwithstanding anything contained in any of the aforesaid Acts or rules made thereunder, be punishable with imprisonment for a term which may extend to five years, or, if his intention is to assist any State at war with His Majesty or to wage war against His Majesty, with death, transportation for life, or imprisonment for a term which may extend to ten years, and shall, in either case, also be liable to fine.

(3) For the purposes of this section, any person who attempts to contravene, or abets or attempts to abet, or does any act preparatory to, a contravention of, a provision of any law, rule or order, shall be deemed to have contravened that provision

6. Temporary amendments of Acts.

During the continuance of this Act,—

(1) section 1 of the Geneva Convention Act, 1911, shall have effect in British India as if, in sub-section (1) thereof, for the words "shall be liable on summary conviction to a fine not exceeding ten pounds", the words "shall be punishable with imprisonment for a term which may extend to six months and shall also be liable to a fine" had been substituted;

(2) section 5 of the Indian Official Secrets Act, 1923, shall have effect as if—

(a) in sub-section (1) thereof, after the words "in his possession or control" the words "any information likely to assist the enemy, as defined in the rules made under the Defence of India Act, 1939, or" had been inserted, and after the words "in such a place" the words "or which relates to, or is used in, a protected area, as defined in the rules made under the Defence of India Act, 1939, or relates to anything in such an area," had been inserted; and

(b) for sub-section (4) thereof, the following sub-section had been substituted, namely:—

"(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to five years, or, if such offence is committed with intent to assist any State at war with His Majesty, or to wage war against His Majesty, with death, or transportation for life, or imprisonment for a term which may extend to ten years, and shall in either case also be liable to fine."

(3) the Indian Press (Emergency Powers) Act, 1931, shall have effect as if in sub-section (1) of section 4 thereof, after clause (b), the following word and clause had been inserted, namely:—

"or

(bb) directly or indirectly convey any 'confidential information', any 'information likely to assist the enemy' or any 'prejudicial report', as defined in the rules made under the Defence of India Act, 1939, or are calculated to instigate the contravention of any of those rules,";

(4) the Indian Aircraft Act, 1934, shall have effect as if—

(a) at the end of clause (r) of sub-section (2) of section 5 the following words had been inserted, namely:—

"including the taking of steps necessary to secure compliance with, or to prevent contravention of, the rules regulating such matters, or, where any such rule has been contravened, to rectify, or to enable proceedings to be taken in respect of, such contravention";

(b) in clause (b) of sub-section (1) of section 8, for the words, brackets, letters and figures "clause (h) or clause (i) of sub-section (2) of section 5", the words, brackets, letters and figures "clauses (d), (e), (h), (i), (k) or (l) sub-section (2) of section 5, or the commission of an offence punishable under section 11," had been substituted;

(c) in section 11, after the words "in the air" the words "or in such a manner as to interfere with any of His Majesty's forces, ships or aircraft" had been inserted;

(d) in section 13, for the words, brackets, figures and letters "clause (i) or clause (l) of sub-section (2) of section 5" the words, brackets, figures and letters "clauses (c), (d), (e), (h), (i), (j), (k) or (l) of sub-section (2) of section 5, or punishable under section 11" had been substituted; and

(e) section 14 had been omitted; and

(5) the Indian Navy (Discipline) Act, 1934, shall have effect as if for section 90 of the Naval Discipline Act as set forth in the First Schedule to the first-named Act, the following section had been substituted, namely:—

"90. (1) If any person who would not otherwise be subject to this Act enters into an engagement with the Central Government to serve His Majesty—

(a) in a particular ship, or

(b) in such particular ship or in such ships as the Officer Commanding the Indian Navy, or any officer empowered in this behalf by the Officer Commanding the Indian Navy, may from time to time, determine,

and agrees to become subject to this Act upon entering into the engagement, that person shall, so long as the engagement remains in force, and notwithstanding that for the time being he may not be serving in any ship, be subject to this Act, and the provisions of this Act shall apply in relation to that person, as if, while subject to this Act, he belonged to His Majesty's navy and were borne on the books of one of His Majesty's ships in commission.

(2) The Central Government may by order direct that, subject to such exceptions as may, in particular cases, be made by or on behalf of the Officer Commanding the Indian Navy, persons of any such class as may be specified in the order shall, while subject to this Act by virtue of this section, be deemed to be officers or petty officers, as the case may be, for the purposes of this Act or of such provisions of this Act as may be so specified; and any such order may be varied or revoked by a subsequent order."

7. Saving and temporary amendment of Act VIII of 1928.

(1) Notwithstanding anything contained in the Indian Tea Control Act, 1938, the Central Government may appoint any person to be an additional member of, and to act as Chairman of, the Indian Tea Licensing Committee during the continuance of this Act, and on such appointment being made and until this Act ceases to be in force, the Chairman of the said Committee elected under section 5 of that Act shall cease to exercise the functions of Chairman.

(2) If in pursuance of any scheme for the control of import of Indian tea into the United Kingdom, the Central Government considers it necessary or expedient so to do, it may by order direct the Indian Tea Licensing Committee to apportion the requirement of the United Kingdom among the tea estates in accordance with such principles as may be laid down in the order, and the said Committee shall comply with such order.

(3) If at any time during the continuance of this Act, the agreement referred to in the preamble to the Indian Tea Control Act, 1938, is determined or otherwise ceases to be valid as between the parties thereto, the provisions of that Act shall, notwithstanding the said determination or invalidity of the agreement, continue in force:

Provided that nothing in this sub-section shall be construed as continuing the Indian Tea Control Act, 1938, in force after the 31st day of March, 1943.

CHAPTER III.

SPECIAL TRIBUNALS.

8. Constitution of Special Tribunals.

(1) The Provincial Government may for the whole or any part of the Province constitute Special Tribunals which shall consist of three members appointed by the Provincial Government.

(2) No person shall be appointed as a member of a Special Tribunal unless he—

(a) is qualified under sub-section (3) of section 220 of the Government of India Act, 1935, for appointment as a Judge of a High Court; or

(b) has for a total period of not less than three years exercised, whether continuously or not, the powers under the Code of Criminal Procedure, 1893 (hereafter in this Chapter referred to as the Code) of any one or more of the following, namely:—

(i) Sessions Judge, Additional Sessions Judge, Chief Presidency Magistrate, Additional Chief Presidency Magistrate.

(ii) District Magistrate, Additional District Magistrate.

(3) At least one member of a Special Tribunal shall be qualified for appointment thereto under clause (a) of sub-section (2), and where only one member is so qualified under that clause, at least one other member shall be qualified for appointment under clause (b) of that sub-section by virtue of having exercised powers exclusive of those specified in sub-clause (ii) of the said clause (b).

9. Jurisdiction of Special Tribunals.

The Provincial Government may, by general or special order, direct that a Special Tribunal shall try any offence—

(a) under any rule made under section 2, or

(b) punishable with death, transportation or imprisonment for a term which may extend to seven years,—

triable by any Court having jurisdiction within the local limits of the jurisdiction of the Special Tribunal, and may in any such order direct the transfer to the Special Tribunal or any particular case from any other Special Tribunal or any other Criminal Court not being a High Court.

10. Procedure of Special Tribunals.

(1) A Special Tribunal may take cognizance of offences without the accused being committed to it for trial.

(2) Save in cases of trials of offences punishable with death or transportation for life, it shall not be necessary in any trial for a Special Tribunal to take down the evidence at length in writing, but the Special Tribunal shall cause a memorandum of the substance of what each witness deposes to be taken down in the English language, and such memorandum shall be signed by a member of the Special Tribunal and shall form part of the record.

(3) A Spécial Tribunal shall not be bound to adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interests of justice.

(4) A Spécial Tribunal shall not, merely by reason of a change in its members, be bound to re-call and re-hear any witness who has given evidence, and it may act on the evidence already recorded by or produced before it.

(5) After an accused person has once appeared before it, a Spécial Tribunal may try him in his absence if, in its opinion, his absence has been brought about by the accused himself for the purpose of impeding the course of justice, or if the behaviour of the accused in Court has been such as, in the opinion of the Spécial Tribunal, to impede the course of justice.

(6) In the event of any difference of opinion among the members of a Spécial Tribunal, the opinion of the majority shall prevail.

(7) The Provincial Government may, by notification in the official Gazette, make rules providing for—

(i) the times and places at which Spécial Tribunals may sit; and

(ii) the procedure to be adopted in the event of any member of a Spécial Tribunal being prevented from attending throughout the trial of any accused person.

(8) A Spécial Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Act or by rules made thereunder, follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates.

11. Exclusion of public from proceedings of Spécial Tribunals.

In addition, and without prejudice, to any powers which a Spécial Tribunal may possess by virtue of any law for the time being in force to order the exclusion of the public from any proceedings, if at any stage in the course of a trial of any person before a Spécial Tribunal application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Spécial Tribunal may make an order to that effect, but the passing of sentence shall in any case take place in public.

12. Powers of Spécial Tribunals.

A Spécial Tribunal shall have all the

powers conferred by the Code on a Court of Session exercising original jurisdiction.

13. Sentences of Spécial Tribunals.

(1) A Spécial Tribunal may pass any sentence authorised by law.

(2) A person sentenced by a Spécial Tribunal—

(a) to death or transportation for life, or

(b) to imprisonment for a term extending to ten years under section 5 of this Act or under sub-section (4) of section 5 of the Indian Official Secrets Act, 1923, as amended by section 6 of this Act—

shall have a right of appeal to the High Court within whose jurisdiction the sentence has been passed, but save as aforesaid and notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of a Spécial Tribunal, and no Court shall have authority to revise such order or sentence, or to transfer any case from a Spécial Tribunal, or to make any order under section 491 of the Code, or have any jurisdiction of any kind in respect of any proceedings of a Spécial Tribunal.

(3) The powers conferred upon the Provincial Government and the Governor-General by Chapter XXIX of the Code shall apply in respect of a person sentenced by a Spécial Tribunal.

CHAPTER IV.

SUPPLEMENTAL.

14. Jurisdiction of ordinary Courts.

Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.

15. Ordinary avocations of life to be interfered with as little as possible.

Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India.

16. Savings as to orders.

(1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the

meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

17. Protection of action taken under the Act.

(1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(2) Save as otherwise expressly provided under this Act, no suit or other legal proceeding shall lie against the Crown for any damage caused or likely to be caused by anything in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

18. Protection from prosecution, etc., of members of military and police forces of Indian States while serving His Majesty.

Every provision of law for the time being in force which gives protection, whether specifically or otherwise, to members of His Majesty's military forces or of the police forces in British India from any prosecution or other legal proceedings or from any other liability shall apply also to members of the military or police forces respectively of any Indian State, while attached to, operating with, or assisting any of His Majesty's military forces or any police force in British India.

19. Compensation to be paid in accordance with certain principles for compulsory acquisition of immovable property, etc.

(1) Where by or under any rule made under this Act any action is taken of the nature described in sub-section (2) of section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out, that is to say:—

- (a) Where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement.
- (b) Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified under sub-section (3) of section 220 of the above-mentioned Act for appointment as a Judge of a High Court.
- (c) The Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property acquired, to assist the arbitrator, and where

such nomination is made, the person to be compensated may also nominate an assessor for the said purpose.

(d) At the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinions is a fair amount of compensation.

(e) The arbitrator in making his award shall have regard to—

- (i) the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, so far as the same can be made applicable; and
- (ii) whether the acquisition is of a permanent or temporary character.

(f) An appeal shall lie to the High Court against an award of an arbitrator, except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government.

(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section.

(2) The Central Government may make rules for the purpose of carrying into effect the provisions of this section.

(3) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

- (a) the procedure to be followed in arbitrations under this section;
- (b) the principles to be followed in apportioning the costs of proceedings before the arbitrator and on appeal;
- (c) the maximum amount of an award against which no appeal shall lie.

20. Definition.

In this Act, unless there is anything repugnant in the subject or context, the expression "Provincial Government" means, in relation to a Chief Commissioner's Province, the Chief Commissioner.

21. Repeal and saving.

The defence of India Ordinance, 1939, is hereby repealed and any rules made, anything done and any action taken in exercise of any power conferred by or under the said Ordinance shall be deemed to have been made, done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 3rd day of September, 1939.

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

APPEAL AFTER PLEA OF GUILTY.

A type of appeal which is by no means infrequent in practice is that of appeal against conviction where a plea of guilty has been entered. At Surrey Quarter Sessions, on 22nd September, the appellant, who had pleaded guilty to a charge of obtaining credit by fraud, appealed against his conviction (*R. v. Neill*). In his notice of appeal he stated that he was not guilty, the matter complained of was a civil debt only, and he did not understand until after sentence. He had admitted a number of similar offences, and the police had found pawn tickets and a watch on him. On 6th May, the appellant, giving the name of Fitzgerald, had visited O, and told her that he had been sent from the newspaper shop for lodgings. He untruthfully stated that he was working on a building in the district. On 12th May he told O: "I am sorry to disappoint you; the boss has gone to France to bury his sister and has not paid us." On 19th May he left without paying.

On being cautioned, he said: "I have been to see the lady since and have paid her. I owe one or two people money, but you can't pay if you are out of work and sleeping out."

On appeal, it was held that there may have been some doubt in the mind of the appellant as to what he was pleading to, and he was therefore permitted to proceed with his appeal against conviction. The appeal was, however, dismissed.

Normally criminal courts are unwilling to allow appeals against conviction to proceed where a plea of guilty has already been entered. There are cases, nevertheless, where appeals have been allowed to proceed and have actually been successful although a plea of guilty has been entered. Where a learned commissioner at the Central Criminal Court persuaded a prisoner to plead guilty to a charge of abduction, although the prisoner insisted that the

girl whom he was alleged to have abducted said that she would rather drown herself than go home, the prisoner's appeal was allowed to proceed, and it succeeded. The learned commissioner was apparently under the erroneous impression that the offence consisted in preventing the girl's parents from knowing her whereabouts, and it was to this imaginary offence that the prisoner had pleaded guilty (*R. v. Alexander*, 107 L. T. 240).

A similar case occurred in *R. v. Ingleson* [1915] 1 K. B. 512. The appellant had pleaded guilty to an indictment charging him with stealing horses and receiving them knowing them to have been stolen. When asked whether he had anything to say why the court should not pass sentence upon him, he handed up a written statement, containing the words: "I am guilty of taking the horses not knowing them to have been stolen." He was sentenced to four months' imprisonment with hard labour. In allowing the appeal, Lord Coleridge, J., said that the recorder could not have read to the end of the statement, and added: "It is most important that a prisoner should not be misled by the plea of guilty. He clearly thought he was guilty without having any felonious intent to steal. The absence of felonious intent is inconsistent with a plea of guilty, either to the stealing or receiving. In those circumstances it is quite clear that the plea of guilty was wrongly entered and all the proceedings consequent on that plea are bad. A plea of not guilty must be entered and the case must go back for rehearing."

The effect of such a direction, as is shown in *R. v. Baker*, 7 Cr. App. Rep. 217, is that there has been no proper plea of guilty. The form of order allowing the appeal, as recorded in that case, was: "The Court . . . doth allow the said appeal, and doth order that the conviction and

judgment be set aside and annulled, and that the appellant do appear at the next session of the Central Criminal Court and plead to and answer the said indictment and that in the meantime, the appellant be remanded in custody." In other words, the whole proceedings are treated as a nullity, and a *renire de novo* is ordered (see *Crane v. Director of Public Prosecutions* [1921] 2 A. C. 299).

"It will require a very strong case and exceptional circumstances," said the court in *R. v. Lucas*, 1 Cr. App. Cas. 61, "to induce the court to give leave to re-open a case in which the prisoner has pleaded guilty." In *R. v. Forde* [1923] 2 K. B. 400, at p. 403, Avory, J., went into details: "A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged." In *Lucas's Case* leave to appeal was refused when it was stated, on behalf of the applicant that he would not have pleaded guilty had he not been so upset at the trial. In *Forde's Case* it was submitted that the plea of guilty to a charge of indecent assault where carnal knowledge of a girl under sixteen years of age was charged in the same indictment was entered by mistake because, it was contended, the appellant was under twenty-three years

of age and he had, in the circumstances, reasonable grounds for believing that the girl was of or above the age of sixteen years, within the proviso to s. 2 of the Criminal Law Amendment Act, 1922. It was held that the proviso did not apply to a charge of indecent assault and the appeal was dismissed.

Where there is merely an appeal against sentence, there is nothing in a plea of guilty to prevent the appeal from proceeding. In appeals to quarter sessions this is expressly provided by s. 25 of the Criminal Justice Act, 1925. Further, it has been held, on the true construction of s. 4 (3) of the Criminal Appeal Act, 1907, that where a person pleads guilty at his trial the Court of Criminal Appeal has power to quash the sentence passed upon him and substitute such sentence as they think proper (*R. v. Ettridge* [1909] 2 K. B. 24). In many cases there is more hope of success on an appeal against sentence where the prisoner has pleaded "guilty" than where the prisoner has pleaded "not guilty," for, as Channell, J., pointed out in *R. v. Sneasby*, 2 Cr. App. Rep. 178: "One is more reluctant to interfere where the judge has heard the whole case." In that case the sentence was substantially reduced on the ground that if the learned commissioner who tried the case had had all the facts before him he would probably not have passed the sentence he did.—*The Solicitors' Journal*.

CONSENT TO ASSAULT

In a recent police court case at Watford (*R. v. Starkey*, *The Times*, 16th August) the chairman of the magistrates made a statement of law which deserves careful examination. On summons for assault taken out by a wife against her husband, the wife asked for the summons to be withdrawn on the ground that she had forgiven the assault. She said: "I gave him sauce, and he will not have it. He hit me with a whip I forgive him for what he has done." The magistrate then asked her whether she had decided that she would not give him any sauce, and, on receiving her affirmative answer, he asked whether she was quite willing that he should thrash her if she did, and she again replied "Yes." The chairman then remarked: "It seems to me that you are arranging a new code outside our law here." The defendant said they had been

married for nineteen years and he had only hit his wife twice during that time. On binding over the defendant for twelve months not to assault his wife with a whip or otherwise, the chairman said: "I want to make it quite clear that you cannot treat your wife as if she is a slave. Her statement that she is willing for you to thrash her if she answers you back will not work in a free country like this."

A consideration of the case of *R. v. Donovan* [1934] 2 K. B. 498 seems to show that the Watford magistrate's somewhat wide statement of the law on the subject of consent to assault needs some qualification. In that case the appellant was charged at quarter sessions with (a) indecent assault, and (b) common assault, on a girl of seventeen. The evidence was that he had beaten her with a cane, and the

defence was that the girl had consented and that the onus was on the prosecution to prove lack of consent. He was found guilty and was sentenced to concurrent sentences of eighteen months' imprisonment for indecent assault and six months' imprisonment for common assault.

The court delivered a considered and unanimous judgment (read by Swift, J.), allowing the appeal. It was pointed out in the judgment that the beating was in circumstances of indecency, to gratify a form of sexual perversion to which the appellant was apparently addicted, and the medical evidence was that the beating was "fairly severe." There was independent evidence of a telephone conversation which showed that the prosecutrix submitted to going to the place where the beating took place, "with full knowledge of the appellant's intentions and without reluctance."

One of the grounds on which the appeal was allowed was that the chairman failed to direct the jury in accordance with the requirement laid down in *R. v. May* [1912] 3 K. B. 572, 575: "The court is of opinion that if the facts proved in evidence are such that the jury can reasonably find consent, there ought to be a direction by the judge on that question, both as to the onus of negating consent being on the prosecution and as to the evidence in the particular case bearing on the question."

With regard to the contention on behalf of the Crown that this was a case in which it was unnecessary for the prosecution to prove absence of consent, the judgment went on to state that the learned judges had considered the authorities and thought it of importance that they should state their opinion on the law applicable to the case. The law was that no one could license another to do an act which was in itself criminal. In such cases it was never necessary to prove absence of consent. "There are, however," continued the judgment, "many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the

person affected. What is, in one case, an innocent act of familiarity or affection, may, in another, be an assault, for no other reason than that, in the one case there is consent, and in the other consent is absent. As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

The court then referred to some of the well-established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. Such are the exceptions of manly diversions such as foils or wrestling, where bodily harm is not the motive, and rough and undisciplined sport or play, where bodily harm is not the motive. The court held that the case did not come into either of those categories. The jury, however, should have been directed that they had first to be satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix. "For this purpose we think that 'bodily harm' has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than transient and trifling." The question as to the likelihood or intention of bodily harm was never left to the jury and therefore there had been misdirection.

An old writer once said that it was permitted to a husband to chastise his wife with a rod no thicker than a man's thumb, but such a view could not prevail in these days of sex equality, even if the chastisement could not cause bodily harm. Where, however, there is full consent by a penitent wife, and the circumstances of the case are such that there was no likelihood or intention of bodily harm, it is wrong to suggest that the law could interfere in what is an entirely domestic affair.—*The Solicitors' Journal*.

Extracts from Contemporaries.

Unusual Probation Condition

The obstinacy of the errant young is exasperating to their elders and often dangerous to themselves. In a case at Leamington a girl thief, who had, by

excessive slimming, seriously undermined her health and indirectly, no doubt, her morale, was bound over with a condition that she should give up her inexpert treatment of herself. She broke this con-

dition of her recognizance. When brought up, she was asked why she was so persistent in the habit. She replied that her body was her own property to do with as she liked. If it was against the law to take these tablets, why were they manufactured and sold?

The mayor said it would be in the girl's own interest that she should receive the training and attendance which six months' imprisonment would impose.

One pictures her in prison, getting comfortably plump in body and sensible in mind.—*Justice of the Peace.*

Fun Fairs

The complaint against the fun fair is that it offers thinly disguised gambling to youthful buyers of chances, who sometimes pay with other people's money, and

at the best waste their own pennies. Well, there was gambling before ever a fun fair opened or an automatic machine was devised to take a penny. Did not Henry VIII prohibit "shove-groat" by a law passed in the interests of archery on the petition of the bow and arrow makers? We called it, by the way, "shove ha'penny" in the days of our own youth. The gambling instinct is simply ineradicable. If you leave men with nothing but their ten fingers they will use them as instruments of gaming. They actually do so in Italy when Signor Mussolini is not looking. Till we give the young some alternative, light and noisy, the opportunity to try, try again (which we always were taught was so estimable in Bruce's spider), and the chance of a prize, will continue to dazzle their fancy.—*Justice of the Peace.*

REVIEWS.

Broom's Legal Maxims. Tenth Edition.—By R. M. KRESLEY, M. A., LL. M. (OANTAB.), PUBLISHED BY SWEET & MAXWELL, LTD., 3, CHANCERY LANE, W. O. 2. PRICE £1, 12s. 6d. net.

The late Dr. Broom published the first edition of this book in 1845 and since then it was recognized as a masterly exposition of the principles upon which the English Common Law is based. The learned Editor of the present edition has followed the example set in by previous editions, by keeping the arrangement of the subject-matter, wherever possible, unchanged. Many new cases have been added and some transfers from one chapter to another have been made.

In the legal science, perhaps more frequently than in any other, reference must be made to first principles. Hence a knowledge of first principles is at least as essential in law as in other sciences. In the present work the learned author has not only pointed out the most important Legal Maxims but also explained and illustrated their meaning. He has shown the various exceptions to the rules which they enunciate. In this task the learned author has consulted various Reports and Treatises on the subject. The plan adopted, in presenting the subject before the reader, is both logical and natural. The book is useful not only for the use of

students intending to practice at the Bar but also to the first-rank practicing lawyer, who may be desirous of applying a Legal Maxim to the case before him. We are sure that this work of Dr. Broom shall remain all the time a legal classic.

Laws of India or Civil Practice, Volume 1.—By MR. D. R. PREM, ADVOCATE, FEROZPORE CITY, PRINTED AT "LABOR ART PRESS." PRICE RS. 12 PER VOLUME.

The learned and well-known author of "Criminal Practice" has now brought out the first Volume of his new work Laws of India or Civil Practice, which has been cast on the same lines as his previous work. The work is to be completed in 5 or 6 Volumes. The work, which is styled by Sir B. L. Mitter, Advocate-General of India as *magnum opus* is an exhaustive encyclopædia of Civil Case-law. The alphabetical arrangement will be found most useful by the busy Practitioners and Judges and will save a lot of their time in finding out the law point required. The work is a valuable addition to the law publications. We hope that the work will be warmly received by the Bench and the Bar alike. The printing and get-up are good.

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

CHARACTER TRAINING CENTRES

The following speech was delivered by the Hon'ble Sir Douglas Young, Chief Justice of the Lahore High Court at the garden party given by the citizens of Ludhiana:—

About eight years ago at Allahabad I first realized the necessity of trying to do something for Indian boys, especially for those of the poorer classes. I was attending the Finals of a Football competition. At half-time some two or three hundred small boys from the city of Allahabad rushed on to the field trying, during the interval, to get one kick at the football. This was the only opportunity which these small boys had to indulge in the very proper and natural propensity of a boy for ball games. Except to some extent in the schools and colleges of India, little or nothing is done to amuse, and through amusement to educate the boys of India. In addition, even in the schools and in their homes, education in discipline and self-control is lacking, with the inevitable result that the lack of discipline and control is damaging to the State. An excess of crime is largely due to this fact. We get in this country astonishing examples of undisciplined conduct, not only in schools and colleges but occasionally even in the learned profession of law. Lack of discipline is as harmful in the educated as in villagers.

Since I have been in the Punjab I have had an opportunity to try and do something to remedy this condition of affairs, and I must say I have been considerably encouraged by the interest which thinking and public-spirited people are taking in this subject. Much more, however, requires to be done. In my opinion nothing can be more important to the future of India than that public opinion should be mobilized in the endeavour to give the boys of India what might properly be termed 'character training'. We have now completed in Lahore an institution for this purpose. We have com-

bined training in the laws and practices of scouting with the best and most modern form of physical education together with instruction in the teaching of all kinds of sports and games. The year's course which we are giving to graduates turns out, in my opinion, the most useful type of educated and trained men. Every person who has seen what our new College can do in this way has been in agreement with me as regards the necessity of spreading throughout the Punjab what we teach in our College. We have now got a central institution where the curriculum contains all that is necessary to improve India in these essential matters. About a year ago I discussed this matter with Mr. Hervey, the Principal of the Government College in this place. He is, I need hardly say, an enthusiastic supporter of the scheme. The District authorities, too, realize the importance of providing in Ludhiana a centre where the interests of the boys of Ludhiana may be looked after. Land has been promised, a Club House has been planned which will house not only the headquarters of scouting, athletics, physical education and Red Cross work, but where the boys of Ludhiana can get the sports and games they need for amusement and health, physical education, and the character training which scouting provides, in all a complete course both for the body and the character of your boys. I have been only too delighted to come to Ludhiana to assist in the campaign to obtain for this city this very necessary institution. Rs. 20,000 is required for the building, a tube-well and other necessities. I am not here to take money out of Ludhiana. The money that is collected here will stay here and will be of permanent and enduring benefit to your town. If you have such an institution in Ludhiana you will be the happier for it.

My ambition is to see such an institution in every town of the Punjab and in charge

of it. I would like to see one of our trained graduates from the College of Physical Education and Scouting at Lahore. I estimate that Rs. 50,000 will provide in each town such an institution with a trained man in charge of it. Surely this is not an impossible ideal. When each town has its own local institution, then it would be possible to have similar smaller branches in the villages. I would like to see Government also give a grant to every such local institution. Rs. 1,000 a year would, I think, provide and maintain all the necessary equipment. Half a lac or one lac a year—even in these days of enormous expenditure in Hissar—might—I think—be provided in grants. Any expenditure on this project, I am certain, would produce large dividends. Crime necessarily would decrease and with it the enormous expenditure on crime. There would be more unity and co-operation in India. The energies of Indians would not be wasted in futile displays of indiscipline. We at Lahore would be responsible for organization and, if we are dealing with 50 or even 100 such branch institutions, we could make arrangements to buy at very cheap rates all the necessities for games and sporting activities generally

which we could distribute to the branches. We are also there to assist by expert advice and for inspection purposes to keep the standard of training of the highest and most modern level.

I would like the district authorities everywhere to consider this proposition and, if any district authorities or any association of public-minded citizens anywhere require my assistance, I would only be too glad to be at their disposal during the short time which remains to me in this country. My ambition is to see in the Punjab before I leave India a complete organized scheme for character-building and training in healthy sports, physical education, discipline and self-control. I know the personal opinion on this matter of His Excellency the Governor, the Premier and the other Ministers of Government. With the assistance primarily of public-minded people in each locality and with some small assistance from Government, I see no reason why the scheme should not be in operation in the Punjab within a year or two. Ludhiana has the chance of being the pioneer in the *mofussil*, and I will be gravely disappointed if the citizens of Ludhiana do not seize such a great opportunity.

Extracts from Contemporaries.

Don't and Do

The problem of the evacuated children is, in Browning's alliterative phrase, "multi-form, manifold and menacing." It is very much on the mind of those of us who have been concerned with the work of juvenile courts. "We make no excuse for returning to it here.

We have flattered ourselves that we really have of late years got to know something about the causes of juvenile delinquency. Certainly no one with any sense has failed to recognise that they are multiple and complicated, but we are sure that one very potent factor is merely the ordinary human craving to escape from boredom. "What shall we do now?" is the everlasting cry of the healthy playing child.

"Go and see what baby's doing and tell him not to do it," may be a pardonable utterance for a harassed mother. As a social policy for the young it falls short. "Don't" and "Do" stand for two sharply contrasted methods. It would be foolish to think that we can manage entirely without prohibitions, but the emphasis ought to be on encouragement, and not on nega-

tion. The men who built up the boy scout movement have done more to check juvenile wrong-doing than all the framers of the criminal law from Moses to the present day.

A few weeks before the war some justices and others interested in juvenile delinquency met for a talk. The word "delinquency," by the way, is really worth noticing. We are no longer so ready to stigmatise youthful lapses as "crime," as people were in the days when they sometimes hanged for thieving, small boys who could not, for their weeping, see where to set their feet on the scaffold. Many things came up for discussion, but mainly the talk was about fun fairs and open counter shops and then community centres. —J. P.

Prize Courts.

The announcement that letters patent have been issued for the establishment of a Prize Court is a reminder that even in war time, when ships and cargo may have been captured by one of the belligerents, the question whether the seizure was or was not lawful is to be determined by a

judicial tribunal which we know as a Prize Court. The jurisdiction of this Court, which is exercised by the Admiralty judges, with an appeal to the Judicial Committee of the Privy Council, is based upon international law, unless, in so far as Great Britain is concerned, that has been otherwise affected by statute. During the Great War, the Prize Court was kept fully occupied in the discussion and decision of a multitude of interesting questions arising out of the seizure of alleged contraband of war, among the many points laid down being that a cargo of petroleum owned by a German company shipped at a neutral port on board a British vessel was not immune from condemnation by reason of having been shipped in a British vessel before the outbreak of war. In another case it was held that although a subject of a belligerent State can acquire a commercial domicile in a neutral State which will protect his goods from condemnation, residence in the neutral State is an essential condition of such domicile. Consequently, where none of the German partners in a firm carrying on business in Buenos Aires, whose goods were shipped in a British vessel before the outbreak of war, were resident in the Argentine Republic at the time of seizure, the goods must be regarded as enemy property and subject to condemnation.—S. J.

Scraps of Paper.

It has been wisely said that treaties are for the most part not international law, but contracts between States, the interpretation and application of which are governed by international law.

Hitler, *furor teutonicus*, and Stalin, the red czar, are treating the repudiation of contracts according to the will of one party of them, as ordinary international procedure. It is by them asserted to be justifiable on such grounds as the necessity of the stronger party as seen by himself (Hitler's *Lebensraum* doctrine), the temporary disablement of the weaker party in a war, not with the other party to the treaty-contract, but with another aggressor (Stalin's ground of justification for the Russian entry into Poland).

This is the doctrine of *rebas sic stantibus* carried to crazy point. It makes the plighted word of national representatives idle breath and their signature a mere dastardly spurt of the pen. Treaties, especially non-aggression pacts, become scraps of paper. What these over-clever bullies overlook are the difficulties which even

such high-mightinesses get into when nobody can believe a word they say, and others fight on in determination or desperation. When they themselves would fain make peace.

The liar manifest, though he has power to make the skies fall, cannot compel belief.—J. P.

Discipline and Character.

Relationship between discipline, character and crime is obvious. For character-building, training in discipline is essential. Our leaders, many a time fail to control a mob whom they address. Result is riots. Even amongst students, college students not excepting, we get the same picture, though not with the same consequences. What the Indian youth to-day lacks is discipline in mind, body and deed. Actions must be subordinated to our better judgments, called by some "conscience". Child must be taught to distinguish wrong from right. His actions must be watched—in short, he must be trained. Like soldiers in the field, his action must respond to his superior will force. This is what we call character. Here is a field then for our leaders. It is one of the ambitions of Hon. Sir D. Young, the Chief Justice of the Punjab, to inculcate this spirit in the youths of the Province. In his career as the Chief Justice, he has never lost an opportunity to "serve the youths"—be it in public functions or on the Bench.

—and crime.

We respectfully agree with him when he said* the other day at a garden party given in his honour by the citizens of Ludhiana, "even in the schools and in their homes education in discipline and self-control is lacking, with the inevitable result that the lack of discipline and control is damaging to the State. An excess of crime is largely due to this fact. We get in this country astonishing examples of undisciplined conduct not only in schools and colleges, but occasionally even in the learned profession of law. Lack of discipline is harmful in the educated as in villagers". His plea for institutions for "character-training" is timely. There is already one college specially started with this aim in view, in Lahore, at his instance and effort. That shall be a standing monument to his zeal towards the Youths of India. The money spent over such institutions, is sure to produce large dividends. Crime would decrease and with

*Full report of the speech of his Lordship appears on p. 21 of the Journal section of this issue.—[Ed.]

it the enormous expenditure on crime. There would be more unity and co-operation, and canker of communalism will slowly subside.

We only wish, his cry is not a cry in wilderness. What we want, is greater number of such public spirited men giving such silent services to the cause of Indian nationhood.

The Poor Woman's Dog

One of the many surprising things discovered in the courts, as elsewhere, is what will move people to tears. The world is full of woes, and, to save us all going mad with horror, they are largely ignored, but if you want to see men made properly soft and their purse-strings loosed tell them of the widow and her dog, her only friend in a harsh world, with whom she must part because she cannot afford a license. She can do, in fact, better without a license, if only a reporter with a need for a bit of copy happens to be in court when her case comes on and the sub-editor wants something to fill a corner.

We remember one such case many years ago of a poor widow and her canine friend. She quite genuinely could not afford a license, but both she and her dog looked in good condition. She was not fined, but merely told she must comply with the law. Within twenty-four hours a dozen licenses had been taken out in her name, and rich people were sending hot-foot to the police court to enquire into the sad case; the ladies came in person, the men sent their valets or their butlers. Within a week over a hundred pounds had arrived in small sums, and they dabbled in for months, as the provincial press belatedly copied the pathetic paragraph. No longer was the widow's cupboard bare or the poor dog without a bone. Both of them had a real good time for quite a long time.

Even with the present plethora of horrors from the Far East to the Baltic and on all the seven seas, the dog without a license can find a corner in an evening paper. This time it is a poor invalid boy who needs four-footed companionship and a kindly poor woman who gives it him without paying toll to the public purse. But is she in trouble? She is not. She thought the animal had to be destroyed because she could not pay the fine of twelve shillings and sixpence. The dog's death was not demanded, as, of course, that would not have wiped out the fine, but that does not matter.

"Many people have communicated with this office, offering to pay the fine and the license as well." Thus runs the legend beneath the picture in an evening paper, of a careworn woman's face and the dear, sweet doggie held up in her arms, probably wondering what it is all about.—J. P.

Road accidents and the black-out.

The nature of the road casualty problem under black-out conditions emerges more clearly as further experience is gained. Figures for October record a total of 919 deaths, compared with 1,130 for the previous month and 641 for the corresponding month last year. For the first time the return of the Ministry of Transport shows the number of fatal accidents which occurred during the hours of darkness. The total for last month amounted to 564. Of the 572 pedestrians killed during the month, no less than 424 were killed in the dark. Only three of these were under fifteen years of age. On the other hand, it was stated at a recent Press conference arranged by the National "Safety First" Association that about one-third of those killed on the roads since the beginning of the war were over seventy years of age, one-third were between sixty and seventy, and one-sixth were between fifty and sixty, only one sixth being under fifty. It was accordingly suggested that, if elderly people were to refrain from going out in the dark except when absolutely necessary, the number of accidents would be greatly reduced. According to Mr. Howard Hodges, acting General Secretary of the Association, it has been found that a great percentage of street accidents have been caused by pedestrians stepping into the path of a car in the belief that the driver could see them. The pedestrian, he said, had not been able to rid himself of his peace-time road psychology and subconsciously thought he could be seen. The correctness of this diagnosis would appear to be confirmed by the higher incidence of accidents among the middle-aged and elderly, among whom habits, once formed, are perhaps less easily eradicated. But it also suggests that no great improvement in the situation is likely to be effected by a more rigorous enforcement of the law. Proposals put forward by the Association to the Ministry of Transport and the Ministry of Home Security include the modification of lighting restrictions and the employment of air-raid wardens to supplement the work of the police in giving warnings and advice to road users.—S. J.

IMPERIAL ACTS.

ACT No. XXXVI of 1939

THE INDIAN AIR FORCE VOLUNTEER
RESERVE (DISCIPLINE) ACT, 1939

Received the assent of the Governor-General on the 29th September 1939, and is published in the Gazette of India, Part IV, dated, 30th September, 1939.

An Act to provide for the discipline of members of the Indian Air Force Volunteer Reserve raised in British India on behalf of His Majesty.

Whereas it is expedient to provide for the discipline of members of the Indian Air Force Volunteer Reserve raised in British India on behalf of His Majesty ;

It is hereby enacted as follows :—

1. *Short title, extent and commencement.*

(1) This Act may be called the Indian Air Force Volunteer Reserve (Discipline) Act, 1939.

(2) It extends to the whole of British India and applies to members of the Indian Air Force Volunteer Reserve wherever they may be.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

2. *Power to make rules for regulation of the Indian Air Force Volunteer Reserve.*

The Central Government may make rules for the government, discipline and regulation of the Indian Air Force Volunteer Reserve.

3. *Liability to Indian Air Force Act, 1932.*

Every members of the Indian Air Force Volunteer Reserve, while undergoing training in any unit, or otherwise, in pursuance of rules made under section 2, or when called into actual service in the Indian Air Force, in pursuance of the said rules, shall be subject to the Indian Air Force Act, 1932, in the same manner as a person belonging to His Majesty's Indian Air Force, and shall continue to be so subject until duly released from such training or service, as the case may be.

4. *Penalty for failure to attend when required or called up.*

(1) If any member of the Indian Air Force Volunteer Reserve, when required in pursuance of rules made under section 2, to join a unit or attend at any place for the purpose of undergoing training, fails without reasonable excuse to join or attend

in accordance with such requirement, he shall be punishable with fine which may extend to two hundred rupees.

(2) If any member of the Indian Air Force Volunteer Reserve, when called into actual service in the Indian Air Force, and required by such call to join any unit or attend at any place, fails without reasonable excuse to comply with such requirement at or within such time as the Central Government may, by order, direct, he shall be liable to be apprehended and punished in the same manner as a person in or belonging to the Indian Air Force deserting or improperly absenting himself from duty, except that the punishment shall not exceed imprisonment which may extend to two years.

5. *Rule of evidence.*

When any member of the Indian Air Force Volunteer Reserve is required, in pursuance of the rules made under section 2, to join any unit or attend at any place for the purpose of undergoing training, or is called into actual service in the Indian Air Force, a certificate purporting to be signed by an officer appointed in this behalf under the said rules and stating that the said member failed to join or attend in accordance with such requirement or call shall, without proof of the signature or appointment of such officer, be evidence of the matter stated therein.

6. *Jurisdiction.*

No Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try an offence punishable under subsection (1) of section 4.

7. *Repeal and saving.*

The Indian Air Force Volunteer Reserve (Discipline) Ordinance, 1939, is hereby repealed; and any rules made, anything done and any action taken under the said Ordinance shall be deemed to have been made, done or taken under this Act as if this Act had commenced on the 16th day of September, 1939.

Act No. XXXVII of 1939

THE INDIAN AIRCRAFT (AMENDMENT) ACT,
1939

Received the assent of the Governor-General on the 29th September 1939, and is published in the Gazette of India, Part IV, dated, 30th September, 1939.

An Act further to amend the Indian Aircraft Act, 1934, for certain purposes.

Whereas it is expedient further to

amend the Indian Aircraft Act, 1934, for the purposes hereinafter appearing ;

It is hereby enacted as follows :

1. Short title.

This Act may be called the Indian Aircraft (Amendment) Act, 1939.

2. Amendment of section 1 of Act XXII of 1934.

To sub-section (2) of section 1 of the Indian Aircraft Act, 1934 (hereinafter referred to as the said Act) the following shall be added, namely: —

"and applies also—

(a) to British subjects and servants of the Crown in any part of India ;

(b) to British subjects who are domiciled in any part of India wherever they may be ;

(c) to, and to persons on, aircraft registered in British India wherever they may be".

3. Amendment of section 3.

In section 3 of the said Act, for the words "the provisions of this Act and of the rules made thereunder, or from any of such provisions," the words "all or any of the provisions of this Act" shall be substituted.

4. Amendment of section 5.

In sub-section (2) of section 5 of the said Act, after clause (j) the following clause shall be inserted, namely :

"(jj) the installation and maintenance of lights on private property in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes, by the owners or occupiers of such property, the payment by the Central Government for such installation and maintenance, and the supervision and control of such installation and maintenance, including the right of access to the property for such purposes ;".

5. Amendment of section 7.

In sub-section (1) of section 7 of the said Act, for the words "air navigation in or over British India" the following shall be substituted, namely :—

"the navigation —

(a) in or over British India of any aircraft, or

(b) anywhere of aircraft registered in British India".

ACT No. XXXVIII of 1939

THE PANTH PIPLODA COURTS (AMENDMENT) ACT, 1939

Received the assent of the Governor-General on the 29th September, 1939, and is published in the Gazette of India, Part IV, dated, 30th September, 1939.

An Act to amend the Panth Piploda Courts Regulation, 1931, for a certain purpose.

Whereas it is expedient to amend the Panth Piploda Courts Regulation, 1931, for the purpose hereinafter appearing :

It is hereby enacted as follows :—

1. Short title.

This Act may be called the Panth Piploda Courts (Amendment) Act, 1939.

2. Amendment of section 8 of Regulation No. IV of 1931.

To section 8 of the Panth Piploda Courts Regulation, 1931, the following sub-section shall be added, namely :

"(3) Where any business under this section pending before the Court of the Chief Commissioner requires the aid of a further Additional Judge for its disposal according to law, the Central Government may, for that purpose, appoint a person to be a further Additional Judge of the Court of the Chief Commissioner."

ACT No. XXXIX of 1939.

THE INDIAN OATHS (AMENDMENT) ACT, 1939

Received the assent of the Governor-General on the 29th September 1939, and is published in the Gazette of India, Part IV, dated 30th September, 1939.

An Act further to amend the Indian Oaths Act, 1873, for a certain purpose.

Whereas it is expedient further to amend the Indian Oaths Act, 1873, for the purpose hereinafter appearing ; It is hereby enacted as follows :—

1. Short title.

This Act may be called the Indian Oaths (Amendment) Act, 1939.

2. Amendment of section 5, Act X of 1873.

In section 5 of the Indian Oaths Act, 1873, after the word "juror" the following proviso shall be inserted, namely :—

"Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the

provisions of section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

ACT No. XL of 1939.

THE MOTOR VEHICLES (AMENDMENT) ACT 1939.

Received the assent of the Governor-General on the 29th September, 1939, and is published in the Gazette of India, Part IV, dated, 30th September, 1939.

An Act to amend the Motor Vehicles Act, 1939, for certain purposes.

Whereas it is expedient to amend the Motor Vehicles Act, 1939, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title and commencement.

(1) This Act may be called the Motor Vehicles (Amendment) Act, 1939.

(2) It shall come into force at once; but sections 2 and 3 shall be deemed to have taken effect on the 1st day of July, 1939.

2. Amendment of section 1 of Act IV of 1939.

In sub-section (3) of section 1 of the Motor Vehicles Act, 1939 (hereinafter referred to as the said Act), after the word "but" the following shall be inserted, namely :—

"section 38 and Chapter IV shall not have effect until the 1st day of April, 1940, or such earlier date as the Provincial Government may, by notification in the official Gazette, appoint, and"

3. Amendment of section 134.

In section 134 of the said Act,—

(a) for sub-section (2) the following sub-section shall be substituted, namely :—

"(2) Notwithstanding the repeal of the Indian Motor Vehicles Act, 1914, rules made by any Provincial Government under section 11 of that Act, other than rules prescribing the fees payable in respect of the grant or renewal of licences to drive motor vehicles, shall, whether or not they are consistent with this Act but subject to the provisions of sub-section (3) of this section, continue to be in force for a period of nine months from the commencement of this Act, unless before the expiry of that period they are

cancelled by the Provincial Government by notification in the official Gazette."

(b) after sub-section (4) the following sub-section shall be inserted, namely :—

"(5) While, under the provisions of sub-section (2), any rules made by a Provincial Government under section 11 of the Indian Motor Vehicles Act, 1914, continue to be in force—

(a) section 112 shall be construed as if after the words "any rule made thereunder" there were inserted the words and figure "or of any rule made under the Indian Motor Vehicles Act, 1914, and continuing in force", and

(b) section 113 shall be construed as if after the words "under this Act", wherever they occur, there were inserted the words and figure "or under any rule made under the Indian Motor Vehicles Act, 1914, and continuing in force."

4. Amendment of First Schedule.

In the First Schedule to the said Act,—

(a) in Section III of Form A,—

(i) for question (d) the following questions shall be substituted, namely :—

"(d) Can you readily distinguish the pigmentary colours red and green ?

(e) Do you suffer from night blindness?"

(ii) questions (e) and (f) shall be re-lettered as (f) and (g), respectively ;

(b) in Form C, for question (b) in paragraph 4 the following questions shall be substituted, namely :—

"(b) Can the applicant readily distinguish the pigmentary colours red and green :

"(c) Does the applicant suffer from night blindness?"

and question (c) shall be relettered as (d).

5. Amendment of Second Schedule.

In Part I of the Second Schedule to the said Act, for item 6 the following item shall be substituted, namely :—

"Inability readily to distinguish the pigmentary colours red and green."

6. Amendment of sixth Schedule.

In the Sixth Schedule to the said Act, after the entry relating to Ajmer-Merwara, the

following entry shall be inserted, namely :—

"Andaman and Nicobar Islands :
AN."

7. Amendment of Ninth Schedule.

In Part A of the Ninth Schedule to the said Act, for the entry relating to Sign No. 7 (including the direction as to colour so far as it relates to Sign No. 7) the following entry shall be substituted, namely :—

"No. 7

USE OF SOUND SIGNALS PROHIBITED

Cross and border—Red
Background—White
Device—Black."

ACT No. XLI of 1939.

**THE INSURANCE (SECOND AMENDMENT)
ACT, 1939.**

Received the assent of the Governor-General on the 29th September 1939, and is Published in the Gazette of India, Part IV, dated, 30th September, 1939.

An Act further to amend the Insurance Act, 1938, for a certain purpose.

Whereas, it is expedient further to amend the Insurance Act, 1938, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title.

This Act may be called the Insurance (Second Amendment) Act, 1939.

2. Amendment of section 3 of Act IV of 1938.

In clauses (a) and (b) of sub-section (2) of section 3 of the Insurance Act, 1938, after the words and figure "incorporated under the Indian Companies Act, 1913," the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted.

ACT No. XLII of 1939

**THE WORKMEN'S COMPENSATION (SECOND
AMENDMENT) ACT, 1939.**

Received the assent of Governor-General on the 29th September 1939, and is published in the Gazette of India, Part IV, dated 30th September, 1939.

An Act further to amend the Workmen's Compensation Act, 1923, for a certain purpose.

Whereas it is expedient further to amend

the Workmen's Compensation Act, 1923, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title and commencement.

(1) This Act may be called the Workmen's Compensation (Second Amendment) Act, 1939.

(2) It shall be deemed to have come into force on the 3rd day of September, 1939.

2. Amendment of section 15 of Act VIII of 1923.

In section 15 of the Workmen's Compensation Act, 1923, after clause (4) the following clause shall be inserted, namely :—

"(5) No compensation shall be payable under this Act in respect of any personal injury for which a payment could be obtained under any scheme made under the Personal Injuries (Emergency Provisions) Act, 1939 ;

Provided that the failure to give a notice or make a claim or commence proceedings within the time required by this Act shall not be a bar to the maintenance of proceedings under this Act in respect of any personal injury, if,—

(a) an application for a payment under any such scheme has been duly made in respect of the injury ; and

(b) the Commissioner is satisfied that the said application was made in the reasonable belief that the injury was such that a payment could be made under the said scheme ; and

(c) the Provincial Government certifies that the application was rejected, or that payments made in pursuance of the said application were discontinued, on the ground that the injury was not such an injury ; and

(d) the proceedings under this Act are commenced within one month from the date of the said certificate of the Provincial Government."

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

PUNCH AND THE POLICE

In a Christmas Number we may be allowed to forget the war for the length of one article, and to touch the lighter side of things. "All round the house is the Jet Black Night," as Cissie Loftus used to sing long ago in *Peter Pan*, but this side of the black-out curtains it is still permitted to us to be merry (if we are young enough) or to read an ancient volume of *Punch* in bed (if we are old enough) and chuckle at the odd ways of our grandfathers and the even odder ways of our grandmothers.

It need not hurt our feelings to realize that they would have at least as much right to laugh at us, did we not happen to have the accidental advantage (a fleeting one) of coming last. Perhaps in the paper limbos where they lie transfixed by the pencil of Leech or Du Maurier they actually do, when the volume is shut as tightly as our windows, grin coarsely, or open wide pre-Raphaelite eyes, at our queer or scandalous ways, our strange war for instance with its fighting men turned into mischievous birds and fishes beside whom the Roc and Leviathan might be regarded as drawing-room pets. The demure young ladies with croquet mallets or spoon tennis rackets would be frightfully shocked, not without a touch of envy, at land girls in breeches and auxiliary fire-women in slacks. Someone ought to develop a new-style grangerized book. *Punch* of the Crimean war days, interleaved with *Punch* of the days of the War-to-end-war would be a pleasant gift for troops in billets.

Punch, the incorrigible rogue of the marionette world, and *Punch* the London Charivari, are among the most pleasant of our acquaintances. How many general-knowledgers, by the way, could place the subtitle of our humorous weekly, or know that "charivari" is "a serenade of rough music, made with kettles, pans, tea-

trays, etc., used in France, in derision of incongruous marriages, etc?" So says the Oxford Dictionary. There is virtue in that "etc." In the Middle West it used to be a well rosined plank drawn across an empty barrel, rough music *fff* as enjoyed by the inhabitants of Medicine Bow in Owen Wister's *The Virginian*. We confess that until we opened the O.E.D. we thought Charivari was the title of a dead and gone Paris comic paper of the days when Frenchmen copied their emperor by wearing a sort of hairy comma on the chin.

Anyway Codlin's our friend, and we have no quarrel with Short. The writer of this article ran after any old *Punch* and Judy man in the days when nice little boys had to wear sailor suits with a silly sort of inside bib which they liked about as much as Toby did the paper frill round his neck. Toby was often a weary and disdainful little dog, taking his part without zest and barking flat to mark his boredom.

Punch the puppet never showed proper respect for the police. When, as in most versions of the play, the constable comes with a warrant to arrest him for the murder of Scaramouch, *Punch* defiantly says, "What's that to you? If you stay here much longer I'll serve you the same."

Constable: "Don't tell me! You have committed murder, and I've a warrant for you."

Punch: "And I've a warrant for you," thereupon knocking down the constable and dancing and signing with conscious unconcern.

When an officer in a cocked hat follows, a sort of French gendarme fellow, this time with a charge of murdering wife and child, and "I'm come to take you up," *Punch* retorts, "And I'm come to take you down"—and effectually does so. Jack Ketch, the hangman, has no better luck:

he is tricked into his own halter and hanged on his own portable gallows.

In some versions (characters pop in and out of the play according to the taste and fancy of the showman) the Lord Chief Justice of England then comes to arrest him with his own hands, which, as supreme coroner and a justice of the peace for everywhere in England and Wales, he is presumably entitled to do, though the outcome shows that he had much better have relied on the posse. The dialogue is undignified on the Lord Chief Justice's side and disrespectful on the culprit's.

Chief Justice : "Hullo, Punch, my boy !

Punch : "Hullo ! Who are you with your head like a cauliflower ?"

Chief Justice : "Don't you know me ? I'm the Lord Chief Justice."

Punch : "I don't care if you're the Lord Chancellor. You shan't get me into Chancery, that's all."

Chief Justice : "But I shall get you into prison. You're a murderer, and you've killed I don't know how many people."

Punch : "If you don't know, you'd better go and learn."

Chief Justice : "That won't do, my fine fellow. You're a murderer, and you must come and be hanged."

Punch : "I'll be hanged if I do"; knocks down the Chief Justice and dances and sings.

... ..

The scoffing hunchback began to publish his observations on life in 1841. Eighty-odd volumes of his works, named as is proper after himself, *Punch*, stand on the book-shelves behind the writer. After volume seventy-nine there is a great gap which he had every intention of filling, before the income-tax rose to its present impressive figure. *Punch* was excited in 1852 about an income tax of seven pence. The doleful prophecy was that The Income-Tax Never Dies. How true ! How very true !

From volume seventy-nine the work jumps to volume one hundred-and-forty-eight and its immediate successors, featuring the world war. We have lost the page, and the index will not help us to find the picture of the special constable whose wife is reassuring a frightened maid by pointing to the master going out to keep off the Zeppelins, so we can only hope we have got it right. If not, there is sure to be some reader who can correct us. A gentle skit on the super-zealous constable

of August, 1915, might touch the spot even to-day :

Rural constable : "Sketching the harbour is forbidden, Sir."

Artist : "Oh that's all right. I'm making a study of clouds."

R. C. (impressively) : "Ah, but supposin' your picture got into the hands of the enemy's aircraft department, see the use they could make of it !"

The first prize in this group of volumes ought to be given, however, to the backed chestnut man being cautioned by a "somewhat talkative policeman": "You ain't 'arf got a muzzel velocity." Turn to page 154 of volume one-hundred-and-forty-eight and have a look at the policeman. He's the real thing.

But let us go back again to the comfortable days when islands were islands, comfortably ensconced behind a two-power-standard navy, or still earlier times when all wars were carried on a long way off in places like India or the Crimea. *Punch* began his literary career by announcing that he would, "from week to week, offer to the world all the fun to be found in his own and the following heads," one head being "Police." "This portion of the work is under the direction of an experienced nobleman, a regular attendant at the various offices." The "offices" were the police offices of Bow Street and other metropolitan centres, now "police courts," and some day we hope to be known as "magistrates' courts," as more exactly descriptive of their true status and function.

The earliest mention of the police in *Punch* is the "New police", that is Sir Robert Peel's force, after him called "bobbies" and "peelers." But the former term is said to have been in use before the setting up of the metropolitan police. "Bobby the beadle" was the guardian of a public square or other open space. "Peeler" was first applied to the Royal Irish Constabulary, another creation of Sir Robert's. He was Secretary for Ireland from 1812 to 1818.

By the 1850's the police had become "coppers" or "cops" which seems to show they were catching thieves and other law-breakers, which was more than the old "Charlies," as the watchmen were called, had been able to do.

Of course *Punch* does not forget the policeman's supposed predilection for female domestic servants, especially cooks. The very first picture of a policeman we have come across, if we except the "funny

dog" with top-hat and truncheon which with other funny dogs makes the tail-piece to the Introduction to volume One, is a constable bending at the knees to kiss a housemaid through the area railings. He, too, has the tall hat and tail coat of the period, a costume due, we believe, to the desire to make the new police as much unlike soldiers as possible. Our ancestors of that period had, from an exaggerated fear of military tyranny, for many years endured unsafe streets and robbery with violence. In the light of after history the contemporary doubts and hesitations are amusing. The public was more given to apprehension than the police.

Punch of the forties made merciless fun of one Sir Peter Laurie, an alderman of the City of London. "The general conduct of the police," he is reported as saying, "was, he believed, good; but the instances of arbitrary conduct and overbearing demeanour set to flight all the ancient examples brought forward to enrich by contrast the serious parts of the glorious genius of Shakespeare."

The first mention of Bow Street we have found occurs in the issue of the ninth of November, 1841, where in a delightfully comic skit on police court proceedings, it is mentioned as "that den of thieves and magistrates." The wrong, and perfectly innocent, man is bounced into the dock and out again, convicted and fined, judicially scolded and pushed out of court, in a glorious fog of misunderstanding due to the speedy methods of gaolers and magistrates, which are still a feature of many courts of summary jurisdiction.

With the end of the first volume we part with regret from the rear view of a fat man on the outside page of each number, being robbed by a little cockney rickshack with a monkeylike face, one of Fagin's early successes no doubt.

We get some items of police history that probably even a lengthy search of Home Office files would not disclose. We discover for instance that the first police order for the medical examination of persons charged with drunkenness was issued in 1842. All persons who may be brought to stations insensible are to be examined at seven and six pence for each, a fee which it is suggested might induce young practitioners to "make as many people as possible drunk". Why does the facetiousness of other days leave us so cold? There is

a good deal of this rather watery humour to put up with in the earlier volumes. Our full-blooded great-grand-parents were easily satisfied in some ways. Listen to the effort: "Why are policemen like the dogs of man? Because they are numbered." Ha! Ha! or perhaps only Ho! Ho!

A little later we are to infer that the Metropolitan Police Commissioner had ordered a discard of whiskers. "If we are to be disfigured," say some of them, "let the figures be taken from our collars, but let not the disfiguring process be put in practice upon our visages." Well, well, it is a poor heart that never rejoices.

In 1843 our wonderful police, as American lady visitors are so often reported as calling them, were already acquiring a reputation for courtesy. "Punch, in his too frequent collisions with the police has frequently remarked the growing politeness, the humane and gentle courtesies to be found among that body; a day or two since he discovered the cause of this. Mr. Higginbottom of Flayem House, Buxton, was regretting to a friend and late school-master, the dearth of classical assistants—the paucity of ushers, who, at thirty pounds per annum, were wont to teach Greek, Latin, mathematics, etc. 'Why,' said his friend, 'there was no want of such people in my time! No ushers to be had! How do you account for it?' 'My dear friend,' said Higginbottom, 'they're all gone into the new police.'" What a long shadow the police college did, as a coming event, cast before it!

But we must not linger too long in those ancient days when there were no warbling notes save those of the nightingales, when no elephants' children climbed wire ropes into the sky. But we cannot omit the really bitter gibe in a *Punch* effort of 1848, entitled "The Model Policeman": "He has a vivid recollection of what another policeman remembers." Well, it must be confessed that it is like that sometimes.

All this of course was before the writer and most of his readers were born, but there is still living an ex-metropolitan magistrate who was alive when *Punch* said the unkind words last quoted.

In a nearer day Tenniel had an effective cartoon in *Punch* based on the amazing revelations which preceded the trial of the detectives in November, 1877. John Bull is depicted turning a bull's-eye lantern on a policeman in uniform and helmet, with side whiskers and moustache complete. In the background is a note;

"Scotland Yard," and a door labelled "Detective Department." The legend underneath is: "Mr. Bull (takes policeman's lantern). Thank you, I'll just have a look round myself. Strikes me the premises ain't as clean as they might be." The really comforting part of that affair was that a policeman did the cleaning up himself, with great courage and efficiency.

Let us end on a pleasant note. *Punch* of the 22nd November in this year of grace and peril, has a policeman in his steel helmet marshalling a string of schoolgirls across the street. He has that ineffably determined sideface characteristic of the policeman on traffic duty. A fat gentleman,

gas mask on haunch, takes his wife's arm. "Come along then, Gertrude. If you want to cross the road we'd better join the convoy." Of course this joke is not on the constable, but we have turned so many pages, of so many volumes looking for policemen that whenever we spot one to us he is the centre of the picture.

We conclude by saying that though we never fail to enjoy *Punch's* badinage or even sharp criticism of the police, the immense majority of the policemen we have known—and what an army that is—were good fellows quietly doing a useful job of work.—*J. P.*

Extracts from Contemporaries.

Passports

Nobody, we believe, has a legal right to a passport at all. The grant of a passport is an act of courtesy by the Sovereign to assist his trusty and well-beloved subjects to go about the world armed with a request that they be well treated. But it is obvious that anyone who requires a passport must make a true declaration at the passport office, and must make no false pretence as to the intention which he has with regard to its use. The case of *R. v. Brailsford and another* (1905, 2 K. B. 731) is the leading authority on this point. If a person obtains a passport on the representation that he himself wishes to use it and then hands it to another, he is guilty of a public mischief and may be tried and convicted on a common law indictment. This week a magistrate in the Metropolis had before him a case in the same field as *Brailsford's* case. The charge was of making an untrue statement in order to obtain a British passport for a German-born woman. Of course, if she was married to the defendant she was a British subject: but on this point the report (*Times*, September 30) is not clear. Assuming that the German lady was in that position, we still cannot look without grave suspicion at a defendant who forges the name of a sponsor to sign the necessary photograph. The law on the matter, though not laid down by statute, is clear enough, and the learned Magistrate did well to impose a substantial sentence.—*L. J.*

Unconscious Libel.

Of course, a plaintiff in a libel action

must satisfy the jury that the words of which he complains would be taken by reasonable people to refer to him. The Judge has to rule whether they are reasonably capable of being so taken and then the jury, after hearing all the evidence, give their verdict as to whether they would or would not be so taken. In a recent case which has just been before the Court of Appeal (November 21, 1939) the learned Judge had left the proper question to the jury and they could not agree upon it. It was an extraordinary case. A newspaper had said with perfect truth of a certain Harold Newstead of Camberwell that he was a bigamist. But there happened to be another person in Camberwell called Harold Cecil Newstead of whom the words were utterly false. The jury were not able to make up their minds as to whether the words would be reasonably taken to refer to the plaintiff, though they found on some other issues apparently in the defendant's favour. The Judge below thought that unless they were agreed on the first and vital question, no judgment could be entered. The defendants challenged this decision and Lord Justice MacKinnon was for allowing the appeal; but the other two Lords Justices agreed with the Judge below. Ever since *Hulton v. Jones* (1910, A.C. 20) we have known that A. can libel B. though he does not know B's existence. Now we see that it is no defence for A to say that there is some other B. of whom all that he says is true. Some time soon we hope to deal more at length with the matter.—*L. J.*

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

CATTLE ON THE HIGHWAY.

Habits of thought engendered by professional activities are apt, perhaps unfortunately, to assert themselves in conditions of every-day life, and it may well have occurred to practitioners driving in a motor car along the highway to speculate when passing a herd of cattle upon the legal position which would result from one of the animals suddenly running across the road and occasioning injury to the car or its occupants. The problem is by no means a simple one. Such a case was recently heard at the East Retford county court, and the judge's decision was ultimately reversed by the Court of Appeal. The question turned upon the nature and extent of the duty which, in the circumstances, lay upon the owner of the cattle to control them. Before considering this case in further detail, it will be convenient to review certain of the earlier authorities.

First it may be desirable to draw attention to the following statement made by Mr. Justice Neville in the course of a judgment delivered in the Court of Appeal in *Heath's Garage, Limited v. Hodges* (115 L. T. Rep. 129; (1916) 2 K. B. 370). "In my opinion," the learned Judge said, "the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable safety of the public using the road. I am unable to draw any distinction in this regard between domestic animals. I think horses, cattle, sheep, pigs, fowls and dogs all fall into the same category for this purpose. There is no doubt that the advent of motor cars has greatly increased the danger resulting from the presence of loose animals on the road owing to the speed at which the cars travel and the difficulty shared by man and beast in avoiding them. It was only yesterday, however, that, as mechanically propelled carriages, the right of motor cars to use the roads was subject to conditions which rendered great speed unat-

tainable, and I think that to-day those who use them must take the roads as they find them and put up themselves with such risk as the speed of their cars occasions not only to themselves but to others. The *prima facie* harmlessness of domestic animals as frequenters of the highway is, I think, established as a legal doctrine."

But whatever the extent of the right of depasturing animals on the road may be, it is clear, that in order to succeed, a plaintiff must prove that the injuries sustained are a natural result of the alleged breach of duty and are not due to some extraneous element beyond the reasonable contemplation of the defendant. This point may be illustrated in *Hadwell v. Rightson* (97 L. T. Rep. 133; (1907) 2 K. B. 345) where the plaintiff claimed damages in respect of injuries sustained while riding a bicycle on a highway. Fowls, belonging to the defendant, on the footpath were frightened by a dog belonging to a third party, and one of them flew into the spokes of the plaintiff's machine. A divisional court dismissed an appeal from a county court which had found in favour of the defendant. Even if the fowl was not lawfully on the highway, the circumstances in which the accident happened, it was held, prevented the damage from being the natural consequence of its presence there (see *Cox v. Burbidge* (13 C. B. (N. S.) 430).

In the case under review, the county court judge had assumed that the fowls were unlawfully upon the highway as they were not using it for the mere purpose of passage either in the company of their owner or without him. Even so, Mr. Justice Phillimore observed, there was no antecedent probability that the fowl would be frightened by a dog, still less was there any probability that, if so frightened, it would fly into the spokes of a bicycle. The owner was not bound to contemplate such a result,

as likely to flow from his letting the fowls be at large upon the road. The fowl would have done no harm but for the wrongful act of the animal of a third person. In such a case *causa proxima non remota spectatur*.

The learned judge intimated, however, that in his view too narrow a limitation had been placed upon the use to which a highway might lawfully be put. "It was said," the judgment continued, "that the rights of members of the public in a highway were confined to passing and re-passing, and that animals, except when accompanied by their owners, had no right to be on the highway at all. In the first place, I think that members of the public, in addition to using it *eundo et redeundo*, are also entitled to use it *morando* for a short time. And I doubt whether, even with that addition, the lawful uses are thereby exhausted. For instance, if fowls are kept near a highway, and there is corn stubble belonging to their owner on the other side of the road to which they might naturally and properly go, I am not prepared to say that to allow them to go there by themselves would be an unlawful use of the highway by their owner simply because they might while so doing run or fly into someone who was riding a bicycle.

Mr. Justice Bray observed that the plaintiff's case could only rest on negligence, and said: "In the absence of anticipated danger, there is no room for the suggestion of negligence."

It appears to be established that an owner or occupier of land who is entitled to pasture, to place horses, cattle, sheep, fowls, or another tame animal in a field, is not responsible if, by reason of the absence of hedges, those animals get on the highway. In *Deen v. Davies* (153 L. T. Rep. 90; (1935) 2 K. B. 282) Lord Justice Slesser stated that he did not think such general proposition could be disputed. There might, however, the learned Lord Justice intimated, be circumstances in a particular case which put a particular duty on a person and made him liable for negligence. Apart from the case of an animal of known vicious propensities, a person might, in Lord Justice Greer's words in *Sycamore v. Ley* (147 L. T. Rep. 342), "be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as to render it likely that the dog will get excited, will lose its temper, and will cause damage to people lawfully passing along the highway."

The important words in this excerpt in regard to the point now in consideration are, "if he puts it in such a position and in such circumstances..." In *Deen v. Davies* (*sup.*) it was held that where the owner of a quiet horse, after riding it to a town, fastened it to a stable insecurely, and the animal got loose and, while trying to make its way home, injured a pedestrian, the owner was liable in damages. If the defendant had turned his horse into a field while he was pursuing his lawful occupation in the town, or the horse had escaped on to the highway through a gap in the hedge or an open gate, and had damaged the plaintiff, the defendant would not, according to Lord Justice Romer, have been liable. The reason for this will be sufficient by clear from the cases to which reference has been made.

But there was, the learned Lord Justice said, another series of cases where the court had to deal with the position of the owner of an animal which he himself had brought on the highway and which, having been so brought, damaged somebody else who was lawfully using the highway. In examining those cases it was very necessary to draw a distinction (similar to that which we have already observed in the other series of cases) between two different matters. First whether the owner of such an animal owed any duty at all to the public, and, secondly, whether, if he did owe such a duty, he had committed a breach of it; because if he did owe a duty to take all reasonable care that the animal which he had brought on to the highway did not damage other parties, what was reasonable care in one case might not be reasonable in another. It would be found in some cases that where a man had brought an animal on to the highway he had been held liable for damage caused to another party, and in other cases that he had not been held liable. "As I read those cases," Lord Justice Romer continued, "bearing that distinction again in mind, it had been clearly established that the owner of an animal who brings it on to the highway does owe a duty to those who are using the highway to use all reasonable care to prevent the animal damaging other persons. What may be reasonable care in the country may not be reasonable care in the town. What may be reasonable care in the case of one animal may not be reasonable care in the case of another."

The matter is, then, placed upon the footing of "reasonable care."

In the case referred to at the outset of

the present article; *Ludlam v. W. E. Peel and Sons*, which was reported in *The Times* of October 10th, the plaintiff was driving his car along the highway when he met six cows belonging to the defendants. The cows were in charge of a drover, and when the plaintiff first saw them were on the grass verge at the roadside. When the plaintiff was a few yards from them, one of them suddenly ran out in front of his car and a collision occurred. The county court judge awarded damages, holding that it was the duty of the owner of cattle which were driven on the highway to control them, and that it was not necessary to prove actual negligence on the part of the drover, but sufficient that the owner had caused them to be on the highway and had failed to keep them under proper control.

In the Court of Appeal Lord Justice Slesser adverted to the importance of the case to farmers, as well as to drivers of motor cars. The county court judge had

not found any specific act of negligence on the part of the drover. The view that such act was not necessary seemed to have been taken by Lord Moncrieff in *Harpers v. Great North of Scotland Railway Company* (13 R. 1139), but that was not the view of the majority of the court in that case. In the present case, the county court judge was wrong in coming to the conclusion that it was not necessary to show any act of negligence on the part of the drover. It was true that the position where an animal was brought on to the highway was different from that where an animal strayed on to the highway (*Deen v. Davies (sup.)*) but in the present case there was no evidence that the owners of the cows, who had employed a competent drover, had failed to take reasonable care. The county court judge had sought to impose an absolute duty which did not exist in law, and his decision was accordingly reversed.—*L. T.*

Extracts from Contemporaries.

Old Scots Judges

In these days of *Sturm und Drang*, and the excitement which follows from them, it is with a sense of relief that one turns to the stories of some of the occupants of the old Scots Bench who were certainly noted for their outspoken remarks, usually given forth in the broadest of broad Scots. Happily, Sir Walter Scott, himself, it will be borne in mind, a member of the Scots Bar and a sheriff (a functionary who, it is necessary to remember, is a judicial personage corresponding to some extent to a county court judge with us, but with a considerably wider jurisdiction in civil proceedings, and with jurisdiction in criminal cases also), lived at a time when the Scots Bench was manned by a number of men of undoubted legal capacity and with the accompaniment of a power of graphic expression which their successors would never dream of emulating. Another point of difference between the Scots judges and their southern confreres is in the titles they bear, each being entitled to be described as "Lord" so-and-so. This does not necessarily mean that they are peers; one or two of them have been ennobled, but the title is with most of them a

mere courtesy description. Their wives, moreover, are not, as such, entitled to the appellation of "Lady." Apparently, however, some of these ladies in the early days were inclined, not unnaturally, to claim the title "Lady" an assumption, which was soon repelled by James V., the sovereign who founded the College of Justice, he declaring with some acerbity, "I made the carles lords, but who the devil made the carlines ladies?" He might, however, have extended the royal courtesy by giving the wives the corresponding title, as more than once it has led to some awkward questioning when, for example, Lord Fountainbridge is observed to be travelling with, say, Mrs. Smith—the name "Smith" being the judge's patronymic, which he uses in signing documents. Our Scots friends have apparently become quite accustomed to this curious feature in judges' titles.

Scots Judges' Other Titles

As has just been recalled, the old Scots judges almost invariably chose their judicial titles from the estates they owned or with which they were in some way connected; but there is an additional distinction in the descriptions they bear

in the reports. As is generally known, the Court of Session—the supreme tribunal for civil causes in Scotland—consists of what is known as the Inner House and the Outer House. The former is for the most part an appellate court, while the Outer House consists of several courts each presided over by one of the Lords of Session, who, as taking cases of first instance, is officially known as a Lord Ordinary. It may not seem to be a very dignified title to confer upon these Outer House judges, but a long-established usage has accustomed the Scots people, and particularly the Scots Legal Profession, to this nomenclature. Another term is in general use in Edinburgh in connection with the judges sitting singly as judges of first instance; they are described as sitting in “boxes”—their court rooms being so small as really to merit this somewhat disparaging appellation—an analogy, however, being furnished by the sportsman in the north who speaks about his shooting “box.”

A Judicial Compliment to Scott

Readers and admirers of Scott's novels hardly need to be reminded of the frequency with which these are illustrated and lit up by some citation of the quaint old laws of Scotland. Surely no greater compliment was paid to Scott in the eyes of the public than the pleasing incident that occurred in the court where he was sitting as clerk when Lord Gillies, in the case of *Thom v. Black* (7 Shaw 158), quoted with judicial approval the doctrine of Monkbarne on the origin of imprisonment for civil debt in Scotland, which, however whimsical it may appear to the lay reader, was admitted by the learned Lord in question to be technically accurate.—*L. T.*

Dangerous Ambiguities.

Mr. Registrar Owen White recently wrote to a newspaper which had reported him as having said at Whitechapel County Court that solicitors did their work in a slipshod way, to point out that his remarks referred

to some solicitors only and not to all. It is always well to be careful how you put any observations about the profession. Once at the Glamorgan Assizes a defendant was asked with regard to his legal advisers: “Were they not a respectable firm of solicitors?” He replied: “Yes, as solicitors go.” To his discomfort Mr. Justice Field angrily turned on him expressing surprise at hearing such a remark from a man of position and intelligence. The witness said it was a slip of the tongue, and the Judge warned him not to let his tongue slip in future, adding: “I have been a solicitor myself.” That revelation added fervour to the culprit's apology.

Making Amends.

Even judges have been known to utter in hasty moments generalisations, the natural meaning of which tended to reflect unfavourably on individuals. Mr. Maurice Healy, K. C., in his charming book of reminiscences, gives a splendid example of such an incident and the way to make amends for it. As a young man he defended a prisoner tried at the Kerry Assizes on a charge of highway robbery. Though the witnesses for the defence all appeared to be superior and honourable people, old Chief Baron Palles was strongly convinced of the guilt of the accused. His summing-up was full of scorn and indignation, and in the course of it he said: “When I was at the Bar there were counsel strong enough, aye, and honourable enough to say: ‘I will not put such witnesses in the box to commit perjury!’” He then virtually directed an acquittal and forgot all about what he had said. During the adjournment someone pointed out to him the implications of his words, and immediately on returning to court he addressed Healy: “I have been told that this morning I used words which might be understood as imputing dishonourable conduct to you. As dishonour is a word that I am sure I could never properly associate with your name I have sent for you to express my regret with the same publicity as attached to my error.—*S. J.*”

INDIAN CASES

1940

JOURNAL

Vol. 185

[Editors do not hold themselves responsible for the views expressed by the contributors.]

SANDBAGS

"Take heed lest, in escaping one pit, ye fall into another." If that bit of sage counsel, instead of having been addressed by Plato, circa 374 B. C., to his young disciples in reference to rival systems of philosophy, were given by a lawyer to local authorities, bankers, shopkeepers and divers others in the year 1939, in relation to sandbags, it would be a timely warning.

There is no more common sight in these dismal days, and no more frequent obstacle to pedestrian progress in these darkened nights—at any rate in London and the larger provincial towns—than piles of sandbags. They deploy themselves, in many instances, for three or four feet of the five or six-foot pavements. In the daytime those who go on their lawful occasions along those pavements may, with the exercise of ordinary care, avoid contact with those unsightly objects. But, "watchman, what of the night?" Even with the illicit flashing of a torch to "escape" the "pit" a pedestrian stands a very good chance of a violent acquaintance with one or more of them.

By what manner of right has the precious freedom of passage along the highway been filched from the citizen? Is there any such right? In the engulfing spate of legislation—Acts, Rules, Regulations and Orders—there may lurk some show of authority. The writer knows of none.

If any person "shall in any way wilfully obstruct the free passage of any highway" he is guilty of an offence (Highway Act, 1835, sec. 72). "Highway" includes a foot-path (*Dennis v. Good*, 83 J. P. 110).

Apart from and in the absence of express statutory authority, the urgency of the need in the emergency created by the war may be some reason for that "winking" by the police which, according to one learned judge, is the attribute of a

prudent constable. Perhaps another is the fact that most, if not all, police stations are partly embroidered by the same sandy safeguards. And, on the assumption that those responsible for the obstructions are allowed, in the presence of a common danger, to protect their property in this way, is their immunity complete?

Although having the lawful right to do the work, a surveyor was convicted of wilful obstruction for leaving large stones on a road under repair without sufficient light at night (*Fearnley v. Ormsby*, 4 C. P. D. 136; 27 W. R. 823).

Ought the constructors, then, to light these obstructions? If they do, they offend against a specific and recent enactment. "No person shall, during the hours of darkness, cause or permit any light, not being a light in a roofed building, closed vehicle or other covered enclosure, to be displayed" (Lighting (Restrictions) Order, 1939, dated September 1, S. R. & O., 1939, No. 1093). And "person" includes a corporation (Interpretation Act, 1889, sec. 19).

It would seem that the cautious citizen is involved in the anomalous position that he is silently "permitted" to commit, without punishment, the offence of wilfully obstructing the highway, and is expressly forbidden to place any light upon that obstruction thereby to reduce the chances of injury to a pedestrian.

It is the statutory duty of local authorities to provide shelters in case of air-raids. This duty has been generally, and expensively, observed. And in the result another series of obstructions has been brought upon the highways. These, too, are unlighted at night—in pursuance of the Order (*supra*). Unlighted also are great numbers of refuges, bollards and other "nuisances" attendant and consequent upon the regulation of road traffic.

What are the liabilities of local authorities

ties and the rights of citizens in relation to personal injuries due to the lack of light on these excrescences?

"If persons acting under statutory powers interfere with a highway, they must exercise due care to see that their works, while in progress, are so carried on, and, when completed, are so maintained, that the public are not injured thereby". (*Holliday v. National Telephone Co.* (1899, 2 Q. B. 392, C. A., and see other authorities set out in *Halsbury, Hailsham* edn., vol. 16, p. 363).

In *Polkinghorn v. Lambeth Borough Council* (1938, 1 All E. R., at p. 339) it was held that the defendant council, having erected the refuge and bollards, were under a continuing duty to keep them adequately lighted; and in *Skilton v. Epsom and Ewell Urban District Council* (1936, 2 All. E. R., at p. 50) that a local authority is under obligation to maintain an artificial work—in that case a traffic stud—brought by them upon a highway.

If, as appears to be the case, the Lighting Order (*supra*) relieves a local authority of the duty of adequately lighting a roadway obstruction for which they are responsible—indeed, makes the discharge of that duty an offence—then their liability to protect, so far as possible, the users of the roads against danger only persists, in this regard, during the daytime (when those users are better able to protect themselves) and ceases with the coming of darkness (when they have the greater need of such protection).

If this be the case, local authorities are in a happier position than those persons who bring similar, or other, obstructions

upon the highway. The former have a legal right to place sandbag and other obstacles upon the highway, and are forbidden to illuminate them at night. But the latter have no such right. And if a motorist comes into violent contact with, for example, a bollard on refuge, at night, he would have no right of action against the local highway authority—for there would be no negligence; but the discharge of a dual duty. A pedestrian, however, who suffered personal injury through running into an unlighted sandbag obstacle on the pavement erected by the frontager would, apparently, have a claim for damages. The immunity of the local authority, however, would only extend (so far as sandbagging is concerned) to the protective works done under statutory authority, *e. g.*, air-raid shelters. There is no such authority for protecting their town halls and other buildings—and in this respect they would be on the same footing as citizens in relation to claims for damages.

There is still another queer aspect of the sandbag difficulties. Against public offices, telephone kiosks, unemployment exchanges, post offices and other Government buildings there are serried rows of high-reaching bags of sand. No injury resulting from their presence would entitle an injured person to damages. A petition of right does not lie against the Crown in respect of a claim founded upon tort, because the Crown can do no wrong (*Tobin v. R.*, 1864, 16 C. B. N. S. 310), nor for compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duty (*ibid*).—L. J.

Extracts from Contemporaries.

Legal Practitioner and Money-lending

The question whether the advances of loans made by an Advocate do amount to engagement in money-lending so as to amount to professional misconduct on the part of the Advocate, came before a Bench of the Allahabad High Court (41 Or. L. J. 211). Agreeing with the dictum of Mac Cardie in (1906) 1 K. B. 205, their Lordship held that the answer must depend on the facts of the particular case. As was the case here, a man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. The line

of demarcation cannot be defined with closeness. It is a mixed question of fact and law. In 52 Ind. Cas. 638 (F. B.) the same High Court held that an element of continuity and habit is essential to constitute the exercise of a profession or business. Where it is found that money-lending transactions are numerous, continuous and systematic, the Advocate must be held to have entered into money-lending business. In this respect, the Full Bench decision of the Madras High Court in 8 Ind. Cas. 677 was also referred. Finding it difficult to formulate a hard and fast rule as to what does and what does not constitute a money-lending business, their Lordships accepted

the finding of the Bar Tribunal in favour of the Advocate. Such matter, it was remarked, concerns the Bar Council and therefore the High Court ordinarily accepts the findings on question of fact recorded by the Bar Tribunal, provided, the findings are not perverse.

—Warning.

Before parting with the case, their Lordships rightly administered a warning to the learned profession. They observed that it is in the interest of the Advocates themselves that before making advances by way of loan, they should obtain the previous sanction of the Bar Council and of the High Court. It may be that in a particular case half a dozen advances made during a particular period may not be held to amount to engagement in money-lending business, but seven advances by way of loan made during the same period may be held to amount to engagement in money-lending.

Cruelty to Animals

There is no limit how far human ingenuity will go to acquire profits. In some parts of India, there is a practice amongst the milk-sellers to inflict a kind torture to cows and buffalos to make them yield more milk. This practice is generally known as *phooka*. It consists in thrusting a long bag or a cotton plug containing some irritant matter into the urinary-passage of the animal. In this way by applying internal pressure the animal is forced to give more milk. This instrument is sometimes 24 inches in length and 9 inches in circumference at end and tapering off to an ordinary rope at the other. To make the animal submit, she is often mercilessly beaten. Another method of *phooka*, as the name signifies, is to blow air into the urinary passage and then insert the plug. It is really high time that such revolting practices should be abolished by propaganda and legal machinery.

—Punishment.

Only recently a case came before the A. D. M. of Amritsar. The offender was found to have tortured a she-buffalo day after day, for nearly two months since her calf had died. He was apprehended, while in the act of applying *phooka*, by the local agents of the S. P. C. A. The offender was let off with a mere fine of Rs. 25. We do not know under what act he was convicted. But we respectfully consider

that the punishment was much too insignificant considering the nature of the offence. Perhaps the learned Magistrate might have taken into account other circumstances of the case, while awarding the sentence. We, however, feel that in such cases, the conviction should be as severe as possible, so as to act as deterrent to others, and also to make the practice of *phooka* unprofitable.

Notice Under S. 107, Criminal Procedure Code

A Full Bench of the Madras High Court consisting of three Judges considered an important point of law, having bearing on the scope and construction of s. 107, Criminal P. C. (*In re Methuswami Chettiyar and others*, 185 Ind. Cas. 824). The question was whether the information and the evidence on which a Magistrate can act under s. 107 must relate a breach of the peace or wrongful act in contemplation at the time when such information is given to the Magistrate. Leach, C. J. who delivered the judgment of the Bench explained the Case-law relied on by the petitioner and held that the action under s. 112 constituted a judicial act and the Magistrate, therefore, should not act in an arbitrary manner. There must be information of a nature which would convince him that there is likelihood of a breach of the peace. The learned Chief Justice, however, held that it was impossible to formulate any rule with regard to the nature of the information on which a Magistrate should act. The question would depend on the particular situation. His Lordship while agreeing that there must be something more than the past misconduct of the person proceeded against to justify a notice being served upon him, held that the Code did not require the information to show the particular act which was in contemplation at the time. While enunciating this principle of law, His Lordship relied on the case reported in 47 Ind. Cas. 72 and incidentally remarked that where the notice issued did not comply with the requirements of s. 112, the High Court could quash the proceeding. Our respectful comment on this is that the construction put on the scope of the section is in keeping with the general theme of the preventive and precautionary proceedings mentioned in the Code. If the scope of the section is restricted in a manner suggested, it would impair its practical usefulness as a provision authorising preventive proceedings being instituted against persons, who, in the opinion

of the Magistrate, are likely to disturb public tranquillity. The fear that such a wide construction might have the effect of turning the section into weapon of oppression in the hands of the magistracy is ill-founded.

Is an "Armed Merchant Ship" Legal?

The capture of enemy merchant ships on the high seas is a long-established right of belligerents, and is, in fact, an essential part of sea warfare and blockade. If, however, a merchant ship is captured, its passengers and crew must be placed in safety. This is the first obligation of a captor, and it has been clearly laid down that open boats cannot be regarded as a place of safety unless very close to the shore and in favourable weather.

During the last war the first German attack on British maritime trade was made by surface raiders.

They captured ships, often as much in order to renew their own supplies as to damage our sea-borne trade, but they were scrupulous with regard to the safety of crews. The submarine, by her very nature, is seldom capable of ensuring the safety of the crew of a merchant ship which she may sink. Nor can a submarine capture a merchant ship unless that submarine belongs to a navy having command of the sea, for a submarine cannot carry prize crews.

It was on February 1st, 1917, that Germany embarked upon unrestricted submarine warfare.

In a few weeks the whole world was horrified, not so much at the ship losses, as at the ruthless sacrifice of non-combatants' lives. Small wonder that for years after the war diplomats and jurists sought to prevent the repetition of such ruthlessness.

The result was the Submarine Protocol, which laid down very clearly that a sub-

marine must abide by international law particularly as regards placing the crews of her merchant ship victims in a place of safety. This international agreement was freely and unconditionally subscribed to by Germany.

Strict adherence to the Submarine Protocol would have made submarine warfare against sea-borne trade impossible on any great scale.

That Germany had no intention of adhering strictly to her obligation was proved by the fact that German submarines were already stationed on the ocean trade routes before Germany forced Europe into war.

Some German submarine captains endeavoured to honour their obligations to the laws of humanity, but others did not. That Germany herself was ashamed of the most glaring of these breaches of International Law—the sinking of the *Athenia*—is clear from the childish efforts of the Germany Propaganda Ministry to disclaim German responsibility for the sinking of this passenger liner without warning.

An instance of the value of German claims was the recent announcement that the North Sea is controlled by the German Navy. If it were, it would surely be a better policy to take neutral ships into harbour for examination instead of sinking them without warning or provision for the safety of their crews.

Now Germany threatens the even more ruthless prosecution of the U-boat war on commerce. As an excuse, Germany cites the defensive arming of the British merchant ships.

So far from being an excuse, this is putting the cart before the horse. The defensive arming of merchant ships—which is in accordance with International Law—is only made necessary by unrestricted submarine warfare in defiance of International Law.

END OF VOLUME 185.

